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ROSCOE'S DIGEST

OF THE

LAW OF EVIDENCE

AND THE PRACTICE

IN

CRIMINAL CASES

(CHIEFLY ON INDICTMENT).

THIRTEENTH EDITION.

BY

HERMAN COHEN,

OF THE INNER TEMPLE AND SOUTH EASTERN CIRCUIT,
BARRISTER-AT-LAW, AUTHOR OF "THE SPIRIT OF OUR LAWS,"
"TRADE UNION LAW," ETC.

LONDON:
STEVENS AND SONS, LIMITED,
119 & 120, CHANCERY LANE,
SWEET AND MAXWELL, LIMITED,
3, CHANCERY LANE,
Law Publishers.
1908.

PRINTED BY
WILLIAM CLOWES AND SONS, LIMITED,
LONDON AND BECCLES.

PREFACE TO THE THIRTEENTH EDITION.

THIS edition has been revised, it is hoped, thoroughly, up to the end of 1907.

A few new subject-sections have been added ; the date of each case cited has been inserted, except in some rare instances where it could not be discovered. The order of the last edition has generally been preserved. Some data as to the text-book writers most frequently quoted have been prefixed, and two Introductory Notes have been inserted. Space has been gained partly owing to recent legislation, which—as for example, the Trade Disputes Act, p. 360—has rendered some case-law obsolete, partly by the excision of redundant matter and accretions, inevitable in a book frequently re-edited by different hands, and by the citation of reports in one passage only, and partly by the use of a notation for Acts of Parliament (*e.g.* "6–7 W. 4, 65, 9," instead of "6 and 7 Will. 4, c. 65 s. 9") which has been found convenient elsewhere, and by the omission of the abbreviation "R. *v.*" in the title of criminal cases—an innovation, it is believed, introduced for the first time in a book on criminal law. Despite the diminished number of pages in this edition, the summary of very many cases has been enlarged ; where it seemed useful, the verdict has been noted. An elaborate system of cross-references between different quotations of the same case and between passages on the same or a cognate subject has been constructed, and the reader will do well to turn to any page to which he is directed by the word "see," while those indicated by "cf." illustrate, rather than bear directly on, the point discussed ; "p." and "pp." refer to pages in *this* book (unless the context indicates another). To the General Index at the end of the book, above all, the reader is invited to resort, as a short cut to its contents ; much effort has been spent to make it complete, and in the desire to anticipate the words or phrases which a reader might seek, literary form has frequently been sacrificed.

The sections on Writ of Error, New Trial, Court for Crown Cases Reserved (pp. 199–204) have been retained, notwithstanding the Criminal Appeal Act, 1907 (which, though not within the scope of this book, is set out in the Appendix), partly because that Act does not come into force until next April, but chiefly because the old practice is likely to serve as a guide to principles under the new procedure, and because the Court for Crown Cases Reserved is rather merged in the new Court of Appeal than abolished.

I must thank Mr. F. P. Fausset, of the North Eastern Circuit for his help in revising the Indexes. Great pains have been taken to verify references, and indulgence is prayed for any mistakes or misprints which have crept in among such a large number.

H. C.

Xmas, 1907.

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AUTHORITIES CHIEFLY CITED
(NOT LIVING).

BACON, MATTHEW. His "Abridgement" appeared first in 1736. It is said (Marvin's "Legal Bibliography") to have been written for the most part by Baron Gilbert (*see* Gilbert), and merely to have been arranged for the press by Bacon. The edition used in this book is the 7th, by Gwillim and Dodd, 1832, in 8 vols.

BEST, W. M., on "Evidence." 1st ed. 1849; 10th ed. 1906 by J. M. Lely is cited in this book. Best also wrote a treatise on "Presumptions of Law and Fact," 1844.

BLACKSTONE, WILLIAM (1723–1780); Vinerian professor of law at Oxford, 1758; Judge of the Common Pleas, 1770. The first volume of the "Commentaries" appeared in 1765, the other three in the next four years. The edition used in this book is the 21st, by Hargrave, etc., 1844, in 4 vols., cited as "Bl. Comm." The "Reports" (1746–1779) appeared in 1781.

BULLER, FRANCIS (1746–1800); Judge of the King's Bench, 1778. The "Introduction to the Law relative to Trials at Nisi Prius" (cited as "B. N. P.") appeared in 1772. The edition used in this book is the 7th, 1817.

BURN, RICHARD (1709–1785); a clergyman and J.P. "The Justice of the Peace and Parish Officer," appeared first in 1755 in 2 vols. The edition used in this book is the 29th, by Chitty (and Bere), 1845, in 6 vols.

CARRINGTON, F. A.; joint editor of Carrington and Payne's and other Reports. The third edition of the "Supplement to all the Treatises on the Criminal Law," which is used in this book, appeared in 1828.

CHITTY, JOSEPH (1776–1841); special pleader and legal writer. The first edition of the "Treatise on Criminal Law" appeared in 1816; the second, that used in this book, in 1826, in 4 vols.

COKE, EDWARD (Sir, commonly called Lord Coke, 1552–1634); Chief Justice of the King's Bench, 1613. The "Reports" first appeared in French (pleadings in Latin) from 1600 to 1615; the first English edition in 1658; the edition used in this book is by Thomas and Fraser, 1826, in 6 vols. There have been many editions of the "Institutes"; the first of the First Part appeared in 1628; that of the Second in 1642; that of the Third and Fourth in 1644. The edition of the First Part ("Coke upon Littleton") used in this book is by Hargrave and Butler, 19th ed., 1832, in 2 vols.; of the other parts, an edition of 1809 (Latin text and translation) in 4 vols.

COMYNS, JOHN; Lord Chief Baron of the Exchequer, 1738; died 1740. The "Digest of the Laws of England" first appeared (translated from "law French" into English) 1762–1767. The edition used in this book is Anthony Hammond's, published in 1822, in 8 vols. The "Reports" (also translated) appeared in 1744.

DALTON, MICHAEL; "probably died" (Dict. Nat. Biog.) between 1648 and 1655; little is known about him. "The Country Justice" appeared in 1618; there have been many editions, that used in this book being of 1742. He also published, in 1623, a work on the Office of Sheriff.

EAST, EDWARD HYDE (1764–1847); Chief Justice of Calcutta, 1813; Member of the Judicial Committee of the Privy Council. The "Treatise of the Pleas of the Crown," 2 vols., appeared in 1803; the "Term Reports" (1785–1800), 5 vols., in 1817, and other (East's) Reports, in 16 vols. (1800–1812) from 1801 to 1814.

Fitzherbert, Anthony (1470–1538); Judge of the Court of Common Pleas, 1521. "La Graunde Abridgement" appeared in 1514; the edition used in this book is Tottell's, in 1577; that of "L'Office et Auctority de Justices de Peace" (1583) is Crompton's, in 1606.

Foster, Michael (1689–1763); Judge of the King's Bench, 1745. The "Crown Cases and Discourses on Crown Law" appeared in 1762; the 3rd ed., by Dodson, used in this book, was published in 1792.

Gilbert, Geoffrey (1674–1726); Chief Baron of the Exchequer, Ireland, 1715; Lord Chief Baron of the Exchequer, England, 1725. He wrote many legal works, including "The Law of Evidence," 1761; the edition used in this book is the sixth (1801), which is only the first volume of Lofft's edition in 4 vols., published in 1796, which has been used for the three other volumes. *See* Bacon, Matthew.

Hale, Matthew (1609-1676); Chief Justice of the King's Bench, 1671. The "History of the Pleas of the Crown" was first edited by Sollom Emlyn in 1736; this, the *editio princeps*, was re-edited by Dogherty, in 1800 (edition used in this book).

Hawkins, William (1673–1746); Serjeant-at-law, 1723. The "Treatise of the Pleas of the Crown" first appeared in 1716; there have been many editions; that used in this book, by T. Leach, appeared in 1795 in 4 vols.

Phillipps, S. M. The "Treatise on the Law of Evidence" first appeared in 1814. The 10th ed., in 2 vols. (1852), that cited in this book (as "Ph. Ev."), is jointly edited by T. J. Arnold, a police magistrate.

Rolle, Henry; Chief Justice of the King's Bench, 1645; died 1656. The "Abridgement" appeared in 1668; the "Reports" in 1675–1676.

Russell, William Oldnall (1785–1833); Chief Justice of Bengal, 1832. The "Treatise on Crimes and Misdemeanors" appeared in 1819, 2 vols.; the 3rd and 4th eds., were by C. S. Greaves, Q.C., in 1843 and 1865; the 6th ed. (1896), in 3 vols., has been used in this book. Russell and Ryan's Reports (Crown Cases, 1799–1824) appeared in 1825.

Starkie, Thomas; Downing Professor at Cambridge; Q.C. The 1st ed. of the "Practical Treatise on the Law of Evidence," appeared in 1824: the 4th in 1853. His work on "Slander and Libel" appeared about 1822: the 6th ed., by Folkard, in 1897. The edition of Starkie's books used is always stated.

Stephen, Fitzjames (1829–1894); judge in 1879; of the Q.B. Div. 1881. The 6th ed. (1904) of the "Digest of the Law of Evidence," which first appeared in 1876, has been used in this book. The edition of the "Digest of Criminal Law" (1877) used is the 5th, that of 1894. The "History of the Criminal Law," in 3 vols., appeared in 1883.

Taylor, John Pitt; sometime a County Court Judge. "The Law of Evidence" appeared in 1848: the 10th edition, which has been used in this book, and is cited as "T," was published in 1906, in 2 vols.

Viner, Charles (1678–1756); not a lawyer. "A General Abridgment of Law and Equity," appeared from 1742–1753 in 23 vols.: it is based on Rolle's. There is an alphabetical index by Kelham (London, 1758).

Previous editions of this book have appeared in 1835, 1840, 1846, 1857, 1861, 1862, 1868 (by J. F., afterwards Mr. Justice, Stephen), 1874, 1878, 1884, 1890, and 1898. The author, Henry Roscoe (1800–1836), also wrote a "Digest of the Law of Evidence on the Trial of Actions at Nisi Prius," which appeared in 1827, and of which there have been 18 editions, the last in 1907.

Another abbreviation used is Phips., *for Phipson's Law of Evidence* (1907).

INTRODUCTORY NOTES.

I. THE DEFINITION OF CRIME.

WHAT is a "Crime"? The latest discussion of the subject is to be found in Professor Kenny's *Outlines of Criminal Law*, 3rd ed. (1907), ch. 1. His conclusion is that "crimes are wrongs whose sanction is punitive, and is remissible by the Crown, if *remissible at all*" (p. 15). For "no private person can ever grant a valid remission of any criminal sanction. Herein lies the only ultimate and unvarying distinction between the two kinds of procedure" (p. 16), *i.e.* civil and criminal. This refers only to English law, but in this respect English law is a type of all civilised law. For law, jurists have now well established, was originally a private matter—that is, inveterate custom accepted as binding.

Now, it seems that in the history of no race is the differentiation of civil and criminal law actually visible, and probably among backward or savage peoples to-day they are not differentiated. There is no trace of such a movement in the Old Testament, which contains several Hebrew codes, and obviously a primitive people would have no need of the distinction; even early Athens and early Rome seem not to have conceived the difference. See *Maine, Ancient Law*, ch. 10, "The Early History of Delict and Crime."

In a note to that chapter (1906 edition), Sir Frederick Pollock says: "If one feature in early procedure may be fixed on more than another as marking the recognition of criminal and civil responsibility as distinct in character, though one and the same act may be, and quite commonly is, both a wrong and an offence, perhaps it is the appearance of a special fine for breaking the peace."

The evolution of this variation in England as defined by Professor Kenny above, has been worked out at great length by Messrs. Pollock and Maitland in *The History of English Law*, 2nd ed. (1898), vol. 2, ch. 8, "Crime and Tort," and at less length by Professor Kenny (as above), following them. The prevailing view may be summed up in the words of the latter (p. 22): "Later on, again, it comes to be perceived that when one member suffers the community suffer; and hence, that a compensatory expiation is due not only to the victim and his kindred, but also to the State. So perhaps a fine is exacted on behalf of the community, either in addition to or instead of the private one; and probably some person is specified who shall exact it. The fourth and final stage of the process is reached when the State realises that her interest in the preservation of order is so great that she must no longer remain content with saying that those who violate order shall afterwards make her a reparation; she must now deter them by threats from committing any such violation. The idea of a true *punishment* is thus made to supersede all idea of compensation to the community." In other words, the Crown gets a *locus*, and ultimately, as is seen from the definition above, exclusive rights. Its present relation to criminal law seems to have been established in the twelfth century, as may be gathered from the first sentence of the chapter of *Pollock and Maitland* already cited, viz.:—

"On no other part of our law did the twelfth century stamp a more permanent impress of its heavy hand than on that which was to be the criminal law of after days."

The differentiation is by no means complete at the present day. In Cheats and Frauds a link is naturally found between civil and criminal wrongs, and hence it is that a difficulty sometimes arises in determining whether a given act is indictable or actionable (if it is not both). See pp. 321, 406.

II. THE CLASSIFICATION OF CRIMES.

The present technical subdivision of Crimes into Treasons, Felonies, and Misdemeanors was, like the differentiation of criminal from civil law, of gradual growth. "In the thirteenth century," say *Pollock and Maitland*, vol. 2, Bk. II, § 3, "we see but the germs of this scheme. *Trespass* (*transgressio*) is the most general term that there is; it will cover all or almost all wrongful acts and defaults. Every felony, says Bracton, is a trespass, though every trespass is not a felony. In a narrower sense, therefore, *trespass* is used as a contrast to *felony*. The word *misdemeanor* belongs as a term of art to a much later age. In the past even the gravely punishable offences have been contemplated from the point of view of the person who has been wronged. Thus—

Trespasses or wrongful acts are
- Felonies to be prosecuted by appeal.
- Mere trespasses, giving rise to actions in which no words of felony are used.

Only by slow degrees is the procedure which begins, not with the complaint of 'the party grieved,' but with a communal accusation (indictment or presentment), becoming a prominent part of the law's machinery . . . . long before the beginning of Edward I.'s reign, numerous offences that are no felonies are being punished upon indictment or presentment, while many others are being punished in the course of civil actions. We shall perhaps breathe the spirit of the age if we say that—

Offences less than felony are punished.
- (*a*) In civil actions.
- (*b*) Upon presentment before local courts.
- (*c*) Upon presentment before the King's justices."

"There can be little doubt," says Dr. Kenny (above, c. 7), writing in 1907, "that of all parts of our criminal law, none is in greater need of a thorough reconstruction than that which concerns the classification into Felonies and Misdemeanors."

A misdemeanor is the smallest crime known to the law

PART I.

GENERAL HEADS.

A. EVIDENCE.

The *general* rules of evidence are the same in criminal and in civil proceedings. "There is no difference as to the rules of evidence," says Abbott J., "between criminal and civil cases: what may be received in the one may be received in the other; and what is rejected in the one ought to be rejected in the other." *Watson*, 2 *Stark. N. P. C.* 116 at 155; 32 *St. Tr.* 1 at 492 (1817); *Murphy*, 8 *C. & P.* 306 (1837). So Coleridge L.C.J. in *Francis* below: So Hotham B. adding "at the same time it has been stated that one is more disposed to resist, and more cautious in receiving evidence in a case where the party has much at stake, as in favour of life," *Cator*, 143, p. 148. But there are no admissions in criminal cases ("except by a plea of guilty"). *Phips.* ch. 2 (*a*); *ibid.* B. I. ch. 1, p. 5; see p. 7, and pp. 115–6 *Thornhill*; cf. pp. 14–15 and 47, and *Berens*, p. 184.

Best evidence.] It is the "first and most signal rule" (*Gilb. Ev.*, p. 3) of evidence that the best evidence of which the case is capable shall be given; for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it. *Per* Jervis C.J. in *Twyman* v. *Knowles*, 13 *C. B.* 224 (1853); *Best Ev.* Pt. 1, s. 87 and foll. For the history of the rule, see *Phips.* ch. 4. But "it is not necessary to negative every possibility—it is enough to negative every reasonable probability—of anything being kept back," *per* Alderson B., *M'Guhey* v. *Alston*, 2 *M. & W.* 214 (1836).

Best evidence—chattels.] Primary evidence of the contents of written documents is required, as will be presently seen, in almost every case; but with regard to the state or quality of a chattel not produced in court, it would seem that secondary evidence may be given. On the trial of an indictment for endeavouring to obtain an advance from a pawnbroker upon a ring by false pretences, evidence was tendered to show that the prisoner had offered another ring to another pawnbroker upon a previous day; this ring was not produced, but the pawnbroker stated that it was a sham. The evidence was held admissible. L. Coleridge C.J. made the following remarks:—"No doubt if there was not admissible evidence that this ring was false, it ought not to have been left to the jury; but though the non-production of the article may afford ground for observation more or less weighty, according to circumstances, it only goes to the weight, not to the admissibility of the evidence, and no question as to the weight of this evidence is now before us. Where the question is, as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that when

the issue is as to the state of a chattel, *e.g.*, the soundness of a horse or the equality of the bulk of the goods to the sample, the production of the chattel is primary evidence, and that no other evidence can be given till the chattel is produced in court for the inspection of the jury." *Francis, L. R.* 2 *C. C. R.* 128; 43 *L. J. M. C.* 97; 30 *L. T.* 503; 22 *W. R.* 663; 12 *Cox C. C.* 612 (1874), pp. 9, 421, etc. As to an inscription on a ring, see *Farr*, p. 9.

Best evidence—written instruments.] "The contents of every written paper are according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence." The rule was so stated by the judges on the occasion of the trial of Queen Caroline (2 *Brod. & B.* 286 in 1820), and is perfectly general in its application; the only exceptions to it being founded on special grounds. These may be divided into the following classes:—(1) Where the written document is lost or destroyed; (2) Where it is in the possession of an adverse party who refuses or neglects to produce it; (3) Where it is in the possession of a party who is privileged to withhold it, and who insists on his privilege; (4) Where the production of the document would be, on physical grounds, impossible, or highly inconvenient; (5) Where the document is of a public nature, and some other mode of proof has been specially substituted for reasons of convenience. It is apparent, therefore, that, in order to let in the secondary evidence in these cases, certain preliminary conditions must be fulfilled; what these conditions are we shall explain more particularly when we come to treat of *Secondary Evidence*, p. 7.

It is not necessary, in every case where the fact that is to be proved has been committed to writing, that the writing should be produced, but (unless the contents of the written document are themselves a fact or facts in issue, as to which, see pp. 7, 9) only in those cases where the documents contain statements of facts, which, by law, are directed or required to be put in writing, or where they have been drawn up by the consent of the parties for the express purpose of being evidence of the facts contained in them. Indeed, in many cases the writing is not evidence, as in the case of *Layer*, pp. 3, 55.

The following cases are cited as instances of the general rule. Upon an indictment for setting fire to a house with intent to defraud an insurance company, in order to prove that the house was insured, the policy must be produced, as being the best evidence, and the insurance office cannot give any evidence from their books unless the absence of the policy is accounted for. *Doran*, 1 *Esp.* 126 (1791), p. 248; *Kitson*, 1 *Dears. & P. C. C.* 187; 22 *L. J. M. C.* 118 (1853), p. 10; but it is not "absolutely necessary in all cases." Upon the same principle, the records and proceedings of courts of justice, existing in writing, are the best evidence of the facts there recorded. As, for instance, where it was necessary to prove the day on which a cause came on to be tried, L. Ellenborough said that he could not receive parol evidence of the day on which the court sat at nisi prius, as that was capable of other proof by matter of record, *Thomas* v. *Ansley*, 6 *Esp.* 80 (1806). See *Judicial Proceedings*, in Index, and p. 135. So, on an indictment for disturbing a protestant congregation, L. Kenyon ruled that the taking of the oaths under the Toleration Act (1688), being matter of record, could not be proved by parol evidence. *Hube, Peak, N. P.* 180; 5 *T. R.* 542 (1792–4), p. 368. In *Rowland*, 1 *F. & F.* 72 (1858), pp. 143, 689, Bramwell B. held that on an indictment for perjury, in order to prove the *proceedings* of the county court, it was necessary to produce either the clerk's book, or a certified copy therefrom bearing the seal of the court; the County Court Act (p. 143) directing that such minutes should be kept, and that such minutes should be admissible as evidence. And it has been said, generally, that where the

transactions of courts which are not, technically speaking, of record are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic modes of proof which the law recognises. 3 *Stark. Ev.* 1043, 1*st ed.*; where short notes of the proceedings are alone kept these notes (as public documents) may be proved by examined copies, *per* Holt C.J., *Hains, Comb.*, 337 (1695); *Taylor*, s. 1546, p. 143. On indictment for perjury, where there was in existence an information in writing it is the best evidence, and must be produced. *Dillon*, 14 *Cox C. C.* 4 (1877), p. 679. See p. 676. On an indictment under a repealed statute (1697), for having coining instruments in possession, it was necessary to show that the prosecution was commenced within three months after the offence committed. It was proved, by parol, that the prisoners were apprehended within three months, but the warrant was not produced or proved, nor were the warrant of commitment or the depositions before the magistrate given in evidence to show on what transactions, or for what offence, or at what time, the prisoners were committed. The prisoners being convicted, a question was reserved for the opinion of the judges, who held that there was not sufficient evidence that the prisoners were apprehended for the offence charged in the indictment within three months after the offence was committed. *Phillip, Russ. & Ry.* 369 (1818). But it must be remembered that it is a general rule that "All judgments are conclusive of their existence as distinguished from their truth. . . . Every judgment is . . . conclusive evidence for or against all persons (whether parties, privies, or strangers) of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered." *Phipson*, ch. 36, p. 373; and see the whole of the chapter; as to the effect of an acquittal, *ib.* p. 376. As to that of a plea of guilty, see p. 169, below. Previous judgments have been most frequently tendered in highway cases, see p. 501, and cf. p. 190. On the whole subject of estoppel, see *Everest* on *Estoppel*. The award of an arbitrator as to a given fact was mere matter of opinion and wrongly received as evidence of that fact *in perjury:* new trial granted. *Fontaine Moreau*, 11 *Q. B.* 1028; 17 *L. J. Q. B.* 187 (1848), p. 690. But now the awards of official arbitrators are equivalent to verdicts. See *Russell* on *Arbitration*, 9*th ed.*, pp. 232, 308.

But, on the other hand, where a memorandum of agreement was drawn up, and read over to the defendant, which he assented to, but did not sign, it was held that the terms of a letting might be proved by parol, there being no written agreement in existence. *Doe* v. *Cartwright*, 3 *B. & Ald.* 326 (1820); *Trewhitt* v. *Lambert*, 10 *A. & E.* 470 (1839). So facts may be proved by parol, though a narrative of them may exist in writing. Thus a person who pays money may prove the fact of payment, without producing the receipt which he took. *Rambert* v. *Cohen*, 4 *Esp.* 213 (1802). So where, in trover, to prove the demand the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, L. Ellenborough ruled that it was unnecessary to produce the writing; *aliter*, if the verbal "had any reference" to the written demand. *Smith* v. *Young*, 1 *Camph.* 439 (1808), p. 10. So a person who takes notes of a conversation need not produce them in proving the conversation, as they would not be evidence if produced. Thus in *Layer*, a prosecution for high treason, an under-secretary of state gave evidence of the prisoner's confession before the council, though it had been taken down in writing. 12 *Vin. Ab.* 96; 16 *St. Tr.* 214 (1722), pp. 9, 55, 87. Similar illustrations of the same principle will be found at p. 55. So on an indictment for perjury committed upon a trial in the county court, any witness, present at the time, is competent to prove what evidence was given. *Morgan*, 6 *Cox C. C.* 107, (1852) p. 690, *per* Martin B.; *Harmer* v. *Bean*, 3 *C. & K.* 307 (1853), *per* Parke B. (as to *proceedings*, contradicted by *Rowland*, p. 2). So the fact

of a marriage may be proved by a person who was present, "a person present at the wedding dinner, if the register be burnt and the parson and clerk are dead," and it is not necessary to produce the parish register as the primary evidence. *Morris* v. *Miller*, 1 *W. Bl.* 632; *Burr.* 2057 (1767), cf. pp. 8, 145, 272. So the *fact* that a certain person occupied land as tenant may be proved by parol, although there is a written contract. *Inhabs. of Holy Trinity*, 7 *B. & C.* 611 (1827). But the parties to the contract, the amount of rent, and the terms of the tenancy, can only be shown by the writing. *S. C.* and see *Strother* v. *Burr*, 5 *Bing.* 136 (1828); *Doe* v. *Harvey*, 8 *Bing.* 242 (1832); see *Inhabs. of Merthyr Tydvil*, 1 *B. & Ad.* 29 (1830). See *Phips.* ch. 45. Cf. *Regan*, 16 *Cox C. C.* 203 (1887), p. 783.

It must be remembered that parol evidence is admitted to impeach a written contract on the ground of fraud. *Yates* (at 136), p. 686. In the case of *printed* documents, all the impressions are originals, and according to the usual rule of multiplicate originals, any copy will be primary evidence. Thus, where on a prosecution for high treason, a copy of a placard was produced by a person who had printed it, and offered in evidence against the prisoner, who it appeared had called at the printer's, and taken away twenty-five copies, it was objected that the original ought to be produced (after notice, pp. 10, 574), or proved to be destroyed, or in the possession of the prisoner; but it was held that the evidence was admissible; that the prisoner had adopted the printing by having fetched away the twenty-five copies; and that being taken out of a common impression, they must be supposed to agree in the contents. "If the placard," said Bayley J., "were offered in evidence to show the contents of the original manuscript, there would be great weight in the objection, but when they are printed they all become originals; the manuscript is discharged; and since it appears that they are from the same press, they must be all the same." *Watson*, pp. 1, 10, 574; *Stark.* p. 129.

It has been said that the transactions and proceedings of public meetings may be proved by parol, as in the case of resolutions entered into, although it should appear that the resolutions have been read from a written or printed paper. And in support of this proposition a case is referred to where, in a prosecution against Hunt for an unlawful assembly, in order to prove the reading of certain resolutions, a witness produced a copy of the resolutions which had been delivered to him by Hunt as the resolutions intended to be proposed, and proved that the resolutions he heard read corresponded with that copy; this was held sufficient, though it was objected that the original paper from which the resolutions were read ought to have been produced, or that a notice to produce it ought to have been given. *Hunt*, 3 *B. & Ald.* 566; 2 *Chit. R.* 130 (1820), pp. 12, 80, 165, 220, 353. But this decision was expressly grounded, by Abbott C.J., who delivered the judgment of the court, on the admission by the prisoner, by the delivery of the copy to the witness, that it contained a true statement of the resolutions passed at the meeting. In a prosecution on the Irish Convention Act (1793), the indictment averred that divers persons assembled together, and intending to procure the appointment of a committee of persons, entered into certain resolutions respecting such committee, and charged the defendant with certain acts done for the purpose of assisting in forming that committee, and carrying the resolutions into effect. To show what was done at the meeting in question, a witness was called, who stated that, at a general meeting, the secretary proposed a resolution, which he read from a paper. The proposition was seconded, and the paper was handed to the chairman and read by him. It was objected that the absence of the paper should be accounted for, before parol evidence of the contents of it was received. But the majority of the court were of opinion that this was

not a case to which the distinction between primary and secondary evidence was strictly applicable; that the proposed evidence was intended to show, not what the paper contained, but what one person proposed, and what the meeting adopted; in short, to prove the transactions and general conduct of the assembly; and that such evidence could not be rejected because some persons present took notes of what passed. *Sheridan*, 31 *St. Tr.* 671 (1811).

Best evidence—handwriting.] See also *Documentary Evidence*, p. 135. "When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the *writer* himself, or some person who *actually saw the paper* or signature *written*. When evidence such as this cannot be procured, as must often be the case, recourse may be had, either to the testimony of witnesses, who are *acquainted with the handwriting*, or to a comparison of the document in dispute with any writing proved to the satisfaction of the judge to be genuine. These last modes of proof, indeed, may in all cases be given in the first instance since the law recognises no distinction between them and the ocular proof just mentioned; but as they are obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature." *Taylor, Ev.* s. 1862. Nor do the slightness and infrequency of the opportunities which the witness has had of judging of the handwriting make any difference as to his competency. These are only matters of observation to the jury, affecting the weight of his evidence; as also is the fact that the witness has had no recent opportunities of forming a judgment. In *Horne Tooke*, 25 *St. Tr.* 71 (1795), the witness had not seen Mr. Tooke's handwriting for nineteen years previous to the trial; and in *Lewis* v. *Sapio*, *Moo. & M.* 39 (1827), p. 148, the witness had only seen the defendant write *Mr. Sapio* several times (and not the signature in question, *L. B. Sapio*). Cf. Eldon C. in *Eagleton* v. *Kingston*, 8 *Ves.* 473 (1803).

If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow, that it is equally admissible for the purpose of *disproving* it, the question of *genuine* or not *genuine* being the same in both cases. Accordingly, although in an early case, where it was requisite to prove that certain alterations in a receipt were forged, it was held that the person who had written the receipt ought to be called as the best and most satisfactory evidence; *Smith* (1768), 2 *East, P. C.* 1000: yet in subsequent cases of prosecutions for forgery it has been held that the handwriting may be disproved by any person acquainted with the genuine handwriting. *Hughes*, 2 *East, P. C.* 1002 (1802); *M'Guire*, *ib.* (1801); *Harley*, 2 *Moo. & Rob.* 473 (1843), nor need a person necessarily be called to disprove authority to others to use his name; *Case of Bank prosecutions*, *R. & R.* 378 (1819). See pp. 474–5.

In criminal cases the jury may form their opinion as to the genuineness of a document by a comparison of it with any other documents already in evidence before them, and shown to be the genuine production of the person whose handwriting is in question.

Where a witness to any instrument is abroad, proof of his handwriting is proof of the execution. *Cooper* v. *Marsden*, p. 28.

And now by 28–9 Vict. 18, 8, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Best evidence—negative evidence of consent.] In certain prosecutions it is necessary to prove that the act with which the prisoner is charged was done without the consent, or against the will, of some person; and a question has been raised, whether the evidence of that person himself is not the best evidence for that purpose. Although at one time it appears to have been thought necessary to call the person himself, it is now settled that the want of consent may be proved in other ways. Where on an indictment under a repealed Act (6 Geo. 3, 36), for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave any consent, and from all he had heard his master say (who had died before the trial, having given orders for apprehending the prisoners on suspicion), he believed that he never did: Bayley J. left it to the jury to say, whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of night when the offence was committed, and to the circumstance of the prisoners running away when detected, as evidence to show that the consent required had not in fact been given. The prisoners were found guilty. *Hazy*, 2 *C. & P.* 458 (1826). So on an indictment for killing fallow-deer without consent of the owner, and on two other indictments, for taking fish out of a pond without consent, evidence was given that the offence was committed in such circumstances as to warrant the jury in finding non-consent; and the persons engaged in the management of the different properties were called, but not the owners. The judges held the convictions right. *Allen*, 1 *Mood. C. C.* 154 (1826). Cf. *Hurley*, above, and *Wood*, p. 483.

Best evidence—conduct—persons acting in a public capacity.] Where persons acting in a public capacity, have been appointed by instruments in writing, those instruments are not considered the only evidence of the appointment, but it is sufficient, *primâ facie*, to show that they have publicly acted in the capacity attributed to them. Thus in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters without producing their appointments; and this even in the case of murder. *Per* Buller J., *Berryman* v. *Wise*, 4 *T. R.* 366 (1791), p. 571, of an attorney; *Gordon* (1789), *cited ib.*; 1 *Leach*, 515; 1 *East, P.C.* 352, p. 153. So of a deputy county court judge. *Roberts*, 14 *Cox C. C.* 101 (1878). So of a surrogate. *Verelst*, 3 *Campb.* 432 (1813), p. 676. So of an officer of inland revenue, 53-4 Vict. 21, 24 (3). Cf. p. 776. In *Cresswell*, p. 273, Lord Coleridge C.J. said "it must be assumed that the clergyman performing the marriage service was not guilty of the grave offence of marrying persons in an unlicensed place." So where the overseers of a parish were by a local Act to sue and be sued in the name of their vestry clerk, it was held that proof of the latter having acted as vestry clerk was sufficient *primâ facie* evidence of his being regularly appointed such clerk. *M'Gahey* v. *Alston*, 2 *M. & W.* 211 (1836), p. 8. So that a soldier is engaged in the recruiting service is evidence that he is attested. *Wolton* v. *Gavin*, 16 *Q. B.* 48 (1850). So of a commissioner for taking affidavits. *Howard*, 1 *Moo. & Rob.* 187 (1832). So of an attorney, though he may have once ceased to take out his certificate; it being presumed that he has been re-admitted. *Pierce* v. *Whale*, 5 *B. & C.* 38 (1826). So of the appointment of a presiding officer at an election booth. *Garvey*, 16 *Cox C. C.* 252 (1887). But in *Essex, Dears. & B. C. C.* 369 (1857), the prisoner, who was clerk to a savings bank, was convicted on an indictment charging him with embezzlement, the property being laid in A. B. The only evidence of A. B. being a trustee was his own statement that he had so acted, but that, before the commission of the offence, he had attended one meeting only. He was also manager of the bank, and it did not appear that any act had been done by him which was not consistent

with his holding that office only. This was held, on a case reserved, to be insufficient. See p. 17.

Best evidence—conduct, an admission by party.] So where the defendant whether in a civil or criminal proceeding is the office-bearer. Thus in an action for penalties against a collector of taxes, the warrant of appointment was not produced, it being held that the act of collecting the taxes was sufficient to prove him to be collector. *Lister* v. *Priestly*, *Wightw.* 67 (1810). So on an information against an officer for receiving pay from government for a greater number of men than had mustered in his corps, Lord Ellenborough held, that the fact of his being commandant might be proved from the returns, in which he described himself as major commandant of the corps, without adducing direct evidence of his appointment by the king. *Gardner*, 2 *Camph.* 513 (1810). So in an action against a clergyman for non-residence, the acts of the defendant as parson, and his receipt of the emoluments of the church, will be evidence that he is parson without formal proof of his title. *Bevan* v. *Williams*, 3 *T. R.* 635 *a* (1776); cf. *Smith* v. *Taylor*, 1 *New Reports, B. & P.* 196 (1805), p. 572. Again, upon an indictment against a letter-carrier for embezzlement, proof that he acted as such was held to be sufficient, without showing his appointment. *Borrett*, 6 *C. & P.* 124 (1833), p. 711.

The rule by which the admissions of a party are treated as the best evidence against himself has been carried in civil cases to the extent of allowing even the contents of a written document, which are directly in issue, to be proved by such evidence, without in any way accounting for the non-production of the document itself. Whether at all, or how far, this rule is applicable to criminal cases, does not appear to have been much discussed. See p. 1. There does not, on principle, seem any reason why the admissions of a prisoner should not be receivable in evidence as well when they relate to the contents of a written document, as when they amount to direct confessions of guilt. The rule is generally laid down in the broadest terms; *optimum habemus testem confitentem reum.* Everything which the prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as it may seem to them to deserve, p. 35. The law, as applicable to civil cases, is laid down in *Slatterie* v. *Pooley*, 6 *M. & W.* 669, 10 *L. J. Exch.* 9 (1840). The reason, says Parke B., "why such statements or acts are admissible without notice to produce or accounting for the absence of the written instrument is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded, from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas, what a party himself admits to be true may reasonably be supposed to be so. The weight and value of such testimony is quite another question . . . it may be in some cases quite unsatisfactory to a jury." On this latter point, see the same judge in *Earle* v. *Picken*, 5 C. & *P.* 542 *n.* (1833), and *Taylor*, *Ev.*, ss. 410–12, citing Pennefather C.J. in *Lawless* v. *Queale*, 8 *Ir. L. R.* 385 (1845), who disapproved of the rule in *Slatterie* v. *Pooley*, and said it was "a most dangerous proposition." At any rate, there is no presumption in favour of the parol evidence proving such admission. Taylor, *ibid.* See *Confessions*, p. 35.

[N.B.—The law of secondary documentary evidence—especially of the notice to produce—is chiefly of importance in civil proceedings and most of the cases hereunder cited are not criminal, but it has been thought best not to omit the subject.]

Secondary evidence—lost documents.] We have already seen that in certain cases secondary evidence of the contents of written documents is admissible. The most frequent case is that in which the document has

been lost or destroyed. *Giles* v. *Smith*, 1 *C. M. & R.* 462 (1834); *Morris* v. *Miller*, p. 4. In order to lay the necessary foundation for the admission of secondary evidence in this case, it must be shown that the document has once existed, and has either actually ceased to exist, or that all reasonable efforts have been made to find it and have failed. *Reason* (*Str.*), at 500, pp. 30, 626, 697. As to *depositions*, see p. 58.

The degree of diligence to be exercised in searching for a document will depend in a great measure on its importance and the circumstances of each case. *Gully* v. *Bishop of Exeter*, 4 *Bing.* 298 (1827); *Gathercole* v. *Miall*, 15 *M. & W.* 319, 335; 15 *L. J. Exch.* 79 (1846), pp. 576, 582. In the case of a useless document the presumption is that it is destroyed. *Per* Bayley J. in *Inhabs. of E. Farleigh*, 6 *D. & R.* 147 (1825). And, where the loss or destruction of a paper is highly probable, very slight evidence is sufficient. *Per* Abbott C.J. in *Brewster* v. *Sewell*, 3 *B. & Ald.* 296 (1820). Thus where depositions have been delivered to the clerk of the peace or his deputy, and it appears that the practice is, on a bill being thrown out, to put away the depositions as useless, slight evidence of search is sufficient, and the deputy need not be called, as they were not in his custody, it being his duty to deliver the depositions to his principal. *Freeman* v. *Arkell*, 2 *B. & C.* 494 (1824), p. 108. See *Boyle* v. *Wiseman*, 10 *Ex.* 647: 1 *Jur. N.S.* 115 (1855), p. 12, as to a letter in a foreign country.

Where it is the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. *Stourbridge*, 8 *B. & C.* 96 (1828). And where an attorney or officer is applied to generally for documents, the court will assume, until the contrary is proved, that all the documents relating to the subject of inquiry are produced. *M'Gahey* v. *Alston*, 2 *M. & W.* 214 (p. 6). But where an attorney was applied to for a document which related to his own private affairs, and by his direction a search was made in his office, and the document was not found, the Court of Queen's Bench refused to say that the court of quarter sessions was wrong in deciding that there had not been a sufficient search for the purpose of rendering secondary evidence admissible, because the office was not proved to be the proper place of deposit, the attorney not being called. *Inhabs. of Saffron Hill*, 1 *E. & B.* 93; 22 *L. J. M. C.* 22 (1852).

It is not necessary in every case to call the person to whose custody the document is traced. *Ibid.* But some doubt seems to have existed whether, if he be not called, evidence can be given of answers made by him to inquiries respecting the document. Such evidence appears to have been received in *Inhabs. of Morton*, 4 *M. & S.* 48 (1815), but was rejected in *Denio*, 7 *B. & C.* 620 (1827), where, however, a material witness was not called. In *Inhabs. of Kenilworth*, 7 *Q. B.* 642 (1845), a very strong court thought that for this preliminary purpose such evidence ought to be received, and Lord Denman comments on the distinction between *Morton* and *Denio*; in *Saffron Hill*, evidence of this kind had been received, but as the court thought that, even if receivable, it was insufficient for the purpose, the point remained undecided. However, in *Inhabs. of Braintree*, 28 *L. J. M. C.* 1 (1858), the Court of Queen's Bench thought that answers to such inquiries were admissible to satisfy the conscience of the court that the search had been a reasonable one, agreeing with the *Kenilworth* case that hearsay might be admitted.

Secondary evidence—documents in the hands of adverse party—notice to produce.] In the case where a document is in the hands of an adverse party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received. Its object is not, as was formerly

thought, to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it if he likes at the trial, and thus to secure the best evidence of its contents. *Dwyer* v. *Collins*, 7 *Ex. R.* 639, 21 *L. J. Ex.* 225 (1852), p. 10, 93, 129; cf. *Ford*, p. 357. There is no distinction between civil and criminal cases (p. 92) with regard to the production of documents after notice given to the other side to produce them, and with regard to the admissibility of secondary evidence in case of their non-production. *Le Merchand, coram Eyre B.* 1 *Leach* 300 *n.*; 2 *T. R.* 201 *n.* (1772), p. 11. In *Layer* (1722), it was proved by a witness, that the prisoner had shown him a paper partly doubled up, which contained the treasonable matter, and then immediately put it in his pocket; and no objection was made to the witness giving parol evidence of paper. 6 *State Trials*, 229 (*fo. ed.*); 16 *Howell's St. Tr.* 170, pp. 3, 55, 87; prisoner's letter-copy-book was read, *Francia*, 15 *Howell's St. Tr.* 941 (1717).

But where it was proved that a ring which had been lost had an inscription upon it, and that the prisoner had been seen with a ring like the one which had been lost and with an inscription upon it, the counsel for the crown was not permitted to ask what was the inscription upon the ring seen in the prisoner's possession, no notice to produce the ring having been given to the prisoner. ("*Sed quære*," headnote.) *Farr*, 4 *F. & F.* 336 (1864). See *Francis*, p. 1. Where a witness accidentally dropped a medal, the subject of an indictment, on the floor of the court while giving evidence and after more than half an hour's strict search by him and the ushers, it could not be found, he was not allowed to describe the reverse from memory. *Robinson*, p. 341.

A notice to produce will let in secondary evidence in criminal as well as civil cases, where the document to be produced appears to have been in the hands of the agent or servant of the prisoner under such circumstances, as that it might be presumed to have come to his own hands. Colonel Gordon was indicted for the murder of Lieut.-Colonel Thomas in a duel. The letter from Gordon containing the challenge was carried by Gordon's servant, and delivered to Thomas's servant, who brought a letter in answer and delivered it to Gordon's servant; but it did not appear in fact, that this letter was ever delivered to Gordon himself. Eyre B. permitted an attested copy of the latter letter to be read against the prisoner, and left it to the jury as evidence, if they were of opinion that the original had ever reached the prisoner's hands. Hotham B. concurred; but Gould J. thought that positive evidence ought to be given that the original had come to the prisoner's hands. *Gordon*, 1 *Leach*, 300 *n.* (1784). Where a prisoner's attorney produced a deed as part of the evidence of his client's title upon the trial of an ejectment, in which the prisoner was lessor of the plaintiff, and the deed was delivered back to the attorney when the trial was over, it was held to be in the prisoner's possession, and the prisoner not producing it in pursuance of notice, secondary evidence of its contents was received. *Per* Vaughan B., *Hunter*, 4 *C. & P.* 128 (1829), p. 11. The proper course for an attorney, on *subpœna*, seems to be to deliver incriminating documents to his client, *per* L. Mansfield, *Dixon*, 3 *Burr.* 1688 (1765), p. 129. But in order to render a notice to produce available, the original instrument must be shown to be in the possession of the opposite party, or of some person in privity with him, who is bound to give up possession of it to him. Therefore, where a document is in the hands of a person as a stakeholder between the defendant and a third party, a notice to the defendant to produce will not let in secondary evidence of its contents. The right must be "not merely to inspect but to retain." *Parry* v. *May*, 1 *Moo. & R.* 279 (1833). See also *Laxton* v. *Reynolds*, 18 *Jur.* 963 (1854), p. 12.

Secondary evidence—notice to produce—when dispensed with.] Where the prisoner is charged with the theft of the document in question, a notice to produce it is unnecessary. Thus (it was held by the twelve judges), upon an indictment for stealing a bill of exchange, where a *subpœna duces tecum* had been served on the person last seen with it, parol evidence of its contents might be given, without any proof of a notice to produce. *Aickles*, 1 *Leach*, 294 (1784); 2 *East, P. C.* 675, p. 534. So upon the trial of an indictment for administering an unlawful oath, it may be proved by parol that the prisoner read the oath from a paper, although no notice to produce that paper has been given (L. Alvanley). *Moors*, 6 *East*, 419, *n.* (1801), pp. 23, 607. See also *Farr*, p. 9.

But an indictment for setting fire to a dwelling-house with intent to defraud an insurance office, is not such a notice to the prisoner as will dispense with a notice to produce the policy of insurance, so as to allow the prosecutor to give secondary evidence of its contents. *Ellicombe*, 5 *C. & P.* 522 (1833); 1 *Moo. & R.* 260, p. 11; *Kitson*, p. 2. Upon an indictment for perjury (that there was no draft of a statutory declaration) it was held that secondary evidence of a draft last seen in the possession of the prisoner was inadmissible, no notice to produce having been given and the indictment not operating as a notice. It must be observed, however, that the course which the evidence took at the trial, was such, that "the exact contents of that draft became essential," and so did alterations alleged, and it would appear that this circumstance was regarded by several of the judges as of great importance. *Elworthy, L. R.* 1 *C. C. R.* 103; 37 *L. J. M. C.* 3 (1867).

A notice to produce is not necessary if the document be known and can be proved to be not in existence. *Haworth*, 4 *C. & P.* 254 (1830), p. 11; *Spragge* (before 1800), cited in *How* v. *Hall*, 14 *East*, 276, *n.*, nor where the document tendered in evidence is a duplicate original. *Per* L. Ellenborough, *Philipson* v. *Chase*, 2 *Camph.* 110 (1809); *per* Bayley J., *Colling* v. *Treweek*, 6 *B. & C.* 394 (1827); cf. *Watson*, pp. 4, 573; or a counterpart; *Burleigh* v. *Stibbs*, 5 *T. R.* 465 (1793); *Roe* d. *West* v. *Davis*, 7 *East*, 363; cf. *Mayor of Carlisle* v. *Blamire*, 8 *East*, 487 (1807). Or a notice of action; *Jory* v. *Orchard*, 2 *B. & P.* 39 (1799); or a notice to quit, *ibid.*, 41; or a notice of the dishonour of a bill of exchange, *King* v. *Beaumont*, 3 *B. & B.* 288 (1822), where the copy of the letter giving notice was admitted. Nor is a notice to produce necessary where the party has fraudulently or forcibly obtained possession of the document, as from a witness in fraud of his *subpœna duces tecum*. *Leeds* v. *Cook*, 4 *Esp.* 256 (1803). As to "what are originals," duplicate originals, and counterparts, see *Phips*. ch. 44.

It is sufficient to dispense with a notice to produce, that the party in possession of the document has it with him in court. *Dwyer* v. *Collins*, pp. 9, 93. But in *Bate* v. *Kinsey*, 1 *Cr. M. & R.* 38; 4 *Tyrwh.* 662 (1834), pp. 11, 129, where an attorney pleading his privilege refused to produce a deed in court, parol evidence of its contents was not allowed.

Secondary evidence—notice to produce—form of.] It is not necessary that a notice to produce shall be in writing. *Smith* v. *Young*, p. 3. But it is better, and it is the universal practice, to give the notice in writing. No particular form of notice is requisite, it seems, in criminal proceedings; (as to *civil*, see R. S. C., Ord. 32, r. 8) if it sufficiently appear what the document is which is required to be produced, and when and where that is to be done. *Lawrence* v. *Clark*, 14 *M. & W.* 251, 253, (1845). Where under a notice to produce "all letters, papers, or documents touching or concerning the bill of exchange mentioned in the declaration," the party served was called upon to produce a particular letter, Best C.J. was of opinion that the notice was too vague, and that it ought to have pointed out the particular letter required.

France v. *Lucy*, *Ry. & Moo. N. P. C.* 341 (1825); *Jones* v. *Edwards*; *M'Cl. & Y.* 139 (1825—letter written nine years before). But a notice to produce all letters written by plaintiff to defendant "relating to the matters in dispute in this action," *Jacob* v. *Lee*, 2 *Moo. & R.* 33 (1837), or "all letters written to and received by plaintiff between 1837 and 1841, both inclusive, by and from" the defendants, or either of them, and "all papers, &c., relating to the subject-matter of this cause," *Morris* v. *Hauser*, 2 *Moo. & R.* 392 (1841), has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. And see *Rogers* v. *Custance*, 2 *Moo. & R.* 179 (1839).

Secondary evidence—notice to produce—to whom and when—third persons.] In criminal as well as in civil cases it is sufficient to serve the notice to produce, either upon the defendant or prisoner himself, or upon his attorney. *Cates, q. t., v. Winter*, 3 *T. R.* 306 (1789). So *Le Merchand*, p. 9. Cf. *Hunter*, p. 9, and *Hughes* v. *Budd*, below. And it may be left with a *servant* of the party at his dwelling-house. *Per* Best C.J., *Evans* v. *Sweet*, *R. & M.* 83 (1824). It must be served within a reasonable time, but what shall be deemed a reasonable time must depend upon the circumstances of each particular case. The prisoner was indicted for arson. The commission day was the 15th of March, and the trial came on upon the 20th. Notice to produce a policy of insurance was served on the prisoner in gaol upon the 18th of March. His residence was ten miles from the assize town. It being objected that this notice was too late, Littledale J., after consulting Parke J., said, "We are of opinion that the notice was too late. It cannot be presumed, that the prisoner had the policy with him when in custody, and the trial might have come on at an earlier period of the assize. We therefore think that secondary evidence of the policy cannot be received." *Ellicombe*, p. 10; *Haworth*, p. 10. So, where the notice to produce a policy of insurance was given to the prisoner in the middle of the day preceding the trial, the prisoner's residence being thirty miles from the assize town, it was held to be too late. *Kitson*, pp. 2, 10. Notice served on the attorney at his office on the evening before the trial, at half-past seven, too late to communicate with the client, was held by Lord Denman C.J. to be insufficient to let in secondary evidence of a letter in his client's possession. *Byrne* v. *Harvey*, 2 *Moo. & R.* 89 (1838); and *Lawrence* v. *Clark*, p. 10. See p. 93.

In *Barker*, 1 *F. & F.* 326 (1858), a notice to produce policies of insurance served on the prisoner's attorney on Tuesday evening, the policies being then twenty miles off, and the trial taking place on the Thursday, was held sufficient, it being shown that there was an opportunity of procuring the policies, if the prisoner had chosen to do so.

As to documents in the hands of *third persons*, not compellable by law to produce, and refusing, the general rule is that secondary evidence is admissible. *Per* Parke B., *Doe* v. *Ross*, 7 *M. & W.* 122 (1840). See pp. 127–30. Service of a notice on a Sunday is bad. *Per* Patteson J. in *Hughes* v. *Budd*, 8 *Dowl. P. C.* 315 (1840).

Secondary evidence—consequences of notice to produce—stamps.] For the general consequences of giving a notice to produce, see p. 8; it does not authorise any inference as to contents. Cf. *Doe* v. *Whitehead*, 8 *A. & E.* 571 (1838); *Cooper* v. *Gibbons*, 3 *Camph.* 363 (1813). It would seem, however, that the refusing to produce is matter of observation to the jury. Semb. *per* Lyndhurst C.B., *Bate* v. *Kinsey*, p. 10.

If the defendant refuses to produce a document, and the plaintiff is thereby compelled to give secondary evidence of its contents, the defendant cannot afterwards produce it as part of his own case, in order to contradict the

secondary evidence. *Doe* v. *Hodgson*, 12 *Ad. & E.* 135 (1840); *Laxton* v. *Reynolds*, p. 9. If he calls for papers, and inspects them, they will be rendered evidence for the opposite party. *Wharam* v. *Routledge*, 5 *Esp.* 235 (1805); *Wilson* v. *Bowie*, 1 *C. & P.* 10 (1823; if they are material to the issue). Though it is otherwise, if he merely calls for them without inspecting them. *Sayer* v. *Kitchen*, 1 *Esp.* 210 (1794). Secondary evidence of papers cannot be given earlier than the primary could, *i.e.* in the defence (where defendant has given the notice), before which time there can be no cross-examination as to the contents. *Graham* v. *Dyster*, 2 *Stark. N. P.* 23 (1816); but this rule is not strictly enforced. *Taylor*, s. 1817. The presumption is that a lost document is properly stamped. *Closmadeuc* v. *Carrel*, 18 *C. B.* 36 (1856). But a party refusing, on notice, to produce may prove that it was not, and so keep it out. *Crisp* v. *Anderson*, 1 *Stark. N. P.* 35 (1815). But see p. 149.

See *Privilege of Witnesses*, p. 124, and foll.

Secondary evidence—physical inconvenience.] The nature of the obstacles which render it impossible, or highly inconvenient to produce a document, on physical grounds, must be proved in the usual way. This being done to the satisfaction of the court, secondary evidence of the contents will be admitted. Thus, where in an indictment for unlawfully assembling, the question was, what were the devices and inscriptions on certain banners carried at a public meeting, it was held that parol evidence of the inscriptions was admissible. *Hunt*, p. 4, &c. So the inscriptions on a monument may be proved by parol. *Doe* v. *Cole*, 6 *C. & P.* 359 (1834). But where a notice was suspended by a nail to the wall of an office, it was held that it must be produced. *Jones* v. *Tarleton*, 9 *M. & W.* 675 (1842). Secondary evidence may be given of an original which is in a foreign country and cannot by law be removed. *Alivon* v. *Furnival*, 1 *C. M. & R.* 277; 4 *Tyrw.* 75 (1834), p. 143. Cf. *Boyle* v. *Wiseman*, p. 8.

Secondary evidence—public documents.] As to what are public documents, see *Taylor*, s. 1479; as in all other cases, it is the party who seeks to give secondary evidence of the document, who must satisfy the court that the document is of a public nature, within the meaning of the rule. Many documents of this kind will be found mentioned in the chapter on *Documentary Evidence*, p. 143. It is to be observed, that there is in this case this peculiarity, that a particular kind of evidence is required by the law to be substituted for the original, and no other evidence of contents of public documents is admissible. But see p. 13.

Secondary evidence—duty of judge.] The preliminary question of fact upon which the admissibility of the evidence depends, is for the decision of the judge, not of the jury. And in order to decide this question, he "must do everything that is necessary," including the determining a question of fact (Alderson B.). Therefore, where a party who had made a *primâ facie* case for the reception of secondary evidence of a document proceeded to prove its contents by the parol evidence of a witness who had read the original, on which the opposite party interposed, and showing a document to the witness, asked him if that was the original, which the witness denied; it was held that the judge was bound to decide the collateral question, whether the document thus offered was the original or not, and reject or receive the secondary evidence accordingly, and was wrong in refusing to hear evidence that the document was the original (which would have excluded the secondary evidence), and a new trial was granted. *Boyle* v. *Wiseman*, p. 8.

As to degrees of secondary evidence.] There are no degrees of secondary

evidence. This principle was distinctly affirmed in *Doe* d. *Gilbert* v. *Ross*, 7 *M. & W.* 102 (1840), p. 133, and in *Hall* v. *Ball*, 3 *M. & Gr.* 242 (1841). In *Brown* v. *Woodman*, 6 *C. & P.* 206 (1834), it was held that a defendant might give parol evidence of the contents of a letter, of which he had kept a copy, and that he was not bound to produce the copy. But if the party has better secondary evidence than he produces, the jury *may* infer that it would have been adverse to him. *Per* L. Abinger, *Doe* v. *Ross*. So where two parts of an agreement were prepared but one only was stamped, which was in the custody of the defendant, who, on notice, refused to produce it, the court ruled that the plaintiff might give a draft in evidence without putting in the part of the agreement which was unstamped. *Garnons* v. *Swift*, 1 *Taunt.* 507 (1809). Cf. *Waldy* v. *Gray*, *L. R.* 20 *Eq.* 250 (1875). Even in the case of public documents, if good reason can be shown why neither the original evidence nor the substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible. *Thurston* v. *Slatford*, 1 *Salk.* 284 (1700); *M'Dougall* v. *Gowry*, *Ry. & M.* 392 (1826); *Anon.*, 1 *Vent.* 257 (1675).

It is hardly necessary to say that, even if secondary evidence be admissible, a copy of a document is, *in itself*, no evidence of the contents of the original; and it can only become so when verified by the oath of a witness. *Fisher* v. *Samuda*, 1 *Campb.* 190 (1808). Still less is a copy of a copy any evidence of the contents of the original. Where a declaration had been taken down from the lips of a dying man, but not signed by him, and the writer had himself made a copy, the court declined to let him swear this was a true copy, regarding the former as the original. *Reason* (*Str.* at 500), pp. 8, 30, &c. *Everingham* v. *Roundell*, 2 *Moo. & Rob.* 138 (1838); *Liebman* v. *Pooley*, 1 *Stark. N. P.* 167 (1816). But it might become so, if, in addition to being itself verified, the copy from which it was taken was verified also.

PRESUMPTIONS.

General nature of presumptive evidence.] No subject of criminal law has been more frequently or more amply discussed than that of presumptive evidence, and no subject can be more important; the nature of the presumptions made in criminal cases being the feature of English law which distinguishes it most strongly from all the continental systems. "A presumption of any fact is properly an inference of that fact from other facts that are known: it is an act of reasoning." *Per* Abbott C.J., *Burdett*, 4 *B. & Ald.* 95 (1820), p. 578. See *ib.*, 121–3, *per* Best J. "When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such facts, and called *presumptions* and not *proofs;* for they stand instead of proofs of the fact till the contrary be proved." *Gilb. Ev.* 142 (*6th ed.*). The instance selected by Coke (Litt. 6 *b*), to illustrate the nature of very strong presumption is, where a man is discovered suddenly dead in a house, where there is no other man, and another is found running out in haste with a bloody sword.

It is evident that, in every trial, numberless presumptions must be made by the jury; many so obvious that we are hardly aware that they are necessary, and these present no difficulty; but with regard to others, great care and caution are necessary in making them, and it is for this reason that there are certain practical rules which it is always desirable to observe on this subject.

There are indeed some presumptions which, as the phrase is, the law itself makes; that is, the law forbids, under certain circumstances and for certain purposes, any other than one inference to be drawn, whether that inference be true or false. There are but few such presumptions in criminal cases, and those few mostly in favour of the prisoner. Where presumptions against the prisoner have been imperatively directed by the law, the rule has generally been looked on with disfavour.

These two kinds of presumptions are generally distinguished as presumptions of law and presumptions of fact, respectively. With regard to presumptions of law, there is not much difficulty, the circumstances under which they arise being generally pretty clearly defined. It is not so, however, with regard to presumptions of fact, there being frequently the difficulty not only of deciding whether a particular presumption ought to be made at all, but which of several presumptions arising out of the same state of facts is the right one. "In practice, however, the distinction . . . is by no means well defined, and the line of demarcation, even when visible at all, is often overlooked. *Taylor*, s. 111.

The difference between presumptions in civil and criminal cases seems to come to this: "In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burthen of proof, may constitute sufficient ground for a verdict." *Taylor*, s. 112. But "One of the most important of disputable legal presumptions is that of *innocence*. This, in legal phraseology, 'gives the benefit of a doubt to the accused,' and is so cogent that it cannot be repelled by any evidence short of what is sufficient

to establish the fact of criminality with moral certainty." *Ibid.*, citing *White*, 4 *F. & F.* 383 (1865)—a *locus classicus* on this doctrine; p. 16. Thus in criminal cases, there is always a result open to the jury, which is practically looked upon as merely negative, namely, that which declares the accused to be *not guilty* of the crime with which he is charged. In cases of doubt it is to this view that juries are taught to lean. Great caution is doubtless necessary in all cases of presumptive evidence; and, accordingly, Lord Hale has laid down two rules with regard to the acting upon such evidence in criminal cases. "I would never," he says, "convict any person of stealing the goods *cuiusdam ignoti*, merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods." And again, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or, at least, the body found dead." 2 *Hale, P. C.* 290, p. 610. So it is said by Sir William Blackstone, 4 *Comm.* 359, that "all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent suffer." The following case on this subject was cited by Garrow, *arguendo* in *Hindmarsh*, 2 *Leach*, 571 (1792—in murder, death may be presumed from the circumstances, if incapable of being proved by other evidence). The mother and reputed father of a bastard child were observed to take it to the margin of the dock in Liverpool, and after stripping it, to throw it into the dock. The body of the infant was not afterwards seen, but as the tide of the sea flowed and reflowed into and out of the dock, the learned judge who tried the father and mother for the murder of their child observed that it was possible the tide might have carried out the *living* infant, and the prisoners were acquitted.

With respect to the comparative weight due to direct and presumptive evidence, it has been said that "circumstances are in many cases of greater force and more to be depended on than the testimony of living witnesses;" inasmuch as "witnesses may either be mistaken themselves, or wickedly intend to deceive others; . . . but circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie." *Per* Mounteney B., *Annesley* v. *Lord Anglesea*, 9 *St. Tr.* 426; 17 *Howell, St. Tr.* 1430 (1743). But this view is vigorously criticised by *T.* s. 66. It has been observed, that "it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognisance of the judge," *i.e.* a greater surface is exposed for testing. *Bentham's Rationale of Judicial Evidence*, vol. 3, p. 251 (1827). "On the other hand, it may be observed, circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences. Not unfrequently a presumption is formed from circumstances which would not have been noticed as a ground of crimination but for the accusation itself;—such are the conduct, demeanor and expressions of a suspected person, when scrutinised by those who suspect him. And, again, any circumstantial evidence, which comes through the medium of witnesses, may, no less than direct evidence, be discoloured, exaggerated, or perverted." 1 *Ph. Ev.* 468, 10*th ed.* "In no sense . . . is it possible to say that a conclusion drawn from circumstantial evidence can amount to absolute certainty, or, in other words, that circumstances cannot lie." *T.* s. 66. See further *Starkie* on *Ev.* 4*th ed.* p. 838; *Best* on *Ev.* 10*th ed.* p. 256, Bk. 3, Pt. 2, ch. 3, and *T.* as above. Cf. p. 612.

General instances of presumption.] As almost every fact is capable of being proved by presumptive as well as by positive evidence, it would be

impossible to enumerate the various cases in which the former evidence has been admitted. It may be useful, however, to give a few instances of presumptive proof which may occur in the course of criminal proceedings. For a fuller list, see *T.* Pt. 1, ch. 5, ss. 70–216.

Proof of the possession of land, or the receipt of rent, is *primâ facie* evidence of seisin in fee. *Best* on *Ev.* s. 366 and on *Presumptions* (1844), ch. 3, s. 76, citing *Jayne* v. *Price*, 5 *Taunt.* 326 (1814), and *Denn* v. *Barnard*, *Cowp.* 595 (1777). Cf. *Co. Litt.* 15 *a*. So possession is presumptive evidence of property in chattels. A deed or other writing thirty years old is presumed to have been duly executed, provided some account be given of the place where found, &c. *T.* s. 87. See *Potez* v. *Glossop*, at 195, below. The licence of a lord to enclose waste may be presumed after twelve or fourteen years' possession, the steward of the lord having been cognisant of it. *Doe* v. *Wilson*, 11 *East*, 56 (1809). The flowing of the tide is presumptive evidence of a public navigable river. *Miles* v. *Rose*, 5 *Taunt.* 705; 1 *Marsh*, 313 (1814); but cf. *Montague*, 4 *B. & C.* 602 (1825). The existence of an immemorial custom may be presumed from an "unexplained and uncontradicted" usage of twenty years. *Joliffe*, 2 *B. & C.* 54; 3 *D. & R.* 240 (1823). So the continuance of things *in statu quo* will be generally presumed; as where the plaintiff being libelled in his official character proves his appointment to the office before the libel, his continuance in office at the time of the libel need not be proved though averred. *Budd*, 5 *Esp.* 229 (1805). Cf. *Hollond*, p. 669. So the law presumes that a party intended that which is the immediate or probable consequence of his act. *Dixon*, 4 *Campb.* 12, 3 *M. & S.* 15 (1814), pp. 20, 322, 663. See *T.* s. 80.

So a letter is presumed, as against the writer, to have been written upon the day on which it bears date; *Hunt* v. *Massey*, 5 *B. & Ad.* 902; 3 *Nev. & M.* 109 (1834); and whether written by a party to the suit or not; *Potez* v. *Glossop*, 2 *Ex.* 191 (1848); and a bill is presumed to be made on the day it is dated (by 45–6 Vict. 61, 13 (1); so) *Owen* v. *Waters*, 2 *M. & W.* 95 (1836); except when used to prove a petitioning creditor's debt; *Anderson* v. *Weston*, 6 *Bing. N. C.* 296, 301 (1840). So the presumption is that indorsements on a note admitting the receipt of interest were written at the time of their date. *Smith* v. *Battens*, 1 *Moo. & R.* 341 (1834). Indeed, it is a general presumption that all documents were made on the day they bear date. *Davies* v. *Lowndes*, 7 *Scott, N. R.* at 214 (1843); *Potez* v. *Glossop*, above.

Presumption of innocence and legality.] The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption; p. 14. In other words, a man cannot be presumed to have committed a crime without some evidence of it. Thus, a criminal information was granted against a theatre proprietor for representing on the stage as a murderer a man charged with and afterwards executed for murder. *Williams and Romney*, 2 *L. J. K. B.* 30; 26 *R. R.* 624 (1823), p. 698. "And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offence . . . but it holds in all proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally. . . . It is, however, in general, sufficient to prove a *primâ facie* case." *Best, Ev.* s. 346.

Presumption against immorality.] There is also a general presumption against immoral conduct of every description. Thus legitimacy is always presumed; *Banbury Peerage case*, 1 *Sim. & S.* 155 (1811); and reputation of cohabitation is generally presumptive proof of marriage: *Doe* v. *Fleming*, 4 *Bing.* 266 (1827); except in cases of bigamy: p. 272. So it will not be

presumed that a trespass or other wrong has been committed; *Best, Ev.* s. 350; and there is always a presumption in favour of the truth of testimony. *Ib.* s. 352. Where a woman, whose husband twelve months previously had left the country, married again, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the duration of life. *Twyning, Inhabs. of*, 2 *B. & Ald.* 386 (1819). But the observations of Bayley and Best JJ. therein, with respect to conflicting presumptions, were questioned by the court in *Harborne, Inhabs. of*, 2 *Ad. & E.* 544 (1835). It has now been decided that no presumption arises that the party is alive, but that it is a question for the jury. See *Lumley*, p. 278. See upon the point of conflicting presumptions, *Middleton* v. *Barnard*, 4 *Ex.* 241 (1849).

Presumption omnia ritè esse acta.] This well-known presumption is of very common application, *e.g.*, p. 794. Upon this principle it is presumed that all persons assuming to act in a public capacity have been duly appointed. See pp. 6–7, and p. 61, and cf. p. 508, and *Hollond*, p. 669. In *Stewart*, 13 *Cox C. C.* 296, (1876) p. 68, it was presumed that a consul at New York had taken proper steps with regard to the transmission of witnesses. Cf. pp. 776, 794.

Presumption from the course of nature.] It is a presumption of law that males under fourteen are incapable of sexual intercourse. *Philips*, 8 *C. & P.* 736, (1839) p. 726; *Brimilow*, 9 *C. & P.* 366 (1839). So it is a presumption of fact that the period of gestation in women is about nine calendar months. The exact limits of this period are, both legally and scientifically, very unsettled; and if there were any circumstances from which an unusually long or short period of gestation might be inferred, or if it were necessary to ascertain the period with any nicety, it would be desirable to have special medical testimony upon the subject. The subject was elaborately discussed in the *Gardner Peerage case*, and the scientific evidence given in that case will be found in the report of it by Le Marchant (London: Butterworth, 1828), p. 28; and see *Best*, ss. 339–40. For ordinary purposes, however, it will be a safe presumption that fruitful intercourse and parturition are separated by a period not varying more than a week either way from that above mentioned.

There is no presumption of *law* that life will not continue for any period however long, and juries are not justified in presuming, as a fact, that a person is dead who has been heard of within seven years; *Hopewell* v. *De Pinna*, 2 *Camph.* 113 (1809); but "the presumption of the continuance of life ceases at the expiration of seven years from" the last news. *Best*, s. 409 (see s. 408); this is in analogy to the period fixed by 1 Jac. 1, c. 11, s. 2 (see now 24 & 25 Vict. c. 100, s. 57), which absolves a husband or wife from the penalties of the crime of bigamy after an absence of seven years, and cf. 18–19 Car. II. 11, 2.

Presumption of guilt arising from the conduct of the person charged.] In almost every criminal case a portion of the evidence laid before the jury consists of the conduct of the person, either before or after being charged with the offence, presented not as part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind. The probative force of such testimony has been elaborately, carefully, and popularly considered by Bentham, in his *Rationale of Judicial Evidence*, Bk. 1, ch. 4. In weighing the effect of such evidence nothing more than ordinary caution is required. The best rule is for the jury to apply honestly their experience, and to draw such inferences as experience indicates in matters of the gravest importance. This will, in general, be found a safer guide than a consideration of some of the extreme cases which are related in many of the books on evidence. These

must be considered as somewhat exceptional, and it may be fairly said generally, that a presumption of this kind is very useful evidence, and one which no judge need seek to withdraw from the consideration of a jury. See *Best*, Pt. 2, Bk. 3, ch. 7, ss. 459, 518.

Presumption of guilt arising from the possession of stolen property.] See p. 736. It has already been stated that possession is presumptive evidence of property, p. 16; but where it is proved, or may be reasonably presumed, that the property in question is stolen property, the *onus probandi* is shifted, and the possessor is bound to show that he came by it honestly; and, if he fail to do so, the presumption is that he is the thief or the receiver, according to circumstances. In every case, therefore, either the property must be shown to have been stolen, by the true owner swearing to its identity, and that he has lost it, or, if this cannot be done, the circumstances must be such as to lead in themselves to the conclusion that the property was not honestly come by. In the latter class of cases there are two presumptions: (1) that the property was stolen; (2) that it was stolen by the prisoner.

1. The circumstances under which the former of these presumptions may be safely made are tolerably obvious. "Thus," it is said in 2 *East, P. C.* 657, "a man being found coming out of another's barn, and upon search corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt. So persons employed in carrying sugar and other articles from ships, and wharves, have often been convicted of larceny at the Old Bailey, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could no otherwise be proved. But this must at least be understood of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them." In *Dredge*, 1 *Cox C. C.* 235 (1845), the prisoner was indicted for stealing a doll and other toys. The prosecutor proved that he kept a large toy-shop, and that the prisoner came into the shop dressed in a smock frock. After remaining there some time, from some suspicion that was excited, he was searched, and under his smock frock were found concealed the doll and other toys. The prosecutor could not go further than to swear that the doll had once been his, but he could not swear that he had not sold it, and he had not missed it; and from the mode in which he kept his stock it was not likely that he would miss that or any other of the articles found on the prisoner. Erle J. directed an acquittal. In *Burton*, *Dears. & P. C. C.* 282 (1853), the prisoner was indicted for stealing pepper. He was found coming out of a warehouse in which there was a quantity of pepper both loose and in bags; when stopped and accused, he threw some pepper on the ground, and said, "I hope you will not be hard with me." Upon the case of *Dredge* being cited, Maule J. pointed out the distinction that in this case the prisoner had, in fact, admitted that the pepper had not been honestly come by; and he added "if a man go into the London Docks sober, and comes out of one of the cellars, wherein are a million gallons of wine, very drunk, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was missed." In *Hooper*, 1 *F. & F.* 85 (1857), the prisoner was charged with stealing 190 lbs. weight of Lydney coal. He was left with a ton of that sort of coals in a cart at twelve o'clock, and delivered them, according to his orders, at one o'clock. At half-past twelve o'clock he sold 190 lbs. weight of Lydney coal to a person living in the same town, but there was no evidence of the quantity delivered being less than a ton, or of any coal having been missed. Willes J. left it to the jury to say, whether the 190 lbs. of coal sold by the prisoner was stolen property: not guilty.

2. But "it is clearly established that, in order to put the accused on his defence, his possession of the stolen property must be *recent*; although what shall be deemed recent possession must be determined by the nature of the articles stolen, *i.e.* whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely from his situation in life, or vocation, to become possessed innocently." *Best*, s. 211.

The following cases show what some of the judges have thought on the subject. Where stolen property (it does not appear of what description) was found in the possession of a person, but sixteen months had elapsed since the larceny, Bayley J. held that he could not be called upon to account for the manner in which it came into his possession. *Anon.*, 2 *C. & P.* 459 (1826); *Cockin*, 2 *Lew. C. C.* 235 (1836). Where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner, two months after they had been stolen, Patteson J. held that the prisoner ought to explain how he came by the property. "The length of time," said that learned judge, "is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time; but here that is not so." *Partridge*, 7 *C. & P.* 551 (1836). But Parke B. directed an acquittal where the only evidence against the prisoner was that certain tools had been traced to his possession, three months after their loss; *Adams*, 3 *C. & P.* 600 (1829); and Maule J. did the same, where a horse, alleged to have been stolen, was not traced to the possession of the prisoner until six months from the date of the robbery. *Cooper*, 3 *C. & K.* 318 (1852). Where the prisoner was the servant of a firm which owned a large number of shovels, four of which were found in his possession, it was held that the question of larceny was properly left to the jury, although there was no evidence to show when they were missed, or how long they had been in his possession. *Knight*, *L. & C.* 378 (1864), where, however, there was some evidence against the prisoner.

In *Crowhurst*, 1 *C. & K.* 370 (1844), the prisoner was indicted for stealing a piece of wood; upon the piece of wood being found by the police constable in the prisoner's shop about five days after it was lost, he stated that he bought it of a man named Nash, who lived about two miles off. Nash was not called as a witness for the prosecution, and no witness was called by the prisoner. Alderson B. said to the jury, "in cases of this nature you should take it as a general principle that, where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him." It appears, therefore, that the learned judge thought that in this case the prisoner's account was sufficiently reasonable to shift the burden of proof back again on to the prosecutor; the jury acquitted, but it is not clear whether the case was left to their consideration. In *Wilson*, 26 *L. J. M. C.* 45 (1857), the prisoner was indicted for stealing some articles of dress. It was proved that the property was stolen, and sold by the prisoner. The prisoner on being apprehended said, that C. and D. brought them to his house and that he sold them. In consequence of this C. and D. were apprehended and C. was tried and convicted for stealing other articles taken from the prosecutor's house at the same time as the articles in question; D. was discharged. The constable made inquiries as to the statement made by the prisoner of how he came by the goods, but no evidence of what transpired on such inquiries was received, being objected to by the prisoner's counsel. Neither C. nor D. was called as witness for the prosecution, and no witness

was called by the prisoner. The jury found the prisoner guilty, and the conviction was upheld by the court for Crown Cases Reserved upon the ground, as stated by Pollock C.B., that there was some evidence for the jury upon which the prisoner might be convicted, though he disapproved of the verdict.

The following remarks by Mr. East on this class of case are well deserving of attention: "It is a common mode of defence, to state a delivery by a person unknown, and of whom no evidence is given; little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen, where persons really innocent have suffered under such a presumption; and, therefore, where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence, from the time when the goods might be presumed to have first come into his possession." 2 *P. C.* 665.

As to receiving stolen goods, see pp. 732 and 736.

Presumption of guilt arising from the possession of property in other cases.] There are cases in which the possession of property carries with it the presumption of guilt, although the property has not been stolen; mostly cases where the property itself carries with it indications of a criminal act. Instances of cases in which such a presumption is drawn are the possession of filings or clippings of gold or silver coin, of more than five pieces of foreign counterfeit coin, of coining tools, the possession of instruments or paper for foreign exchequer bills and bank notes, the possession of deer, or implements for taking deer, of implements for housebreaking, of goods belonging to ships wrecked or stranded, the possession of naval and military stores, &c. These presumptions will be discussed under the headings of the principal offences to which they relate.

Presumption of malice.] See p. 617. Much of the difficulty connected with this subject will be removed by considering what malice is in the legal sense of the term. Best J. in *Harvey*, 2 *B. & C.* 257 at 268 (1823), p. 578, said "the legal import of this term differs from its acceptation in ordinary conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is not necessary in support of such indictment to show that the prisoner had any enmity to the deceased; nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional and done without any justifiable or excusable cause." Thus, where a jury returned a verdict of guilty of murder, but said that they believed it was done without premeditation, Byles J. refused to receive the verdict, saying, "the prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved, the law presumes the malice; and, although that may be rebutted by evidence, no such attempt has been made here." *Maloney*, 9 *Cox C. C.* 6 (1861). "He that doth a cruel act voluntarily doth it of malice prepensed." Holt C.J., *Mawgridge* (1706), pp. 604, 617, 630, *ap. Kelynge*, 119 at 127, citing 3 *Inst.* 62.

All, therefore, that is meant by the presumption of malice is that when a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is presumed that he has acted advisedly, and with an intent to produce the natural consequences of such an act. *Best*, s. 433; see p. 246. Thus, in *Dixon*, pp. 16, 322, 663, upon an indictment against the defendant, who was employed to make bread for a military asylum, for delivering bread made from unwholesome materials, it was held to be unnecessary to allege in the indictment, and, therefore, of course, unnecessary

to prove, that the defendant intended to injure the health of any one, as that was an inference of law arising from the doing of the act. Where a man was convicted (on his own confession) of setting fire to a mill, with intent to injure the occupiers thereof, though no motive was suggested or existed and his character was good, a doubt occurred under the words of 43 Geo. 3, 58 (repealed), whether an intent to injure or defraud some person ought not to be proved; or at least some fact from which such intention could be inferred, beyond the mere act of setting the mill on fire; but the judges were of opinion that the intent to injure might be inferred from the wilful act. *Farrington*, *Russ. & Ry.* 207 (1811), p. 247. And in *Philp*, 1 *Mood. C. C.* 263 (1830), pp. 49, 247, where a part owner of a ship was indicted (under 7–8 G. 4, 30, 9, repealed) for setting fire to it with intent to prejudice his co-owners, it was held that the intent was implied by the act, and that no proof of it was therefore necessary. The prisoner was indicted for wounding with intent to do grievous bodily harm, but the jury found him guilty of unlawful wounding only, which must be malicious, and a majority of judges held that malice was sufficiently shown under the following circumstances. The prisoner and the prosecutor, who had been on good terms, were in separate punts upon the water on a light night. The prisoner had on different occasions said he would shoot at wild fowl even if somebody was in the way at the time. The prisoner fired at twenty-five yards' distance, and at that moment the prosecutor's punt slewed round and he was shot. The prisoner then rendered help, and assured him it was an accident. It was stated in the case that it seemed probable that the prisoner only intended to frighten the prosecutor, and to deter him from coming to shoot there again. The court did not, however, give their reasons for arriving at the conclusion that there was evidence of maliciously wounding, but Blackburn J., in the course of the argument, said: "I have always thought a man acts maliciously when he wilfully does that which he knows will injure another in person or property." *Ward*, *L. R.* 1 *C. C. R.* 356; 41 *L. J. M. C.* 69 (1872). See also *Welch*, p. 319. Where by the words creating the offence, it must be done "unlawfully and maliciously," it must be shown to have been done "wilfully" by an intentional act. A man who had been fighting in a crowd threw a stone which broke a window, but he threw it, the jury found, at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window: held not guilty. If the jury had found that the prisoner was aware that the window was where it was, and that he was likely to break it, and was reckless whether he broke it or not, it might have been different. *Pembliton*, *L. R.* 2 *C. C. R.* 119; 43 *L. J. M. C.* 91; 12 *Cox C. C.* 607 (1874), pp. 590, 618; where the prisoner was indicted under 24–25 V. 97, 51, p. 590, for unlawfully and maliciously injuring property, and the jury negatived any intention to injure property. Had the conviction been for injuring one person's property while intending to injure another's, or had it been found that prisoner was reckless of the consequences of his act and might reasonably have expected that particular one, it would, it is submitted, have been upheld. Where, therefore, the prisoner, while unlawfully and maliciously aiming a blow at A., accidentally wounded B., he was held to be rightly convicted of unlawfully and maliciously wounding B. *Latimer*, 17 *Q. B. D.* 359; 55 *L. J. M. C.* 135 (1886), p. 800; *Hunt*, 1 *Moo. C. C.* 93 (1825), pp. 222, 494, 618. The prisoner, with the intention of causing terror to persons leaving a theatre, put out the gas on a staircase, and also with the intention of obstructing the exit, placed an iron bar across a doorway. In attempting to escape several of the audience were injured by the crush; it was held that the prisoner was rightly convicted of unlawfully and maliciously inflicting grievous bodily harm upon two of the crowd. "He acted," said Lord Coleridge C.J.,

"unlawfully and maliciously, not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured." Stephen J. said: "If the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse, he did it 'wilfully,' that is, 'maliciously,' within the meaning of the statute." *Martin*, 8 *Q. B. D.* 54; 51 *L. J. M. C.* 36; 14 *Cox C. C.* 633 (1881); *C. C. R.*, pp. 495, 590, 618. Where the prisoner carelessly set fire to some rum which he intended to steal, and in consequence the ship in which the rum was, caught fire, it was held that he could not be convicted of arson of the ship. *Faulkner*, 13 *Cox C. C.* 550 (1877); *C. C. R.*, *Ir.*, pp. 246, 590, 618. See p. 590. For further discussion of "malice," see Kenny's *Outlines of Criminal Law* (Index), and *T.* ss. 80 and 118. Cf. L. Lindley, *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, 1905, *A. C.* at 255; and Collins M.R., *Read* v. *Friendly Society, &c.*, 1902, 2 *K. B.*, at 739.

Presumption of intent to defraud.] See *Sheppard*, p. 475.

HEARSAY.

General nature of hearsay evidence.] Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds. First, that the person originally stating the facts does not make the statement under the sanction of an oath; and secondly, that the person against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the party making the statement. But where there is a presumption that hearsay evidence is true, it is admissible. See p. 25.

Evidence to explain the nature of the transaction.] The term *hearsay* evidence is frequently improperly applied. Thus, where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was said by those present (whether the accused or not) during the continuance of the transaction, is admissible; and this is sometimes represented as an exception to the rule which excludes hearsay evidence. But this is not hearsay evidence; it is original evidence of the most important and unexceptionable kind. In this case, it is not a second-hand relation of facts, which is received, but the declarations of the parties to the facts themselves, or of others *connected with them* in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances. Thus it has been held on a prosecution for high treason, that the cry of the mob who accompanied the prisoner may be received in evidence as part of the transaction. *Lord George Gordon*, 21 *How. St. Tr.* 535, 2 *Doug.* 591 (1781), p. 138; *Damaree*, *Fost. Crown Cases*, 214; 15 *How. St. Tr.* 522 (1710). See also *Hull*, 8 *C. & P.* 358 (1838); *Doe* v. *Hardy*, 1 *Moo. & Rob.* 525 (1836). In *Bedingfield*, 14 *Cox C. C.* 341 (1879), p. 32, where a woman came from a house with her throat cut, it was proposed to ask what she said; but Cockburn C.J. said: "Anything uttered by the deceased at the time the act *was being done* would be admissible, as for instance, if she had been heard to say something, as 'Don't, Harry.' But here it was something stated by her *after it was all over*, whatever it was, and after the act was completed." This decision gave rise to some discussion, of which a note will be found in the report of the case as cited above. It seems that the ruling of Cockburn C.J. was correct, if it is to be taken as a fact, that the transaction was *entirely* at an end, which it appears was the case. See letter of Cockburn C.J., cited, p. 25. This evidence must not be confounded with evidence of what is said by the accused person himself, which is always capable of being received on another ground, namely, as an admission. Where a man administered an unlawful oath containing a reference to a brotherhood, his statements as to its nature made at the administering were admitted. *Moors*, pp. 10, 667. See *Confessions*, p. 35.

Evidence of complaint in cases of rape.] The evidence which is almost always given in cases of rape that the woman made a complaint of having been violated, is not hearsay, but original evidence of a fact, which is most important, and which cannot be ascertained in any other way. There has

been considerable difference of opinion among judges as to the admissibility of the details of the complaint, but it has now been decided by the court for Crown Cases Reserved that upon the trial of an indictment for rape or other kindred offences against females, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution; not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negativing consent on her part. *Lillyman*, 1896, 2 *Q. B.* 167; 65 *L. J. M. C.* 195; 18 *Cox C. C.* 346, below, pp. 90, 730. It was pointed out by Hawkins J., who delivered the judgment of the court (L. Russell C.J., Pollock B., Hawkins, Cave, and Wills JJ.), that it is the duty of the judge to impress upon the jury in every case that they are *not entitled to make use of the complaint as evidence of the facts complained of*, or for any other purpose than that of enabling them to judge whether the conduct of the woman was consistent with her testimony on oath in the witness-box, negativing her consent, and affirming that the act complained of was against her will, and in accordance with the conduct they would expect from a truthful woman under the circumstances detailed by her. But "the precise scope of this decision is, however, still far from clear; opinions differing as to whether it is to be followed in civil courts also, or only in criminal ones; and as to whether it is to apply to all crimes, or only to sexual crimes, or only to those crimes in which (as in rape) it is essential that the prosecution should negative the defence of consent." (Kenny, *Outlines of Criminal Law*, ch. 25.)

The complaint must be volunteered, and not in answer to questions. *Merry*, 19 *Cox C. C.* 442 (1900). But this was qualified and restricted to "suggestive or leading" questions in *Osborne* 1905, 1 *K. B.* 551; *C. C. R.*, which reviews previous cases, including *Kingham*, 66 *J. P.* 393 (1902), and *Kiddle*, p. 256, and shows that *Lillyman* is to be followed, even where consent is immaterial. In *Kiddle* the child was not sworn, p. 327, cf. pp. 99, 327, 723.

Evidence of complaint in other cases.] Where a person has been in any way outraged, the fact that this person made a complaint is good evidence, both relevant and admissible, but it would seem that the particulars of such complaint are not. Thus, in *Wink*, 6 *C. & P.* 397 (1834), upon an indictment for robbery, evidence was given (without objection) by the prosecutor, that he made a complaint the next morning to a constable. He also stated (no objection being made) that he mentioned the name of a person, as the name of one of the persons who had robbed him. The counsel for the prosecution then proposed to ask whose name was mentioned, but Patteson J. refused to permit it, adding, "but when you examine the constable, you may ask him, whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person, and if he did, who that person was." Cresswell J. in the case of *Osborne*, *Car. & M.* 622 (1842), objects to the latter part of the dictum; and this objection was upheld in *Lillyman*, above, where it is suggested that the prosecutrix's complaint in all its detail in *Osborne* was admissible to show her consistency of conduct. On an indictment for shooting at the prosecutor, Patteson J. held that evidence was admissible to show that the prosecutor, immediately after the injury, had made communication of the fact to another, but that the particulars could not be given in evidence. *Ridsdale*, *York Spring Assizes*, 1837; *Stark. Ev. 4th ed.* 469 *n.*

There is a case of *Foster*, 6 *C. & P.* 325 (1834), in which the prisoner was charged with manslaughter. A waggoner was called, who stated that

immediately after the accident he went up to the deceased, and asked him what was the matter. It was objected that the reply of the deceased, which went to explain the cause of the accident, was not evidence, but Gurney B. said that it was the best possible testimony that, under the circumstances, could be adduced to show what it was that had knocked the deceased down; and he added that the case of *Aveson* v. *Lord Kinnaird*, p. 28, bore strongly upon the point, Park and Patteson JJ. concurring. In that case L. Ellenborough said, "If at the time she fled from immediate personal violence from the husband, I should admit what was said." A somewhat similar case is that of *Thompson* v. *Trevannion*, *Skin.* 402 (1693), where, in an action for assault upon the wife, Holt C.J. allowed what the wife said "*immediatè* upon the hurt received, and before that she had time to devise and contrive anything for her own advantage," to be given in evidence.

These two cases are difficult to reconcile with established principles. It is to be observed that both extend to the *particulars* of what was said; and, though they were both made in close proximity to the event to which they profess to relate, it seems very questionable indeed whether that ground alone, as is presumed by Lord Holt, is sufficient to render them admissible. In *Foster* there was the additional circumstance that the person who made the statement was dead; but it seems to require much consideration whether, as a general rule, the statements of a deceased person as to the circumstances of the injury which caused his death, made immediately after the injury, but not under circumstances which entitle them to be considered as dying declarations (see p. 29), are receivable in evidence. The above remarks were cited with approval in a letter written by Cockburn C.J. to Mr. John Pitt Taylor, the author of the well-known work on Evidence, in which the Chief Justice defended his ruling in *Bedingfield*, p. 23. The correspondence between these learned lawyers, consisting of a letter in the *Times* newspaper of Nov. 17, 1879, the reply * of the Chief Justice just mentioned (London: Vacher & Sons, 1879) and Mr. Taylor's answer (London: Maxwell & Son, 1880), should be consulted by those interested in this subject.

Hearsay evidence—exceptions as to admissibility of.] Though, as a general rule, hearsay, or, as it may more properly be called, second-hand evidence, is inadmissible, there are a considerable number of exceptions to the rule, which appear to be founded partly on the principle of necessity—hearsay being sometimes almost the only species of evidence which is available—and partly on the statement, of which evidence is given, having been made under circumstances which render its being false highly improbable. They may be conveniently divided into the following heads:—1. Evidence which has already been given in judicial proceedings, and which cannot be obtained from the original source. 2. Statements contained in ancient documents on the subject of ancient possession. 3. Statements of deceased persons on questions of pedigree. 4. Evidence of reputation on questions of public or general right. 5. Statements of deceased persons speaking against their own interest. 6. Statements of deceased persons making entries, &c., in the regular course of their duty or employment. 7. Statements having reference to the health or sufferings of the person who makes them. 8. Dying declarations.

* Containing the following passage, which since the Criminal Evidence Act of 1898 has a special significance: "Possibly when the inability of an accused person to give evidence in his own favour shall have been removed, a restriction on the admissibility of statements made against him in his absence, and which unanswered, may operate to his prejudice—a restriction imposed for the protection of possible innocence—may be advantageously removed in the interest of justice."

1. *Evidence which has already been given in judicial proceedings.*] See *Depositions*, p. 57.

2. *Statements contained in ancient documents on the subject of ancient possession.*] This evidence rarely occurs in criminal cases. It will be found discussed in *Best, Ev.* Pt. 3, Bk. 2, ch. 2, s. 240; *T.* s. 658.

3. *Statements of deceased persons on questions of pedigree.*] The written or verbal declarations of deceased members of a family are admissible on questions of pedigree. "Declarations in the family, descriptions in wills, inscriptions upon monuments, descriptions in Bibles and registry books, are all admitted upon the principle that they are the natural effusions of a party who must know the truth; and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth, and that to exclude them would be to exclude nearly all available evidence." *Per* Eldon C., *Whitelocke* v. *Baker*, 13 *Ves.* 514 (1807). But a pedigree purporting to be collected from "parish registers, wills, monumental inscriptions, family records and history," is not evidence, although signed by members of the family, *Davies* v. *Lowndes*, 5 *Bing. N. C.* 161 (1843); except to show the relationship of persons described in it *as living*. *S. C.* 6 *M. & Gr.* 474; 7 *Scott, N. R.*, at 211.

The declarations must be by persons connected by family or marriage with the person to whom they relate; and therefore what has been said by servants and intimate acquaintances; *Johnson* v. *Lawson*, 2 *Bing.* 86 (1824); 9 *J. B. Moore*, 183; or by illegitimate relations; *Doe* v. *Barton*, 2 *Moo. & R.* 28 (1837); is not admissible. See *Doe* v. *Davies*, 10 *Q. B.* 314 (1847). The declarations need not be contemporaneous with the matters declared. Thus a person's declaration that his grandmother's maiden name was A. B. is admissible. *Per* Brougham C., *Monkton* v. *Att.-Gen.*, 2 *Russ. & M.* 158 (1831).

If the declarations have been made after a controversy has arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage case*, 4 *Camp.* 417 (1811), p. 90. The term "controversy" must not be understood as meaning merely an existing suit. *Monkton* v. *Att.-Gen.*, above, at 161; *Walker* v. *Beauchamp*, 6 *C. & P.* 552 (1834). See further, *Crouch* v. *Hooper*, 16 *Beav.* 182 (1852).

4. *Evidence of reputation on questions of public or general right.*] See p. 295. On questions of public or general right; as a manorial custom; *Denn* v. *Spray*, 1 *T. R.* 466 (1786); the boundaries between counties, parishes, and manors, &c.; *Nicholls* v. *Parker*, 14 *East*, 331 *n.* (1811); or a ferry; *Pim* v. *Currell*, 6 *M. & W.* 234 (1840); a feeding *pur cause de vicinage* existing by immemorial custom; *Pritchard* v. *Powell*, 10 *Q. B.* 589; 15 *L. J. Q. B.* 166 (1845), explained in *Earl of Dunraven* v. *Llewellyn*, 15 *Q. B.* 811, 812; 19 *L. J. Q. B.* 388 (1850); hearsay or public reputation is admissible. But reputation is not evidence of a particular fact. *Weeks* v. *Sparke*, 1 *M. & S.* 687 (1813); see *Dunraven* v. *Llewellyn*, above; *Berger*, 1894, 1 *Q. B.* 823; 17 *Cox C. C.* 761; 63 *L. J. Q. B.* 529, p. 508; and *Milton, Inhabs. of*, p. 508; *Bliss*, p. 500. So though general reputation is evidence, tradition of a particular fact is not; as that a house once stood in a particular spot. *Ireland* v. *Powell* (1802, in *Bliss*, p. 500); *Cooke* v. *Banks*, 2 *C. & P.* 481 (1826); *Mercer* v. *Denne*, 1905, 2 *Ch.* 564. Declarations of old persons concerning the boundaries of parishes, have been received in evidence, though they were parishioners, and claimed rights of common on the waste, which the declarations had a tendency to enlarge. *Nicholls* v. *Parker*, above; *Plaxton* v. *Dare*, 10 *B. & C.* 19 (1829). Where the question

is, whether certain lands are in the parish of A. or B., ancient leases, in which they are described as lying in parish B., are evidence of reputation that the lands are in that parish. *Plaxton* v. *Dare*, above; and see *Brett* v. *Beales*, *M. & M.* 416; 10 *B. & C.* 508 (1829). The declaration of an old person, who is still living, is not admissible as proof of reputation. *Per* Patteson J., *Woolway* v. *Rowe*, 1 *A. & E.* 117; 3 *L. J. K. B.* 121 (1834), below. See *T.* s. 793. In order to admit of evidence of reputation, it is not necessary that it should be shown that the reputed right or custom had been acted on. *Crease* v. *Barrett*, 5 *Tyrwh.* 458; 1 *C. M. R.* 919; 4 *L. J. Ex.* 297 (1835). Declarations of this kind are not evidence *post litem motam*. *Cotton*, 3 *Camp.* 444 (1813). See *T.* s. 607. "*Competent knowledge in the declarant* is an essential pre-requisite," *ibid.* s. 609. Perhaps *Dubost* v. *Beresford*, p. 572, should be referred to the head of Reputation.

5. *Statements of deceased persons against their own interest.*] The declarations of deceased persons made against their own interest are admissible; as where a man charges himself with the receipt of money, it is evidence to prove the payment. *Goss* v. *Watlington*, 3 *B. & B.* 132 (1821); *Whitnash* v. *George*, 8 *B. & C.* 556 (1828). So a statement by a deceased occupier of land, that he rented it under a certain person, is evidence of such person's seisin. *Peaceable* v. *Watson*, 4 *Taunt.* 16 (1811). So a deed by a deceased party shown to be in the receipt of the rents and profits, in which S. is stated to be the legal owner in fee, is evidence of such ownership for a party claiming under S. *Doe* v. *Coulthred*, 7 *A. & E.* 235 (1837). So a written attornment to L., by a tenant in possession, is evidence of L.'s seisin. *Doe* v. *Edwards*, 5 *A. & E.* 95 (1836). The principle is, that occupation being presumptive evidence of a seisin in fee, any declaration claiming a less estate is against the party's interest. *Crease* v. *Barrett*, above (and see other cases, *T.* s. 685). Declarations by a deceased lord of a manor that the waste of his manor reached a certain spot, but no farther, are not admissible in a suit between other parties, and they were not reputation of boundary, but only as a declaration of his own property. *Ibid.* (*L. J. Exch.*). In all these cases it must appear that the effect of the declaration is to charge the party making it. *Calvert* v. *Archbishop of Canterbury*, 2 *Esp.* 646 (1794). If the person who made the entry be alive, although out of the jurisdiction of the court, so that he cannot be called, the proof of the entry is inadmissible. *Stephen* v. *Gwennap*, 1 *Moo. & R.* 121 (1831); *Smith* v. *Whittingham*, 6 *C. & P.* 78 (1833). And *semble*, that if the declaration be oral, it is in like manner admissible in evidence. *Stapylton* v. *Clough*, 2 *E. & B.* 933; 23 *L. J. Q. B.* 5 (1853); *Bradley* v. *James*, 13 *C. B.* 822; 22 *L. J. C. P.* 193 (1853); *T.* s. 668.

The declarations of persons who, at the time of making them, stood in the same situation and interest as the party to the suit, are evidence against that party; thus the declaration of a former owner of the plaintiff's land, that he had not the right claimed by the plaintiff in respect of it, is admissible; *Woolway* v. *Rowe*, above; and even although he is alive, and not produced. *Ibid.* So of authorised agents, *Bradley* v. *James*, above. The declarations of tenants are not evidence against reversioners. *Per* Patteson J., *Tickle* v. *Brown*, 4 *A. & E.* 378 (1836).

6. *Statements of deceased persons in the regular course of their duty or employment.*] Where a person in discharge of duty in the course of his employment makes a declaration, such declaration, after the death of that person, has in certain cases been admitted as evidence; as where an attorney's clerk indorsed a memorandum of delivery on his master's bill, this was held

to be evidence of the delivery. *Champneys* v. *Peck*, 1 *Stark. N. P.* 404 (1816). In *Furness* v. *Cope*, 5 *Bing.* 114 (1828), there was no decease alleged and the case may be doubted (*Cooper* v. *Marsden*, below), but bankers' books are now controlled by statute, p. 144. *Chambers* v. *Bernasconi*, 4 *Tyrwh.* 531; 1 *C. M. & R.* 347; 3 *L. J. Ex.* 373 (1834). So a duplicate notice indorsed as served by a deceased attorney, according to the routine of the office, is evidence of service. *Doe* v. *Turford*, 3 *B. & Ad.* 890 (1832). So an entry of dishonour of a bill made by the clerk of a notary in the usual course of business, is evidence, after the clerk's decease, of the fact of dishonour. *Poole* v. *Dicas*, 1 *Bing. New Cases*, 649; 2 *L. J. C. P.* 47 (1835). So contemporaneous entries by a deceased shopman or servant in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. *Price* v. *Lord Torrington*, 1 *Salk.* 285 (1703). But it would appear that the person who made the entry must have personally done the business to which it refers. *Brain* v. *Preece*, 11 *M. & W.* 773 (1843); and see *Doe* v. *Skinner*, 3 *Ex.* 84; 18 *L. J. Ex.* 373 (1834). In order to make such entries evidence, it must appear that the person who made them is dead; it is not sufficient that he is abroad, and is not likely to return. *Cooper* v. *Marsden*, 1 *Esp. N. P.* 1 (1793), p. 5. The prisoner was indicted for the murder of a constable. The constable, in the course of his duty, had made a verbal statement in the nature of a report to his superior officer, to the effect that he intended to watch the prisoner's movements that night. Lush J., after consultation with Mellor J., admitted the statement. *Buckley*, 13 *Cox C. C.* 293 (1873).

7. *Statements having reference to the health or sufferings of the person who makes them.*] Upon this exception there is scarcely any direct authority. See *T.* s. 580. In *Blandy*, 18 *How. St. Tr.* 1135 (1752), the prisoner was charged with having poisoned her father, and the doctor was allowed, without objection, to state all that the deceased said in answer to inquiries respecting his health; but not only was he allowed to do this, but he also went on, still without objection, to state the answers of the deceased to inquiries put by him respecting the person who administered the poison which the deceased had taken, though no evidence was given to show that the deceased was then *in articulo mortis;* this case would not now be considered an authority on the latter point; on the former it is confirmed by *Johnson*, below. In *Aveson* v. *Lord Kinnaird*, 6 *East*, 188 (1805), the facts were somewhat peculiar. The action was brought on a policy of insurance, effected by a husband on the life of his wife. The defence was that the wife was a hard drinker, and was in ill-health at the time the policy was effected. The surgeon who had examined the woman on behalf of the office was called by the plaintiff, and he swore positively to his belief of her good health at the time, and said that he formed his opinion principally from the satisfactory answers which she gave to his inquiries. A witness was then called for the defence, who stated that she saw the deceased a day or two after the surgeon had examined her; that she then complained of being unwell; and said that she was unwell when she went to see the surgeon, with other similar statements. A verdict was found for the defendant, and a rule for a new trial obtained by the plaintiff on the ground that evidence of these statements ought not to have been received, which rule was discharged. It was assumed by all the judges, that what was said by the deceased to the surgeon was evidence of her state of health at the time; and they all thought that this evidence having been produced by the plaintiff, it was open to the defendant to rebut it by showing that she had made different statements on another occasion upon the same subject. In the *Gardner Peerage case*, p. 17, reported by Le Marchant, a great many doctors were examined on the part of the claimant as to their experience of cases of

protracted gestation. In order to ascertain the circumstances of these cases, it was necessary to inquire into the *data* upon which the witnesses had formed their calculations, but these depended on the answers of women to certain medical inquiries involving facts which had taken place some months previously. Evidence of what these answers were was repeatedly objected to, and finally rejected by the Committee upon the advice of Lords Giffard and Redesdale. In *Johnson*, 2 *C. & K.* 354 (1847), p. 168, prisoner was charged with having murdered her husband, and in order to prove the state of health of the deceased before the day of his death, a witness was called who had seen him a day or two before; and on this witness being asked in what state of health the deceased appeared to be when he last saw him, he began to state a conversation which had taken place between the deceased and himself on this subject. This was objected to on behalf of the prisoner, but Alderson B. said that he thought that what the deceased person said to the witness was reasonable evidence to prove his state of health at the time.

The result of the cases seems to be this: that, if it becomes necessary to inquire into the state of health at a particular time of a person who is deceased, a witness may detail what the deceased person has himself said on that subject at that time; and this whether he be a medical man or not. But perhaps a medical man might go further, and, even in case of a person who is still living, state the answers to inquiries made by him having reference to such person's health; this evidence is given in cases of assault, in order to prove what the person assaulted has suffered, "in every day's experience." *Per* Lawrence J. in *Aveson* v. *Lord Kinnaird*, above, and p. 25; *Gloster*, 16 *Cox C. C.* 471 (1888: statement must be confined to the state of health); p. 32. See *Wink*, p. 24.

8. *Dying declarations.*] Evidence of this kind, which is peculiar to the case of homicide, has been considered by some to be admissible from "the fullest necessity," since it often happens that there is no third person present to be an eye-witness to the fact, 1 *East, P. C.* 353. But it is said by Eyre C.B. that the general principle upon which evidence of this kind is admitted is, that it is of declarations made in extremity, when the person is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in a court. *Woodcock*, 1 *Leach*, 502 (1789), pp. 30, 106; *Bernadotti*, 11 *Cox C.C.* 316 (1869), p. 32. Probably it is the concurrence of both these reasons which led to the admission of this species of evidence.

The declaration must have been made by a person who, if alive, would have been a competent witness. Thus, on an indictment for the murder of a girl four years of age, Park J. refused to hear evidence of her declarations, observing that, however precocious her mind might be, it was impossible that she could have had that idea of a future state which is necessary to make such a declaration admissible. In this decision, Parke B. concurred. *Pike*, 3 *C. & P.* 598 (1829). But when a child is of an intelligent mind, impressed with the nature of an oath, and expecting to die, the declaration is receivable. See *Perkins*, where the child was eleven years old, p. 31. It is no objection to the evidence that the deceased person was *particeps criminis* (as a woman who has been killed in attempting to procure abortion). *Tinkler*, 1 *East, P. C.* 354 (1781), p. 619. So the statement of the deceased must be such as would be admissible if he were alive and could be examined as a witness; consequently, a declaration upon matters of opinion, as distinguished from matters of fact, will not be receivable. *Sellers* (1796), *Carr. Supp.* 233. Dying declarations in favour of the party charged with the death were

admitted by Coleridge J. in *Scaife*, 1 *Moo. & R.* 551 (1836). It is no objection to a dying declaration that it has been elicited by questions put to the deceased. *Fagent*, 7 *C. & P.* 238 (1835). See also *Reason* and *Tranter*, 1 *Str.* 499; 16 *St. Tr.* 1; *Foster*, 293; 1 *East, P. C.* 320 (1722), pp. 8, 13, 626. *Woodcock*, above, and *Mitchell*, p. 33. In the last case the deceased was examined upon oath by a magistrate, and the examination signed by both. See also *Smith*, 1 *L. & C.* 607; 34 *L. J. M. C.* 153 (1865), p. 518. The question, whether a dying declaration is admissible in evidence, is exclusively for the consideration of the judge. *Per* Lord Ellenborough, *Hucks*, 1 *Stark. N. P.* 523 (1816), p. 688; *Bartlett* v. *Smith* at 486, p. 116. See also *John* (1790), 1 *East, P. C.* 357; 1 *Lea.* 504 *n.*, below, and p. 106.

Dying declarations—admissible only in cases of homicide, where the circumstances of the death are the subject of the declaration.] It is a general rule, that dying declarations are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. *Per* Abbott C.J., *Mead*, 2 *B. & C.* 605; 4 *D. & R.* 120 (1824). Therefore, where a prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion, and evidence of the woman's dying declarations was tendered, Bayley J. rejected it, observing, that although the declarations might relate to the cause of the death, still such declarations were admissible in those cases only where the death of the person was the subject of inquiry. *Hutchinson*, 2 *B. & C.* 608 *n.* (1822). So evidence of the dying declaration of the person robbed has been frequently rejected on indictments for robbery. *Lloyd*, 4 *C. & P.* 233 (1830).

In one case where A. and B. were both poisoned by the same means, upon an indictment against the prisoner for the murder of A., evidence was allowed by Coltman J., after consulting Parke B., to be given of the dying declarations of B.; the ground alleged being "that it was all one transaction." *Baker*, 2 *Moo. & Rob.* 53 (1837). But in *Hind*, 29 *L. J. M. C.* 147 (1860), a case similar to that of *Hutchinson* above, Pollock C.B. followed the rule in *Mead*, above. But see *Mann*, p. 33.

Dying declarations—the situation of the person who makes them.] Dying declarations are only admissible when made by a person who is under the influence of an impression that his dissolution is impending. There must be no hope, not only of ultimate recovery, but of a prolonged continuance of life. If that impression exists in the mind of the sufferer, it will not render the statement inadmissible that death does not in fact take place till some time afterwards.

In order to judge whether or not such was the state of the mind of the person in question, the whole of the circumstances must be looked at. A few cases may be cited with the caution, however, that it is by no means suggested that they can become precise precedents for any future cases that may arise. For the history of the rule, see note to *Morgan*, p. 32.

In *Woodcock*, p. 29, and *John*, above, this kind of evidence was received under circumstances which would not now be considered sufficient to render it admissible. In the first, the surgeon distinctly stated that he did not think the deceased was aware of her situation; in the second, the deceased had never expressed the slightest apprehension of danger; and in neither case were there any circumstances which led to a different conclusion. In *Woodcock*, no case was reserved by Eyre C.B. for the opinion of the judges; but in *John*, the judges, on a case reserved, (apparently) held that the evidence was wrongly received. But they laid it down that the apprehension of danger may be inferred from the declarant's condition and need not be

expressed by him (but cf. *Cleary*, p. 32), and whether that apprehension existed or not is for the judge and not for the jury.

In *Christie* (1821), *Carr. Supp.* 202, the deceased asked his surgeon if the wound was necessarily mortal, and on being told that a recovery was just possible, and that there had been an instance where a person had recovered from such a wound, he replied, "I am satisfied," and after this made a statement; it was held by Abbott C.J. and Park J. to be inadmissible. In *Van Butchell*, 3 *C. & P.* 631 (1829), p. 599, the deceased said, "I feel that I have received such an injury in the bowel that I shall never recover"; and, on his doctor trying to cheer him, he said that he felt satisfied he should never recover; Hullock B. rejected the evidence, saying that a man might receive an injury from which he might think that he should ultimately never recover, but still that would not be sufficient to dispense with an oath. See *Reaney*, p. 32. In *Crockett*, 4 *C. & P.* 544 (1831), p. 33, the surgeon said, "I had told the deceased she would not recover; and she was perfectly aware of her danger; I told her I understood she had taken something, and she said she had, and that damned man had poisoned her. I asked her what man, and she said Crockett. She said she hoped I would do what I could for her for the sake of her family. I told her there was no chance of her recovery." Bosanquet J. thought a degree of hope was shown, and struck out the whole of this evidence from his notes. In *Hayward*, 6 *C. & P.* 157 at 160 (1833), p. 630, Tindal C.J. observed that "any hope of recovery, however slight, existing in the mind of the deceased at the time of the declaration being made, would undoubtedly render the evidence of such declarations inadmissible." In *Spilsbury*, 7 *C. & P.* 187 (1835), p. 44, Coleridge J. said, "When I consider this species of proof is an anomaly, and contrary to all the rules of evidence, and that, if received, it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence that the deceased said he thought he should not recover, as he was very ill. Now, people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow purporting that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed he was convinced that his death was at hand. As nothing of this sort appears, I think there is not sufficient proof that he was without any hope of recovery, and that I, therefore, ought to reject the evidence." In *Perkins*, 9 *C. & P.* 395; 2 *Moo. C. C.* 135 (1840), p. 29, a boy between ten and eleven years of age was severely wounded by a gun loaded with shot, and died the next morning. On the evening of the day upon which he was wounded, he was seen by two surgeons. One of them, who was then of opinion that he could not survive many days, said to him, "My good boy, you must know you are now labouring under a severe injury, from which, in all probability you will not recover, and the effects of it will most likely kill you." The other surgeon told him, "You may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning." The boy made no reply, but his countenance changed and he appeared distressed. From questions put to him, he seemed fully aware that he would be punished hereafter if he said what was untrue. He then made a statement to the surgeons. All the judges, except three, thought the statements made under the apprehension and expectation of immediate death. In *Megson*, 9 *C. & P.*

118 (1840), two days before the death of the deceased, the surgeon told her she was in a very precarious state. On the following day, being much worse, she said to him that she had been in hopes of getting better, but as she was getting worse, she thought it her duty to mention what had taken place. She then proceeded to make a statement. Rolfe B. held that this statement was not admissible, as it did not sufficiently appear that, at the time of making it, the deceased was without hope of recovery. But cf. *Hubbard*, p. 33. In *Howell*, 1 *Den. C. C.* 1 (1844), the deceased had received a gunshot wound, and repeatedly expressed his conviction that he was mortally wounded. He was a Roman Catholic, and an offer was made to fetch a priest, which he declined. This was insisted on as showing either that the deceased had no sense of religion, or that he did not expect immediate death; but the judges, upon a case reserved, were unanimously of opinion that the evidence was properly received. In *Reaney*, *Dears. & B. C. C.* 151; 26 *L. J. M. C.* 43 (1857), the prisoner, eleven days before his death, signed a statement concluding with the words, "I have made this statement believing I shall not recover." On the same day he said, "I have seen the surgeon to-day, and he has given me some little hope that I am better, but I do not myself think that I shall ultimately recover." The evidence was received by Willes J. the point being reserved for the consideration of the Court for C. C. R. All the judges present were of opinion that the evidence was properly received. Much reliance was placed by the counsel for the prisoner on the word "ultimately," but Pollock C.B. said, "No doubt, in order to render the statement admissible in evidence as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death, but there is no case to show that such apprehension must be of death in a certain number of hours or days. The question turns rather upon the state of the person's mind at the time of making the declaration, than upon the interval between the declaration and the death." Wightman J. said that the statement must be made under an impression "that death must in a comparatively short lapse of time ensue." There must be "a settled hopeless expectation of *immediate* death," *per* Lush J.; *Osman*, 15 *Cox C. C.* 1 (1881). Erle C.J. refused to infer from the nature of a wound alone, that a man must have known as soon as he had received it that he was about to die. *Cleary*, 2 *F. & F.* 851 (1862), but cf. *John*, p. 30; *Smith*, 16 *Cox* 170 (1887); *Gloster*, p. 29. It would seem, however, that in some circumstances it may be possible to draw such an inference. *Morgan*, 14 *Cox C. C.* 337 (1875); *Bedingfield*, *ib.*, 342, p. 23. In *Pickersgill*, *Leeds Summer Assizes*, 1869, the deceased, who was suffering from the effects of poison and died the same night, said, "I am getting worse. I am going to die." The doctor asked her if she thought she would get better, and she said, "No, I shall die." Cleasby B., after consulting Brett J., said the "evidence satisfied them that the woman was in a dying state, and that she believed it. When she said she was going to die, she meant that death was imminent." In *Bernadotti*, p. 29, where the deceased had received a knife-stab in the neck, and the bleeding having been stopped, had recommenced, so that his life was in danger, though not in immediate danger, and a magistrate was sent for, the deceased said, "Be quick or I shall die," just before making the declaration. Brett J., after consulting Lush J., admitted the deposition. See also *Jenkins*, *L. R.* 1 *C. C. R.* 187; 38 *L. J. M. C.* 82 (1869). Where a woman who had received severe injuries was standing at a neighbour's door fainting and apparently dying, and she said, "I am dying; look to my children," and she died in the course of the night, Hawkins J., after consulting Baggallay L.J., admitted her dying declaration. *Goddard*, 15 *Cox C. C.* 7 (1882).

The question is, what was the belief of the person making the declaration

at the time of making it, and it is immaterial that such person afterwards took a more hopeful view of his condition. *Hubbard*, 14 *Cox C. C.* 565 (1881). But cf. *Megson*, pp. 31–2.

Interval of time between the declaration and death.] With respect to the interval of time which may have elapsed between the uttering of the dying declarations and the moment of death, it is clear that, if the impression exists in the mind of the declarant that dissolution is shortly impending, it will not make any difference that death does not in fact take place until some time afterwards. *Reaney*, above. Nor does there appear to be any case in which the evidence has been rejected on this ground. In most of the reported cases, however, the statements have been made within a few days of death actually taking place, and in most cases within a few hours. In the case of *Bernadotti*, p. 31, however, the deceased did not die until three weeks after making the declaration.

Dying declarations—when reduced into writing.] A statement giving the *substance* of questions and answers is not admissible: the actual words of the deceased must be given and so must the questions put, if any; for "answers, even if taken word for word, seem to me to be useless without the questions . . . and when a person is in such a condition the danger arising from leading questions is enormously increased." *Per* Cave J., *Mitchell*, 17 *Cox C. C.* 503 (1892), p. 30, dissenting from *Mann*, 49 *J. P.* 743 (1885), where, on a trial for grievous bodily harm, Denman J. admitted a statement, not a dying declaration nor a deposition, but intended as the former, as one made in the prisoner's presence.

When a dying declaration is taken formally by a magistrate in writing, it is of no value as a *deposition* (pp. 57, 58), unless made in the presence of the prisoner and accompanied by the proper formalities for taking depositions, including "full opportunity" for cross-examination, p. 59; nor if these formalities have not been complied with, *e.g.* if, owing to the sufferer's state the cross-examination cannot be finished, is it admissible as a statement made in the presence of the prisoner—unless the cross-examination was vexatious and frivolous, with the object of wasting time—since he would not be likely to deny at once the statements made, but would wait his opportunity for cross-examination. *Mitchell*, and see p. 49; see also *per* Hawkins J., *Smith*, 18 *Cox C. C.* 470 (1897), p. 49. It has been held that, if a dying declaration has been reduced into writing, and signed by the deceased, no secondary evidence can be given of its contents. *Per* Coleridge J., *Gay*, 7 *C. & P.* 230 (1835), following *Reason*, *Str.* at 500, p. 30; cf. p. 50. But mere notes of the declaration taken down by one of the persons who were present would not be even admissible. See p. 3.

Such evidence is liable to be very incomplete, if only from the physical condition of the sufferer. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed, that animosity and resentment are not unlikely to be felt in such a situation. See *Mitchell*, above, at 507, and *Crockett*, p. 31, where the declaration was, "that damned man has poisoned me," which may be presumed to be vindictive; and *Bonner*, 6 *C. & P.* 386 (1834), where the dying declaration was distinctly proved to be incorrect. Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; especially when it is considered, that they cannot be subjected to the power of cross-examination—a power quite as necessary for securing the truth as the religious obligation of an oath can be. And, of course, the ordinary "sanctions" of courts of justice cannot exist in this case. See *Spilsbury*, p. 31. "When

a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are, nevertheless, open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination." *Per* Alderson B., *Ashton*, 2 *Lewin, C. C.* 147 (1837).

Dying declarations—evidence in answer to proof of.] Dying declarations are, of course, open to direct contradiction in the same manner as any other part of the case for the prosecution; and as a prisoner is at liberty to show that a prosecutor who appears in court against him is not to be believed upon his oath (see p. 87), he seems to be equally at liberty to prove that the character of the deceased was such that no reliance is to be placed on his dying declarations. 3 *Russ. Cri.* 396 (Bk. 5, ch. 1, s. 3), citing a case (1842) where A. (deceased) had declared that B. (prisoner) had assaulted him and knocked him down. B. had stabbed A. while A. was pursuing him to give him into custody. The judge allowed cross-examination to show that A.'s character was so bad that B. might reasonably think that A. was following him to rob him; and it was proved that A. had never been knocked down at all.

CONFESSIONS.

Definition.] In criminal law, *confession* generally means an acknowledgment of guilt; *admission* is of some fact not involving criminal intent. *T.* s. 724, p. 47.

Ground of admissibility.] The confessions of prisoners are received in evidence upon the same principle upon which admissions in civil suits are received, viz. the presumption that a person will not make an untrue statement against his own interest. *T.* s. 723. See p. 7.

Nature and effect of confessions.] Confessions may be divided into two classes:—Judicial and extra-judicial. They may also be divided into plenary and non-plenary.

A plenary judicial confession, *i.e.* a confession made by the accused before a tribunal competent to try him, is sufficient whereon to found a conviction. It is, in other words, a plea of *guilty*.

Where the prisoner freely tells the fact, and demands the opinion of the court whether it be felony, though upon the fact thus shown, it appears to be felony, the court will not record his confession, but admit him to plead to the felony *not guilty*. This, "tho it be in court," is an extra-judicial confession, 2 *Hale, P. C.* 225, which is good evidence, but not conclusive, even though plenary. Whether or not a plenary extra-judicial confession, uncorroborated in any way whatever, is sufficient whereon to found a conviction, has been the subject of some discussion. *T.* s. 868. It is said to have been decided to be so in *Wheeling*, 1 *Leach*, 311 *n.* (1789); but the report is very meagre. The subject is ably discussed by Mr. Greaves in a note to 3 *Russ. Cri.* 366, *4th ed.;* and he is of opinion that it has never been expressly *decided*, that the mere confession of a prisoner *alone*, and without any other evidence, is sufficient to warrant a conviction. The invariable practice in serious cases is for the judge to warn the accused of the gravity of his plea and to offer him "freely" to retract it. *Best*, s. 549.

Degree of credit to be given.] See last paragraph. With regard to the degree of credit which a jury ought to attach to a confession, much difference of opinion has existed. By some it has been considered as forming the highest and most satisfactory evidence of guilt. *Per* Grose J. delivering the opinion of the judges in *Lambe*, 2 *Leach*, 554 (1791). So it is stated by the court in *Warwickshall*, 1 *Leach*, 263 (1783), that "a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it."

On the other hand, it is said by Foster J. (*Discourses*, 243) that "hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured,

words are often mis-reported . . . through ignorance, inattention, or malice . . . and they are extremely liable to misconstruction." Moreover, this evidence is not, in the usual course of things, "to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is, confronted." This opinion has also been adopted by Sir W. Blackstone, 4 *Com.* 357. It has been said that it is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. See *T.* s. 865. It cannot be doubted, however, that instances have occasionally occurred, in which innocent persons have confessed themselves guilty of crimes of the gravest nature. Three men were tried and convicted of the murder of a Mr. Harrison. One of them confessed himself guilty of the fact, under a promise of pardon; the confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive. *MS. case cited* 1 *Leach*, 264 *n.*; and see *T.* s. 863. Other sources of distrust are "the zeal which generally prevails to detect offenders . . . and the strong disposition which is often displayed by persons engaged in pursuit of evidence to magnify slight grounds of suspicion into sufficient proof, together with the character of the witnesses, who are sometimes necessarily called in in cases of secret and atrocious crime." *Ib.* s. 862. (See *per* Alderson B., *Simons*, 6 *C. & P.* 541 (1834), pp. 63, 104.)

What confessions are not admissible in evidence.] *Primâ facie*, as a matter of course, a confession by the prisoner is admissible as evidence against him. But there are certain grounds which may be shown by him sufficient to exclude the confession. The general rule is that no confession by the prisoner is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority. But if an inadmissible confession gives a clue to other evidence in the case, that may be given. *Leatham*, p. 283.

It is usual to speak of a *threat* or *inducement* as excluding the confession; and whether a man says, "If you *do* confess I *will not do* so and so," or whether he says, "If you *do not* confess I *will do* so and so," makes very little difference, if in fact the person accused is influenced. All that is here said, therefore, will be applicable to both threats and inducements.

For parallel columns of admissible and inadmissible confessions, see *Phips.* ch. 22.

What is an inducement.] The reported cases in which statements by prisoners have been held inadmissible are very numerous, "and far from consistent with each other." *Best*, s. 551. Before *Baldry*, 2 *Den. C. C.* 430; 21 *L. J. M. C.* 130 (1852), which will be noticed presently, they had gone a very great length. The present state of the law is illustrated by *Knight and Thayre*, 20 *Cox C. C.* 711 (1905). K., a post-office employee, being suspected, S., a detective, who in some cases had power to initiate proceedings—and could and did suspend K.—had an interview of nearly three hours with him alone, at the commencement of which he cautioned him that any statement he made might be used against him; the questions and answers were reduced to writing, and so was a statement made by K. towards the end of the interview. S. then sent for T., with whom K. was charged with conspiring, and questioned him in K.'s presence. S. had declined to allow K. to leave except in some one's charge, which K. declined. He was in the room nearly six hours. S. stated that at the beginning of the interview he had not enough evidence for a prosecution, that he did not intend necessarily to obtain a confession, and that for two hours K. denied all knowledge of the fraud charged. Channell J. with doubt admitted the questions

and answers, to which, however, there was no objection, as they contained no admission of guilt, but refused to admit the statement or "confession," saying, "The difficulty I feel here is whether I ought to admit evidence of what a man has said at the end of a long interview, during which he has been pressed, as this man undoubtedly was pressed, even when a caution was administered at the beginning of the interview. The questioning was continued for a very long period, the man's denials were not accepted, and the impression conveyed by S. to the prisoner's mind may well have been this: 'You will have to tell me that you did this thing, because I shall not let you go till you do so.' This certainly cannot be said to be making a statement voluntarily. It may well be that an admission made immediately after a caution had been given by the person in authority would be admissible, but it does not follow that a suspended person can be cross-examined until the person putting the questions is satisfied." K. was acquitted. On the general question of interrogating detained persons the judge said, "It is, I think, clear that a police officer, or any one whose duty it is to inquire into alleged offences, . . . may question persons likely to be able to give him information, and that, whether he suspects them or not, provided that he has not already made up his mind to take them into custody. When he has taken any one into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so. I am not aware of any distinct rule of evidence, that if such improper questions are asked, the answers to them are inadmissible; but there is clear authority for saying that the judge may . . . in his discretion, refuse to allow the answer to be given in evidence . . . as K. was to all intents and purposes in custody the impropriety of further questions is at least doubtful." (See also on this point an address to police constables by Lord Brampton in the *Police Code*, by Sir Howard Vincent, 1899, p. 18.) See p. 44. All the previous cases were reviewed in *Baldry*, above (where the headnote is correct that: *Drew*, 8 *C. & P.* 140 (1837); *Morton*, 2 *Moo. & R.* 514 (1843); *Furley*, 1 *Cox C. C.* 76 (1844); and *Harris*, *ib.* 106 (1844); have been overruled), where the constable had said to the prisoner, after telling him the charge, "that he must not say anything to criminate himself; what he did say would be taken down, and used as evidence against him." Lord Campbell C.J. at the trial received the evidence, but reserved the point for the consideration of the Court for C. C. R. All the judges were of opinion that the statement was admissible. Pollock C.B. said, "A simple caution to the accused to *tell the truth*, if he says anything, has been decided not to be sufficient to prevent the statement being given in evidence; and although it may be put that when a person is told to tell the *truth* he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. . . . It has been decided that that would not prevent the statement being given in evidence, by Littledale J. in *Court*, 7 *C. & P.* 486 (1836); and by Rolfe B. in a case at Gloucester, *Holmes*, 1 *C. & K.* 248 (1843); but where the admonition to speak the truth has been coupled with any expression importing that it would *be better* for him to do so, it has been held that the confession was not receivable; the objectionable words being, 'that *it would be better* to speak the truth,' because they import that it would be better for him to say something. This was decided in *Garner*, 1 *Den. C. C.* 329; 2 *C. & K.* 920 (1848) [p. 41]. The true distinction between the present case and a case of that kind is, that here it is left to the prisoner a perfect matter of indifference whether he should open his mouth or not."

The case of *Court*, above referred to, was this: the prisoner was taken before a magistrate on a charge of forgery; the prosecutor said, in the hearing of the prisoner, that he considered the prisoner as the tool of one G., and

the magistrate then told the prisoner to be sure and tell the truth; upon which the prisoner made a statement. It was held by Littledale J. that evidence of this statement was admissible. In *Holmes* the prisoner was before a magistrate on a charge of rape, and the magistrate said, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial." Evidence of the statement then made by the prisoner was held by Rolfe B. to be admissible. In *Garner*, a surgeon told the prisoner, in the presence of her master and mistress (which is the same thing as if the words had been used by the master or mistress themselves, pp. 40, 41), that it was better for her to speak the truth; evidence of the statement thereupon made was unanimously held by the Court for C. C. R. to be inadmissible; see also *Jarvis, per* Willes J. and *Fennell* and *Reeve*, below.

In *Sleeman*, 1 *Dears. & P. C. C.* 249 (1853), p. 41, the prisoner, a maid-servant, was taken into custody on a charge of setting fire to her master's premises. She desired to change her dress, and was permitted to do so, being given, for that purpose, into the charge of her master's daughter. While she was changing her clothes, her master's daughter said to her, "I am very sorry for you, you ought to have known better; tell me the truth whether you did it or no." The prisoner said, "I am innocent." The master's daughter replied, "Don't run your soul into more sin; tell the truth." The prisoner then made a full confession. The evidence was admitted; and the Court for C. C. R. held that there was no inducement or threat, nor authority to make any, and affirmed the conviction. In *Upchurch*, 1 *Moo. C. C.* 465 (1836), the prisoner, a servant-girl, aged thirteen, was indicted for attempting to set fire to her master's house. After the attempt was discovered, her mistress said to her, "Mary, my girl, if you are guilty do confess; it will perhaps save your neck; you will have to go to prison; if W. H. (a person whom the prisoner had charged) is found clear, the guilt will fall on you." She made no answer. The mistress then said, "Pray tell me if you did it." The prisoner then confessed. The evidence was admitted, and the point reserved; but the judges thought that it ought not to have been received. In *Hearn*, *Car. & M.* 109 (1841), a servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two bedrooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said nothing to her respecting the fire. Coltman J. held that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction. Where the prisoner's master in the presence of two policemen said, "I think it is right I should tell you, that besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue," and, on his denying having written a letter produced, "Take care; we know more than you think," it was held that these words did not make the evidence inadmissible. Kelly C.B. said, "The words that have been used import advice only on moral grounds, '*take care*, &c.,' only amounted to a caution." *Jarvis*, *L. R.* 1 *C. C. R.* 96; 37 *L. J. M. C.* 1 (1867). So also, where the mother of some little boys in custody said, "You had better, as good boys, tell the truth," it was held that a statement made thereupon was admissible, and that the cases to the contrary had gone too far. *Reeve*, *L. R.* 1 *C. C. R.* 362; 41 *L. J. M. C.*, 92 (1872). Where the prosecutor said to the prisoner, "The inspector tells me you are making housebreaking implements; if that is so, you had better tell

the truth, it may be better for you," and the prisoner immediately after made a confession to the prosecutor in the presence of the inspector, the confession was held not admissible in evidence. *Fennell*, 7 *Q. B. D.* 147; 50 *L. J. M. C.* 126 (1881). Where the prisoner was in custody of a policeman on a charge of arson, and she said to her mistress, "If you forgive me I will tell you the truth," and the mistress without cautioning her said, "Ann, did you do it?" Williams J. rejected her confession. *Mansfield*, 14 *Cox C. C.* 639 (1881). See *Thompson*, p. 50.

The kind of inducement — collateral benefit — religious inducement.] Upon this point there are but few authorities. In *Sexton* (1822), p. 43, the prisoner said, "If you will give me a glass of gin, I will tell you all about it," and two glasses of gin were given him. He then made a confession, which Best J. refused to admit, as he did the same confession read over to the prisoner and signed by him in the presence of a magistrate, who told him that the charge affected his life, *and a confession might do him harm*; he would have admitted the second confession if the magistrate had told him that the previous one was not evidence against him—for he might think he could not (by the second) make his case worse than it was. (But see *Howes*, p. 42.) Moreover, the first confession was not taken down from the lips of the prisoner, but from recollection, and was rejected on this ground. See p. 50. This decision has been repeatedly doubted, partly because the confession was volunteered. See *Joy* on *Confessions*, 17 (1842), 3 *Russ. Cri.* 482 (Bk. 5, ch. 4, s. 1). In *Lloyd*, 6 *C. & P.* 393 (1834), a man and his wife were in prison in separate rooms, on a charge of stealing and receiving, and the constable said to the man, "If you will tell where the property is, you shall see your wife"; Patteson J. held that a confession made afterwards was admissible. In *Green*, 6 *C. & P.* 655 (1834), the prisoner said if his handcuffs were taken off he would tell where he had put the property; the judge thought this was not a confession, but advised the jury to ignore it.

It is to be remarked that if it is necessary that the inducement should have reference to escape from the charge, it is quite unnecessary to discuss, as was done in great length in *Gilham*, 1 *Moo. C. C.* 186 (1828), pp. 41, 128, whether the inducement must be of a temporal nature. There the chaplain of the gaol had had repeated interviews with the prisoner, and had strongly impressed upon him the religious duty of confession; coupling these exhortations with an expression of belief that the prisoner was a guilty man, as indeed the prisoner himself, in general terms, admitted. The gaoler had also conversed with the prisoner on the subject, and had held, in briefer terms, similar language. The prisoner at length, after being cautioned that what he said would be used in evidence against him, made a full confession to the gaoler, and afterwards to the mayor. Both confessions were received by Littledale J., the question of their admissibility being reserved for the opinion of the judges. The judges, without stating any reasons, held that the confessions (*both* according to the report) were properly received; and it is said in 3 *Russ. Cri.* 493, Bk. 5, ch. 4, s. 1, that the ground for this decision was that there were no temporal hopes of benefit or forgiveness held out; and that such hopes, if referable merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded.

In *Wild*, 1 *Moo. C. C.* 452 (1835), a witness, not in authority, but detaining the prisoner, said to him, "Now kneel down and tell the truth. I am going to ask you a very serious question. I hope you will tell me the truth in the presence of the Almighty"; the judges thought the statement made thereupon was strictly admissible, but much disapproved of the mode in which it was obtained. In *Nute* (1842), 3 *Russ. Cri.* 495 (Bk. 5, ch. 4,

s. 1), a mistress told a girl, if she would repent and confess, God would forgive her, and she confessed; some one else, in the mistress's presence but not hearing, told her that her mistress said she had confessed, whereupon she confessed again. The jury thought the first confession made under hope of favour here, and the second under the influence of having made the first. The judges, who thought neither of these points were for the jury, held that on these facts the confessions ought not to have been received, though many thought the inducement was "not hope of favour here." This case shows, according to *Burn's Justice* (1845, *Confession*, p. 875), that "if a confession be obtained by undue means, nothing the prisoner afterwards says under the influence of having made that confession, can be received." So *Meynell*, p. 43.

On the whole the authorities seem to be in favour of the proposition that the inducement must be of a temporal nature. See *Best*, ss. 551, 553. Whether or not it must have reference to escape from the charge, has scarcely been fully discussed.

Inducement held out with reference to a different charge.] An inducement held out to a prisoner with reference to one charge will not exclude a confession of another offence, of which the prisoner was not suspected at the time the inducement was held out. The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf, that one of them had improperly induced him to confess, and this constable was called and stated that whilst the prisoner was in his custody on another charge, and when he was not suspected of the offence for which he was then on his trial, he had made a statement in which he confessed himself guilty of a second charge. It was submitted, that if a promise was held out to him, it was immaterial what the charge was. Littledale J. said, "I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge." The confession was admitted. *Warner*, 1832, 3 *Russ. Cri.* 489. But where a threat was held out to a prisoner—that if he did not tell, he would be given in charge—without the nature of the charge being stated, but subsequently the nature of the charge was stated, and *thereupon* a confession was made, it was held to be inadmissible. *Luckhurst*, 1 *Dears. & P. C. C. R.* 245 (1853); here authority was implied because the threat was made in the presence of the prosecutor (p. 41).

Inducement must be held out by a person in authority.] In *Spencer*, 7 *C. & P.* 776 (1837), Parke B. stated that there was a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement (that "it would be better for him") held out by that person, can be given in evidence. But on the last-mentioned case being cited in *Taylor*, 8 *C. & P.* 733 (1839), Patteson J. said, "It is the opinion of the judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority." And in *Moore*, 2 *Den. C. C.* 522; 21 *L. J. M. C.* 199; 3 *C. & K.* 157 (1852), below, Parke B., in delivering the judgment of the Court for C. C. R., said that if an inducement was held out by a person in authority, "however trifling the threat or inducement might be," the confession was clearly inadmissible, and *vice versâ*.

Who is a person in authority.] The decisions are numerous and undoubted that the prosecutor, or the person who in the ordinary course of things will become so, the constable in charge of the prisoner, and any person having judicial authority over the prisoner, are persons in authority

within the meaning of the rule. The rule also extends to the master or mistress of the prisoner, but *only* where the offence *concerns the master or mistress*. This was decided in *Moore*, above, where the prisoner was charged with killing, or concealing the birth of, her infant child, and had made a confession to her mistress after an inducement (that "she had better tell the truth"), which was held admissible. See *Luckhurst*, p. 40. In *Kingston*, 4 *C. & P.* 387 (1830), Parke J., after conferring with Littledale J., held that an inducement held out by a surgeon called in professionally was sufficient to exclude a confession. This appears to be the only decision on this point. In *Garner*, p. 37, the inducement was held out by the surgeon, and the confession was made to him, but the master and mistress were present. *Gilham*, p. 39, is no authority that the chaplain of a gaol is a person in authority within the meaning of this rule. In *Sleeman*, p. 38, it was held that the daughter of the master of the house who had the maid-servant in her custody for a temporary purpose was not a person in authority. A paid female searcher was held to be a person in authority, and when the prisoner, on being searched, said, "If I tell the truth shall I be hung?" and she replied, "No; nonsense. Who told you so?" prisoner's statement after that was rejected. *Windsor*, 4 *F. & F.* 360 (1864).

Inasmuch as in cases of felony any person may, upon reasonable suspicion, apprehend the suspected party, it follows that a person in no way connected with the charge may put himself in the position of a person in authority. Thus in *Parratt*, 4 *C. & P.* 570 (1831), the prisoner, a sailor, was charged with robbing one of the crew of the ship to which he belonged. The master said, "If you do not tell me who your partner was, I will commit you to prison"; and the prisoner thereupon confessed. Alderson B. held the confession inadmissible. Parke B. referring to this case in *Moore*, p. 40, puts it on the ground that the master had threatened to take part in the prosecution for the felony.

It is the same thing whether the inducement be held out by a person in authority or by another in his presence. *Luckhurst*, p. 40. And it appears from this case, from *Eliz. Laugher* (1846), 2 *C. & K.* 225, p. 817, and *Garner*, p. 37, that even if the person in authority be silent, he will be presumed to acquiesce in the inducement.

Where there were three brothers in custody on the same charge, and one said to another in the presence of the prosecutor and the policeman, neither of whom said anything, "Well, John, you had better tell Mr. Walker (the prosecutor) the truth," and the prisoner addressed thereupon made a confession; evidence of this confession was received, and the Court for C. C. R. affirmed the conviction, probably because the inducement "must be looked upon merely as" that "of an accomplice." *Parker*, *L. & C.* 42 (1861).

Inducement by offer of pardon from the crown.] The mere knowledge by a prisoner of a handbill, by which a government reward and a promise of pardon are held out to any accomplice, does not furnish sufficient grounds for rejecting the confession of a prisoner. But where it was shown that the prisoner had asked to see any handbill that might appear, and one was accordingly shown him, in which a promise of pardon was held out to an accomplice, upon which the prisoner said he saw no reason why he should suffer for the crime of another, and that, as government had offered a free pardon to any one of the parties concerned who had not struck the blow, he would tell all he knew about the matter, and accordingly did so, Cresswell J. held not only the confession then made inadmissible, but also struck out from his notes the previous one he had received before the evidence of the prisoner's remark (cf. *Garner*, p. 50), as it was sufficiently clear that the prisoner was influenced by the offer of pardon. *Boswell*, 6 *Car. & M.* 584

(1842). In *Blackburn*, 6 *Cox C. C.* 334; 3 *C. & K.* 330 (1853), a statement made by the prisoner in a room, in which a large printed handbill, containing an offer of reward and pardon, was hanging up, was rejected by Talfourd J., after consulting with Williams J., the prisoner appearing to have the notion that he would be admitted as witness for the crown, though he said nothing about that expectation or the hope of the reward, and he was told that his statements would be used against him. In *Dingley*, 1 *C. & K.* 637 (1845), the prisoner asked the chaplain of the gaol if any offer of pardon had been made; the chaplain said there had, but added that, if the prisoner made a statement, he hoped he would understand that he could offer him no inducement, as it must be his own free and voluntary act. The prisoner afterwards signed a confession before a justice, in which he distinctly stated that no person had made any promise, or held out any inducement to him to confess anything. Pollock C.B. held that the confession was admissible. As to those cases in which the prisoner has given evidence on another charge, and has subsequently refused to repeat his evidence, and has then himself been put upon his trial, see p. 112.

Inducement—when held to have ceased.] There are many cases in which it has been held that the confession is to be received, if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence.

Thus, if the impression that a confession is likely to benefit him has been removed from the mind of the prisoner, what he says will be evidence against him, although he has been induced to confess. Where the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances was held by Bayley J. to be clearly admissible. *Lingate*, 1815; 1 *Phill. Ev.* 414, 10*th ed.* So where it appeared that where a constable told a prisoner he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would be any benefit to him to confess, on which the magistrate said, he would not say it would; the prisoner having afterwards, on his way to prison, made a confession to another constable, and, again in prison, to another magistrate, the judges unanimously held that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. *Rosier*, 1821; *Ibid.* So, in similar circumstances, after the statutory caution of the magistrate (p. 51). *Bate*, 11 *Cox C. C.* 686 (1871). A prisoner charged with murder was visited by a magistrate, who told him, expressly to induce a confession, that, if he was not the man who struck the fatal blow, and would disclose what he knew, he would use all his endeavours and influence to prevent any ill-consequences from falling on him, adding that it was certain that some one concerned would make the matter known. The magistrate wrote to the Secretary of State, who returned answer, that mercy could not be extended to the prisoner; which answer was communicated to the prisoner, who afterwards sent for the coroner, and desired to make a statement to him. The coroner cautioned him, and added that no hopes or promise of pardon could be held out to him. Littledale J. ruled that a confession subsequently made by the prisoner to the coroner was admissible; for that the caution given by the latter must be taken to have completely put an end to all the hopes that had been held out. *Clewes*, 4 *C. & P.* 224 (1830), p. 83. See also *Howes*, 6 *C. & P.* 404 (1834), p. 39; second confession, after caution by magistrate, admitted, though latter did not say first was of no effect, contradicting *Sexton*, p. 39. A

girl charged with poisoning was told by her mistress, that, if she did not tell all about it that night, the constable would be sent for next morning to take her before the magistrate; upon which the prisoner made a statement (which was rejected). The next morning a constable was sent for, who took the prisoner into custody, and on the way to the magistrate, without any inducement from the constable, she confessed to him. Bosanquet J. said, "I think *this* statement receivable. The inducement was, that if she confessed that night the constable would not be sent for, and she would not be taken before the magistrates. . . . The inducement therefore was at an end." *Richards*, 5 *C. & P.* 318 (1832).

Inducement—when held not to have ceased.] It is said by Buller J. that there must be very strong evidence of an explicit warning not to rely on any expected favour, and that it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession can be given in evidence. 2 *East, P. C.* 658. See *Sexton*, p. 39. So where the committing magistrate told the prisoner, that, if he would make a confession, he would do all he could for him, and no confession was then made, but, after his committal, the prisoner made a statement to the turnkey, who held out no inducement and gave no caution; Parke J. said he thought the evidence ought not to be received after what the committing magistrate had said to the prisoner, more especially as the turnkey had not given any caution. *Cooper*, 5 *C. & P.* 535 (1833), p. 153.

The rule in *Nute* (p. 39) as to second or later confessions confirmed that in *Meynell*, 2 *Lewin* 122 (1834), where Taunton J. said that the second confession was not receivable, it being impossible to say that it was not induced by the promise which a constable made to the prisoner in the morning.

The prisoner was indicted for murder. Some suspicion having fallen upon him, an overlooker charged him with the murder which he denied. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own, and added, "There is no doubt thou wilt be found guilty; it will be better for you if you will confess." A constable then came in and said to the overlooker, in a tone loud enough for the prisoner to hear, "Robert, do not make him any promises." The prisoner then made a confession. Patteson J. said, "That will not do. The constable ought to have done something to remove the impression from the prisoner's mind." It was then further proved that the overlooker, in about ten minutes after the above confession, delivered the prisoner to another constable, and that, when the latter received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. This constable took the prisoner to his house, and there said, "I believe Sherrington has murdered a man in a brutal manner." The wife and brother of the prisoner were there, and they said to the prisoner, "What made thee go near the cabin?" The prisoner in answer made a statement similar in effect to the one he had made before. The constable said nothing at all, but did not caution him, and it was not more than five minutes after he received the prisoner into his charge that the prisoner made the statement. The constable was not aware that the overlooker had held out any inducement. Patteson J. rejected the second confession, saying, "There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received. . . . the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination." *Sherrington*, 2 *Lewin*, 123 (1838). A female servant being suspected of stealing money, her mistress, on a Monday, told her that she would forgive her if she told her the truth. On the Tuesday, she was taken before a

magistrate, and, no one appearing against her, was discharged. On the Wednesday, the superintendant of police went with her mistress to the Bridewell, and told her, in the presence of her mistress, that she was not bound to say anything unless she liked; and that if she had anything to say, her mistress would hear her, but (not knowing that her mistress had promised to forgive her) he did not tell her, that if she made a statement it might be given in evidence against her. The prisoner then made a statement. Patteson J. held that this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, especially as the interval was so short; but that if the mistress had not been then present, it might have been otherwise. *Hewett*, 1 *Car. & M.* 534 (1842). See also *Rue*, 13 *Cox C. C.* 209 (1876).

Confessions obtained by artifice or deception admissible.] Where a confession has been obtained by artifice or deception, but without the use of promises or threats, it is admissible. Thus it has been held, that where the confession was made through a false statement by a constable that some of the prisoner's accomplices were in custody, and the prisoner was a witness against his accomplices, but on the trial denied everything, and was then himself tried on that confession, all the judges held the conviction good: p. 112. *Burley* (1818), 2 *Stark. Ev.* 13 *n.* (*3rd ed.* 1842). Where a turnkey promised he would put a letter in the post, but detained it, it was given in evidence as a confession at the trial and received. *Derrington*, 2 *C. & P.* 418 (1826). So where a person took an oath that he would not mention what the prisoner told him; *Shaw*, 6 *C. & P.* 373 (1834); and where a witness promised that what the prisoner said should go no further, having previously told him, when he asked if he should confess that he had better not, Coleridge J. remarking that the tendency of what had passed here was to make the confession *true*. *Thomas*, 7 *C. & P.* 345 (1836). It appeared that one of the prisoners had made a statement to a constable in whose custody he was, but that he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so. (If this was so, "it is very doubtful whether evidence so obtained would be admitted." *T.* s. 880 *n.*) Coleridge J. said, "I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible . . . it must either be obtained by hope or fear. This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury." *Spilsbury*, p. 31.

Confessions obtained by questioning admissible.] A confession is admissible in evidence where it has been elicited by questions put by a person in authority. *Thornton*, 1 *Moo. C. C.* 27 (1824), where the questions were put by the police constable to a boy fourteen years of age, in circumstances of considerable harshness. A majority of the judges thought the confession good, as there was no threat or promise. In *Kerr*, 8 *C. & P.* 176 (1837), Park J. seemed to think that it might not be in some cases improper for a policeman to interrogate a prisoner, but the practice is reprobated by most of the judges. See *Knight and Thayre*, p. 36. In *Gavin*, 15 *Cox C. C.* 656 (1885), A. L. Smith J. refused to receive admissions elicited by the questions of a constable who read over to prisoners the statement of a fellow-prisoner incriminating them and himself; this was "in the nature of a cross-examination." But "before the prisoner is charged or is in custody he may be asked what he has to say in explanation, or in answer." But in *Brackenbury*, 17 *Cox C. C.* 628 (1893), Day J. dissented expressly from this ruling, and allowed statements made to a constable by the prisoner to be given

in evidence, although they were in answer to questions put by the constable; but see *Histed*, below. In *Male*, 17 *Cox C. C.* 689 (1893), Cave J. however, said, "It would be monstrous if the law permitted a police officer to go, without any one being present to see how the matter was conducted, and put a prisoner through an examination and then produce the effect of that examination against him. . . . A policeman is not to discourage a statement, and certainly not to encourage one. It is no business of his to put questions to prisoners." He refused, therefore, to admit evidence of what the prisoner had said in answer to such questions. But this ruling was carefully limited in *Rogers* v. *Hawken*, 19 *Cox C. C.* 122 (1898)—not an instance of arrest—both L. Russell C.J. and Mathew J. thinking that it might be very much in the interest of the accused person, if innocent, that his immediate answer to a question, suggesting his connection with the charge, should be put in at the trial. (This, however, was before the accused was an admissible witness, p. 829.) In *Miller*, 18 *Cox C. C.* 54 (1895), Hawkins J. said that it was impossible to discover the facts of a crime without asking questions, and as he held that the questions were properly put after due warning in that case, he admitted evidence of the prisoner's answers, saying that every case must be decided according to the whole of its circumstances; the prisoner was not in custody when interrogated. And where two prisoners were jointly charged, and a statement which had been voluntarily made and signed by one and implicated the other was read over to the latter by the police who cautioned him, a confession which had then been made and signed by the second prisoner was admitted as "voluntary." *Hirst*, 18 *Cox C. C.* 374 (1896). In *Histed*, 19 *Cox C. C.* 16 (1898, bigamy), there being no evidence of identity, a detective confronted prisoner, without any caution, with a clergyman, saying, "Do you know this gentleman?" She replied, "You are the Mr. C. who married me, &c., &c." Hawkins J. called this "entrapping" and a "trick," and declined to allow her statement to be given, adding that without the usual caution, a policeman should ask no questions at all of those in custody, and stating that he entirely agreed with the ruling in *Gavin* (despite *Brackenbury*, above).

Confessions or admissions obtained in the course of legal proceedings.] The rule is that what a person states in a lawful judicial proceeding may be used in evidence against him in other legal proceedings. *Chidley*, p. 52, and foll.; and *Walker* (1806—cited in *Lewis*, p. 54, affidavit); as to the production of documents, see *Leatham*, p. 283. This is subject to the common law rule that no one is bound to criminate himself, to which an exception has been made by statute in the case of bankrupts. *Scott*, 25 *L. J. M. C.* 128; 7 *Cox C. C.* 164; *Dears. & B. C. C.* 47; 2 *Jur. N. S.* 1906 (1856), p. 680; *Hillam*, 12 *Cox C. C.* 174 (1872); *Widdop*, *L. R.* 2 *C. C. R.* 3; 42 *L. J. M. C.* 9 (1872); *Ex parte Schofield*, 6 *Ch. D.* 230; 46 *L. J. Bkcy.* 112 (1877), see pp. 237, 268. A witness on the examination of the bankrupt need not criminate himself (see *Baldwin* on *Bankruptcy*, *9th ed.*, p. 539); as to accomplices, see p. 111. The effect of these decisions is produced by the Bankruptcy Act, 1883, 46–7 Vict. 52, which, by s. 17, sub-s. 8, enacts that "the debtor shall be examined on oath, and it shall be his duty to answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to [or by; 53–4 Vict. 71, 2] and signed by the debtor, and may thereafter be used in evidence against him." But see 53–4 Vict. 71, 27, p. 237, for exceptions. But it has been held that this does not preclude any other mode of proving the debtor's admissions made at his public examination, so that on the trial of an indictment against a bankrupt for misdemeanors under the Debtors Act, 1869, where

notes of his public examination had been taken, but not read over or signed by him, parol evidence of the person who took such notes was admissible to prove such admissions. *Erdheim* (1896), 2 *Q. B.* 260; 65 *L. J. M. C.* 176; 18 *Cox C. C.* 355; *C. C. R.*, cf. pp. 50, 51, 237. As to dispositions implicating third persons or one not then accused, see pp. 49, 52.

Confessions partially admissible—accompanying acts—improper inducement.] Declarations accompanying an act done (cf. p. 23) have been admitted in evidence. The prisoner was tried for stealing a guinea and two promissory notes. The prosecutor was proceeding to state a confession procured by inducement, when Chambre J. stopped him, but permitted him to prove that the prisoner brought to him a guinea and a 5*l.* Reading bank note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him. The learned judge told the jury, that, notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note, accompanying the act of delivering it up, as evidence that it was the stolen note. A majority of the judges (seven) held the conviction right. Lawrence and Le Blanc JJ. were of a contrary opinion, and Le Blanc J. said that the production of the money by the prisoner was alone admissible, and not that he said it was one of the notes stolen. *Griffin*, *R.* & *R.* 151 (1809). And see *Jones*, *R.* & *R.* 152 (1809), where the statement of the prisoner, on producing some stolen money out of his pocket, that it was all he had left of it, was held inadmissible, the prosecutor having said "he only wanted his money, and that if the prisoner gave him that he might go to the devil." The principle seems to be that the truth of the prisoner's statement is *guaranteed* by the subsequent act, *e.g.* the finding or delivering up. *T.* ss. 902, 903. So that if a search for property or a body thus indicated is *ineffectual*, neither confession nor act can be received; a prisoner confessed, under improper inducement, to a theft, and took an officer to a house where and to a person to whom he had delivered the property; the person denied the fact and the property was not found. Held, that the conviction was wrong: neither confession nor acts were receivable. "The influence which might produce a groundless confession might also produce groundless conduct." *Jenkins*, *R.* & *R.* 492 (1822).

Evidence only against the persons confessing.] It is quite settled generally, that a confession is only evidence against the person making it, and cannot be used against others. With respect to conspiracy, there is some obscurity on this subject, which will be found discussed on p. 354. But a difficulty occurs where a confession by one prisoner is given in evidence, which implicates other prisoners by name, as to the propriety of suffering those names to be mentioned to the jury. Several cases are collected in 1 *Lewin*, 107 (1829–33), which show that Littledale J., Alderson B., and Denman C.J. considered that the whole of the confession, whether verbal or written, ought to be presented to the jury, not omitting the names; Parke J. thought otherwise. See *Fletcher*, 4 *C.* & *P.* 250 (1829), and *Clewes*, p. 42, in both of which Littledale J. says, that he had formed his opinion after much consideration, and told the jury not to pay the slightest attention to anything implicating any one but the confesser (in *Clewes*, however, it does not appear that any one else was *then* on trial).

The confession of the principal is not admissible in evidence upon an indictment against the accessory. One Turner was indicted for receiving sixty sovereigns, &c., by one Sarah Rich then lately before feloniously stolen. To establish the larceny by Rich, the counsel for the prosecution proposed to prove a confession by her, made before a magistrate in the

presence of the prisoner, but not on oath, in which she stated various facts, implicating herself and others, as well as the prisoner. Patteson J. refused to receive as evidence anything which was said by Sarah Rich respecting the prisoner, but admitted what she had said respecting herself. The prisoner was convicted. Having afterwards learned that a case had occurred before Wood B. at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty, and the receiver not guilty, and that Wood B. refused to allow the plea of guilty, to establish the fact of the stealing by the principal, as against the receiver, Patteson J. thought it proper to refer to the judges the question, "Whether he was right in admitting the confession of Sarah Rich in the present case?" The judges were unanimously of opinion that Sarah Rich's confession was no evidence against the prisoner, and the conviction was held wrong. *Turner*, 1 *Moody, C. C.* 347 (1832), pp. 158, 735; and *Appleby*, p. 49. Cases like this are sometimes explained on the ground that the strictness of judicial proceedings prevents reply by the impugned person (*Melen* v. *Andrews*, p. 49); but this could never apply to the prisoner *then* being examined, and applies still less now that he can deny on oath (cf. p. 49). But in *Cox*, 1 *F.* & *F.* 90 (1858), Crowder J. admitted, on the trial of the receiver, the confession of the thief made in the receiver's presence as evidence of the fact of stealing (but on what ground it is impossible to say from the extreme brevity of the report). Cf. on this subject pp. 695–6, 735. Where the counsel for the prosecution opened no case against one of two prisoners, and was about to detail to the jury certain statements made by that prisoner (incriminating the other), Pollock C.B. interposed, saying that those statements ought not to be repeated merely because the prisoners were jointly charged, and that the proper course would be to take an acquittal, and examine such prisoner as a witness. *Gardner* and *Humbler*, 9 *Cox C. C.* 332; 56 *C. C. C. Sess. Pap.* 708 (1862).

By agents.] An admission by an agent is never evidence in criminal, as it is sometimes in civil, cases, in the sense in which an admission by a party himself is evidence. Cf. p. 1. Thus, in order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to show that such letter was written "in consequence" of an interview, but it must be shown that it was written by the instructions of the client. *Downer*, 14 *Cox C. C.* 486 (1880): *C. C. R.*, p. 128. Where a person is charged with the commission of an offence through the instrumentality of an agent, then it becomes necessary to prove the *acts* of the agent; and, in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced. Thus, on the impeachment of *Lord Melville* by the House of Lords, it was decided that a receipt given in the regular and official form by Mr. Douglas, who was proved to have been appointed by Lord Melville to be his attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money, and to give receipts for the same, *and who was dead*, was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster did receive from the exchequer a certain sum of money in the ordinary course of business. 29 *How. St. Tr.* 746–64 (1806). Had, however, Mr. Douglas been alive at the time, there can be no doubt that he must have been called; and that he might have been called to prove the receipt of the money would probably not have been questioned. "In allowing this receipt of Mr. Douglas to be read nothing is proved, but that this sum was issued to" him "under the power of attorney from Lord Melville . . . but it is a totally different question in the consideration of criminal as distinguished from civil justice how" he "may be affected by the

fact when so established:—The receipt by Douglas "would in itself involve him civilly, but could by no possibility convict him of a crime." *Per* Erskine C.

In the *Queen's Case*, p. 2, at 304, the judges held that evidence to show that an agent of the prosecutor, not called as a witness, had offered a bribe to some one to induce him to give evidence in support of the indictment, or to bring him papers belonging to the accused—such person not having been called as a witness—could not be admitted to discredit generally the witnesses the prosecutor did call, but they were "by no means prepared to say" that in some circumstances it might not be proper to let such proof go to the jury, and their inclination was rather to admit than to exclude it. Whether the "prosecutor" is sufficiently a "party" to make admissions, is not of much practical importance, but see *Phips. B.* II. ch. 22. *T.* s. 724, p. 35.

The whole of a statement must be taken together, but it may be contradicted in whole or in part.] In criminal, as well as in civil, cases, the whole of an admission made by a party is to be given in evidence. *T.* ss. 725, 870. As to the application of this rule to cross-examination, see p. 120. "There is no doubt," says Bosanquet Serjt. "that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, for their consideration, precisely as in any other case where one part of the evidence is contradictory to another." *Jones*, 2 *C. & P.* 629 (1827). Where a prisoner was indicted for larceny, and, in addition to evidence of the possession of the goods, the counsel for the prosecution put in the prisoner's statement before the magistrate, in which he asserted that he had bought the goods, Garrow B. directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together. *Ibid.* But there is not the least doubt that a jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient ground for so doing. Thus where, in addition to evidence of the stolen goods being found in the possession of the prisoner, the prosecutor put in the prisoner's examination, which merely stated that the "cloth was honestly bought and paid for," Park J. told the jury (who convicted), "If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if, from his selling it so very soon after it was lost, at the distance of eight miles, you feel satisfied that the statement of his buying it is all false, you will find him guilty." *Higgins*, 3 *C. & P.* 603 (1829). So where a prisoner, charged with murder, stated in his confession that he was present at the murder, which was committed by another person, and that he took no part in it, Littledale J. left the confession to the jury, saying, "It must be taken all together, and it is evidence for the prisoner as well as against him; still the jury may, if they think proper, believe one part of it, and disbelieve another." *Clewes*, p. 42. See also *Steptoe*, 4 *C. & P.* 397 (1830), and p. 54. In a trial for murder, the counsel for the prosecution said he would treat the statements of the prisoners before the magistrates (*not* as confessions or any evidence against them) as their defence, and show by evidence that they were not consistent with truth; *Greenacre*, 8 *C. & P.* 35 (1837), p. 65, &c.; and this course is frequently adopted in practice.

Admissions of matters void in point of law, or false in fact.] An admission on the part of a prisoner is not conclusive, and if it afterwards appear

in evidence that the fact was otherwise, the admission will be of no weight. Thus, upon an indictment for bigamy, where the prisoner had admitted the first marriage, and it appeared at the trial that such marriage was void, for want of consent of the guardian of the woman, the prisoner was acquitted. *Philp*, pp. 21, 247. So on an indictment for setting fire to a ship with intent to injure two other part-owners, it was held that the prosecutor could not make use of an admission by the prisoner that these persons were owners, if it appeared that the requisites of the shipping acts had not been complied with. *Ibid.*

Confessions inferred from silence or demeanor—statements in presence of prisoner.] See as to silence, pp. 33, 184. Besides the proof of direct confessions, the conduct or demeanor of a prisoner on being charged with the crime, or upon allusions being made to it, is frequently given in evidence against him. Thus, although neither the evidence nor the declaration of a wife was admissible against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer or an evasive reply, were receivable in evidence as an implied admission on his part. *Smithies*, 5 *C. & P.* 332 (1832); *Bartlett*, 7 *C. & P.* 832 (1837), p. 104. So also a statement made by the wife of a prisoner in his presence to a third party is admissible, at all events if made with his authority. *Mallory*, 13 *Q. B. D.* 33; 53 *L. J. M. C.* 134 (1884): *C. C. R.* So evidence of a prisoner's demeanor on a former occasion is admissible to prove guilty knowledge. *Tattershall*, pp. 80, 82, and *Phillips*, p. 82. It has been remarked that a confession may in some cases be collected or inferred from the conduct and demeanor of a prisoner, on hearing a statement affecting himself, but as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution. As to silence, Hawkins J. denied in *Smith*, p. 33, and below, that *any* statement made in the presence of the prisoner is evidence against him; to make it so evidence must "be adduced which would justify the jury in finding that the prisoner having heard the statement, and having the opportunity of explaining or denying it, and the occasion being one upon which he might reasonably be expected to make some observation, explanation, or denial, by his silence, his conduct, or demeanor, or by the character of any observations or explanations he thought fit to make, substantially admitted the truth of the whole or some portion of it;" whether there is any such justifying evidence is for the judge (cf. *Nute*, p. 39); as the prisoner only said of the adverse statement, "This is not true," the judge excluded it when tendered. *T.* s. 907. So in *Bromhead*, where A. and C. were charged respectively with stealing and receiving, and with receiving, and C. while in custody made a written statement implicating A., which was read to A. by the police in the presence of C., and A. made no reply, and C. died before the trial, the Court for C. C. R. held that the statement was properly received against A. on his trial. 71 *J. P.* 103 (1906), p. 741.

A deposition of a witness (p. 57), or the examination of another prisoner (p. 51) taken before the committing magistrate, is not admissible in evidence merely because the party affected by it was present, and might have had an opportunity of cross-examining, or denying, or commenting on the evidence; neither can any inference be drawn from his silence. *Appleby*, 3 *Stark. N. P.* 33 (1821); *Melen* v. *Andrews*, *M. & M.* 336 (1829); *Turner*, p. 47; *Swinnerton*, 1 *Carr. & M.* 593 (1842), p. 56. As to evidence in legal proceedings being afterwards offered against the deponent, see pp. 45, 52. In none of these cases (except *Melen*) was anything said about the regularity of judicial proceedings (p. 47); in the others it was held that the prisoner was not called upon to answer statements not on oath, and therefore not those of

co-prisoners (but this *might* not now apply); in *Melen*, though the party against whom a statement was offered could have cross-examined or commented on it (but did not), that statement was rejected. Of course, it would be rejected if offered against a person who merely happened to be present in court (*Melen*). A deposition on a charge dismissed before the accused had an opportunity of replying would *also* be inadmissible under the "regularity" rule.

Confessions taken down in writing.] If the confession is taken down in writing and signed by the prisoner, or its truth acknowledged by parol, or if it be written by him, then it is put in as an ordinary document and read by the officer of the court. *Swatkins*, 4 *C. & P.* 550 (1831). But if it be taken down by a person who is present when the confession is made, and is not signed or acknowledged by the prisoner, the document is not itself evidence, but may be used by the person who made it to refresh his memory. *Ib.* note *b*. Cf. *Sexton*, p. 39, and *Mitchell*, p. 33. According to general principles, if the confession were contained in a document, which was in existence and admissible in evidence, parol evidence could not be given of it. See *Gay*, p. 32.

The mode of introducing confessions.] It has now been held by the Court for Crown Cases Reserved, that it must be *affirmatively* proved, before a confession is admissible, that such confession was not preceded by any inducement on the part of a person in authority, or that it was not made until after such inducement had clearly been removed. *Thompson*, 1893, 2 *Q. B.* 12; 62 *L. J. M. C.* 93, p. 39 (inducement *possibly* held out to prisoner's brother and expected to be communicated to prisoner, but not proved to be communicated; conviction quashed). Prosecuting counsel and solicitors must therefore satisfy themselves that a confession is admissible before putting it in. *Rose*, 18 *Cox C. C.* 717; 67 *L. J. Q. B.* 289; 78 *L. T.* 119 (1898). This is of great importance, for, such a statement "once read as evidence, it would be extremely difficult, if not impossible, to prevent it from making an impression hostile to the prisoner upon the minds of an ordinary jury." Hawkins J. in *Smith*, above. The same view is expressed by the judge in *Garner*, p. 37, who, having received a confession which he afterwards admitted was wrong, thought he ought to have told the jury to pay no attention to it: conviction quashed. Cf. *Nute*, p. 39; *Boswell*, p. 41, and *Meynell*, p. 43.

The confessions and admissions to magistrates so far dealt with have been made otherwise than under Jervis's Act (1848), *which regulates generally*

EXAMINATION OF THE PRISONER.*

[For the history of the preliminary inquiry, see Sir J. F. Stephen's *History of Criminal Law*, ch. 7.]

11–12 V. 42, 18.]—"After the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices, by or before whom such examination shall have been so completed, as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words or words to the like effect, 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial'; and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; Provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person." Cf. *Bate*, p. 42. The form generally employed is made up of the words here suggested, followed by those in the first proviso ("*and I give you clearly to understand*," &c.). Atkinson's *Magistrate's Annual Practice*, 1900, p. 85. The second caution in the first proviso ought always to be given. *Sansome*, below (Erle J.'s judgment).

Proviso 1.

Proviso 2.

This procedure is unaffected by the Criminal Evidence Act, 1898, 61–2 V. 36 (p. 829). Prisoner's evidence under this Act is a deposition within the statute, and therefore, if he is not a witness at his trial, it may be read. *Bird*, 19 *Cox C. C.* 180 (1898); 79 *L. T.* 359; *C. C. R.*, following *Erdheim*, p. 46. See section 1 (*h*).

Mode of taking examinations—the caution.] The 28th section of the above statute declares that the forms given in the schedule are to be deemed good, valid, and sufficient in law; and the form in the schedule does not

* *I.e.* of the case alleged against him.

contain the second caution mentioned in the first proviso of s. 18. It has, therefore, been held that, if the first caution has been given, the statement of the prisoner is admissible without any further question. *Bond*, 1 *Den. C. C.* 517; 19 *L. J. M. C.* 138 (1849); *Sansome*, 1 *Den. C. C.* 545; 25 *L. J. M. C.* 143 (1850).

Mode of taking examinations—must not be upon oath.] The examination of a prisoner under 11–12 V. 42, 18, must not be taken upon oath: and if it is or purports to be, it will not be receivable in evidence. This was so held before that statute; *Smith*, 1 *Stark. N. P.* 242 (1816); *Rivers*, 7 *C. & P.* 177 (1835); *Pikesley*, 9 *C. & P.* 124 (1839); but since the Criminal Evidence Act this is of little importance. This of course does not apply to a confession made on oath by the prisoner as a witness (p. 45). Thus the deposition of a witness was allowed by Cockburn C.J. to be read at his trial as evidence against him, although after his evidence was taken the magistrates committed him for trial with another prisoner, his evidence criminating himself, but exculpating the other; he was convicted. *Chidley*, 8 *Cox C. C.* 365 (1860); but cf. *Lewis*, p. 54, and *Wilson*, p. 54.

So where the prisoner was tried for arson, and there had been a previous inquiry at Quebec, legally held, as to the origin of the fire, at which the prisoner had been examined on oath as a witness, and had not been improperly compelled to answer questions tending to criminate him (but had not been cautioned that his evidence might be used against him), his depositions thus taken were admitted by the Judicial Committee as evidence against him. *Coote*, *L. R.* 4 *P. C.* 599; 42 *L. J. P. C.* 45 (1873), pp. 125, 134. It has, however, been held that if a person who has given evidence upon oath before a coroner is afterwards made the subject of a criminal charge arising out of the same facts, his deposition could not be given in evidence against him. *Wheeley*, 8 *C. & P.* 250 (1838); but in several later cases they have been admitted. *Owen*, 9 *C. & P.* 83 (1839); *Colmer*, 9 *Cox C. C.* 506 (1864—caution by coroner); *Bateman*, 4 *F. & F.* 1068 (1866); *Wiggins*, 10 *Cox C. C.* 562 (1867—statement not on oath, after caution). In *Biggadike*, 1868, Byles J. admitted in evidence a statement upon oath made by the prisoner voluntarily, and before she was in custody, not signed by her, but taken down in writing by the coroner at the time. The coroner was called; (12*th ed.* of this work, authority not stated). In the case of William York, a boy ten years old, who was charged, in 1748, before the coroner's jury with murder, which he at first denied, but on being closely interrogated, confessed, such confession, together with others subsequently made to the magistrates and other persons, was admitted as evidence against him. *Fost. C. C.* 70, p. 805. It does not appear whether the boy's confession before the coroner was upon oath or not. The question as to coroners' depositions (at any rate, on the point of sufficient proof of *illness*, p. 60) seems to be settled by Darling J.'s remark: "It seems to me that the old practice as to them has gone." They, "in my opinion, now stand on the same footing as depositions taken before magistrates, and all the provisions of 11–12 V. 42 (p. 59) apply." *Butcher*, 64 *J. P.* 808 (1900), where, in absence of medical evidence, pregnancy was not held to admit (coroner's) deposition. Cf. Coroners Act, 1887, 50–1 V. 71, 4 (2); 5 (3), and see p. 60, and p. 66.

Statements made by the prisoner not returned under the statute.] The statute makes no provision for anything the accused says being taken down in writing *except* his statement after the statutory caution (p. 51); to any other statement, therefore, the second proviso in s. 18 (*ib.*) applies. 3 *Russ. Cri.* 543. *T.* s. 890. Thus an incidental observation made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry so as to make it the duty of the magistrate to

take it down in writing, and which was not so taken down, may be given in evidence against him at the trial. *Moore* and *Haslam* (1831), Parke J., Littledale J. assenting. *Matthews Digest Crim. Law* (1833), 157; so Coleridge J., *Spilsbury*, p. 31. See *Stripp*, p. 54. Nor does the statute make any provision if the examination is not reduced into writing; but Littledale J. is reported (*Matthews*, above) to have said in *Mulvey* (1831) that if it ought to have been taken down in writing, and was not, it is inadmissible. But in 1831 the governing Act was 7 G. 4. 64, which contains nothing corresponding to the second proviso (p. 51). That Act (repealed) only requires what is "material" to be taken down (ss. 2, 3); cf. *Weller*, p. 54, and *Coveney*, p. 58. It seems, however, clear, that if no examination was taken in writing, then the evidence was always considered admissible. But this must be distinctly shown. Thus where the witness stated that no examination was taken down in writing, Parke J. said, "As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing; and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence." *Packer* (1829); *Phillips* (clerk actually called, and nothing having been taken in writing, parol evidence of what prisoner said received: 1831). 3 *Russ. Cri.* 544 *n.* So clerk called to prove witness stated something before magistrate, not taken down in the deposition, but repeated at the trial. *Moore*, 20 *L. T.* 987 (1869). Where the prisoner's examination before the magistrates was not taken in writing, it was proved by *vivâ voce* testimony. (Apparently there was no other evidence except a letter.) *Huet*, 2 *Leach*, 821 (1798).

The rule is the same although the prisoner's examination is afterwards taken in writing. Thus where one of two prisoners was committed before the other was apprehended, and the depositions against that prisoner were read over before the magistrate to the other prisoner, and after they were read the prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoner before himself, and the statement to the witness was not contained in it; Parke J. held that what the prisoner had said to the witness might be given in evidence. *Johnson* (1829), 3 *Russ. Cri.* 547. So where a man and woman were brought before the magistrate on a charge of burglary, and, in the course of the examination of a witness, a glove was produced which had been found on the man with part of the stolen property in it; on which the man said, "She gave me the glove, but she knew nothing of the robbery"; the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statements in the depositions or the examination of the prisoner, Erskine J. held, that what the man said might be proved by parol evidence. *Hooper*, 1842, 3 *Russ. Cri.* 548. And it was said by Best C.J. that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. *Rowland* v. *Ashby*, *Ry. & Moo.* 232 (1825). Where on the examination of a prisoner, on a charge of stealing Bennett's, Pennell's, and another's sheep, what was confessed as to the stealing of Pennell's sheep, was taken down in writing by the magistrate, but not what was confessed as to Bennett's; on a question reserved for the opinion of the judges, whether any confession, as to Bennett's, could be supplied by parol evidence on the indictment for Bennett's sheep; and whether, as the magistrate had taken down in writing everything he heard, and intended to take down all that was said to him, and believed he did so, parol evidence could be given of anything else that had been addressed to him, the judges present were all of opinion that the evidence was admissible,

"being precise and distinct." *Harris*, 1 *Moody, C. C.* 338 (1832). In *Lewis*, 6 *C. & P.* 162 (1833), p. 45, where *Harris* was cited, Gurney B. said it was very dangerous to admit such evidence, and thought it ought not to be done in the case before him; he had previously rejected the written deposition of the prisoner, when a witness, and he did not think the examination was "perfectly voluntary." So in *Wilson*, p. 55, where the prisoner had not been sworn. So where the magistrate's clerk, in taking down the examinations of three prisoners, had left a blank whenever one had mentioned the name of either of the other prisoners, Patteson J. refused to allow the blanks to be supplied by the parol evidence of the clerk, observing that the rule ought not to be extended. *Morse*, 8 *C. & P.* 605 (1838). In *Weller*, 2 *C. & K.* 223 (1846), Platt B. refused to receive evidence of something that was said by the prisoner before the magistrate, in the course of the examination of the witnesses, but which did not appear in the depositions; if it was material, it ought to appear therein. In *Watson*, 3 *C. & K.* 111 (1857), on the other hand, where the prisoner made a statement under similar circumstances, which was written down in the depositions, but not signed by the prisoner, who had not been cautioned, Patteson J. held that it was not evidence *per se*, but that any one who heard the prisoner make it might give evidence of it; but the prisoner should have been told by the magistrate that that was not the proper time to make a statement. The clerk was called and allowed to refresh his memory from the depositions. In *Stripp*, 25 *L. J. M. C.* 109 (1856), the prisoner was brought before a magistrate on a charge of stealing a cash-box: no evidence was given, the policeman asking for a remand, but the prisoner made a statement. This statement was repeated by the policeman at the second examination, and was embodied in his deposition. Evidence of this statement was also given by the policeman at the trial, and the question was reserved, whether or not it was properly received, the prisoner not having been previously cautioned. The judges held that it was; Jervis C.J. saying, "It is scarcely necessary to observe that the caution and warning prescribed by the statute is intended to apply to the final proceeding only, when, after all the witnesses have been examined, the prisoner is asked whether he has anything to say in answer to the charge. This provision of the statute, however, does not exclude any declaration or voluntary statement made by the party accused before, during, or after the inquiry." Cf. *Bell*, p. 55.

Upon the whole, it now seems perfectly clear that what is said by a prisoner at any time during the preliminary inquiry before a magistrate previous to the final examination is evidence, which must be proved in the usual way by a person who heard it, or by a memorandum acknowledged by the prisoner. As to the statement made at the final examination, when the prisoner is called upon, if it is returned in a form which is available under the statute, that return is the only evidence of it, exclusive of all parol testimony. If from some defect or informality this return is not available, then what is said by the prisoner on this occasion may be proved in the usual way. A confession made under circumstances which do not bring it within the statute stands as a confession at common law. See p. 51 on the concluding words of s. 18.

The prisoner is not to be precluded from showing, if he can, that omissions have been made to his prejudice, for the examination has been used against him as an admission, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial omissions (p. 48). Even the prisoner's signature ought not to stop him from proving, if he can, such omissions. 3 *Russ. Cri.* 545; Bk. 5, ch. 4, s. 2.

Mode of taking examinations—signature.] The examination of a prisoner,

when reduced into writing, ought to be read over to him, and tendered to him for his signature. But whether signed or not by him, it is still evidence against him, nothing being said in s. 18, cf. p. 51, about signature by the prisoner, and the statement being expressly made evidence *without further proof*, if read over to the prisoner and signed by the magistrate. In the schedule (N.) it is said, "Get him (the prisoner) to sign it, *if he will*." At common law, as has already been said, if a statement were made by a prisoner and reduced into writing, the memorandum could only be evidence if signed by the prisoner, *or* its truth acknowledged by parol. See *Lambe*, 2 *Leach*, 552 (1791); *Thomas*, 2 *Leach*, 637 (1794); *Bennet*, 2 *Leach*, 553 *n.* (1793); *Telicote*, 2 *Stark. N. P.* 483 (1819). When the prisoner "retracted in time" a confession he had refused to sign, taken down by the magistrate, the judge refused to receive his simultaneous admission of guilt. *Bennet.*

Informal examinations—used to refresh the memory of witness—questions by magistrate.] As to refreshing the memory of the writer of a document, who is giving evidence, see *Watson*, p. 54, and p. 120. Where a person had been examined before the lords of the council, and a witness took minutes of his examination, which were neither read over to him after they were taken, nor signed by him; it was held that although they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and having looked at them, to state what he believed was the substance of what the prisoner confessed in the course of his examination. *Layer*, p. 3, at 214. So where an examination taken at several times, was reduced into writing by the magistrate (much of it in answer to his questions) and was read over to the prisoner each time, and he acknowledged the notes to be correct, although at the last examination he refused to sign them, saying that they were an incorrect account of the transaction, it was held that they might be used as a memorandum to refresh the memory of the magistrate, who gave parol evidence of the prisoner's statement, and that a magistrate has a right to put questions to an accused. "But it is irregular in a magistrate to examine a prisoner in the same manner as a witness." *Per* Richards C.B., *Wilson, Holt, N. P. R.* 597 (1817). And see 3 *Russ. Cri.* 541, Bk. 5, ch. 4, s. 2 (*b*); *Jones*, 7 *C. & P.* 239 *n.* (1828). Cf. *Watkins*, 4 *C. & P.* 550 *n.* (1831). So where, on a charge of felony, the examination of the prisoner was reduced into writing by the magistrates' clerk, but nothing appeared on the face of the paper to show that it was an examination taken on a charge of any felony, or that the magistrates who signed it were then acting as magistrates; Patteson J. permitted the clerk to the magistrates to be called, and to refresh his memory from this paper. *Tarrant*, 6 *C. & P.* 182 (1833); and see *Pressley*, *ib.* 183 (1833); and *Bell*, 5 *C. & P.* 162 (1831—voluntary confession, signed by prisoner, before evidence against him completed, and attested by clerk; confession read by clerk in third person). Cf. *Stripp*, p. 54.

Mode of proof.] If the examination has been taken in conformity with the provision of the statute, it proves itself (p. 51), *T.* s. 890. But should there be alterations or erasures, the clerk to the magistrates, or some person who was present at the time, should be called to explain them. Where, upon an indictment for murder, it was proposed to prove the prisoner's examination before the coroner by evidence of the handwriting of the latter, and by calling a person who was present at the examination, it appearing that there were certain interlineations in the examination, Lord Lyndhurst said that he thought the clerk who had taken down the examination ought to be called, and the evidence was withdrawn. *Brogan* (1834). *MS.* (*1st ed.* of this work, p. 48). Cf. *Bell* (above), 163 & 164 *n.*; *T.* s. 892.

Prisoner's statement—evidence against him only.] In *Haines*, 1 *F. & F.* 86 (1858), Crowder J. refused to allow the prisoner's statement which had not been put in evidence by the counsel for the prosecution to be put in on behalf of the prisoner, for it "is evidence against him, but not for him." As to statement implicating co-prisoner, see *Swinnerton*, p. 49; see pp. 45-6. As to the present practice, see p. 186.

DEPOSITIONS.

It is a well-known rule of evidence, and one which is treated as generally applicable both to civil and criminal cases, that what a witness has once stated on oath in a judicial proceeding, and subject to cross-examination, may, if that witness cannot possibly be produced again, be given in evidence, provided the inquiry be substantially the same on both occasions, and between the same parties "or those claiming under them." *T.* s. 464. *Jolliffe*, 4 *T. R.* 290 (1791), pp. 168, 352, 698. This applies not only to evidence taken at different stages of the same inquiry, but to successive inquiries into the same matter; as, for instance, to a new trial granted in a case of misdemeanor.

It is also a well-known rule of evidence that upon any point material to the issue, a witness may be contradicted or discredited by showing that he has on a previous occasion made statements at variance with that made by him at the trial. This includes all previous statements of the witness, whether on oath or not, and whether in a judicial proceeding or not. And as to this rule, see now 28-9 V. 18, 4, 5, p. 118. *Depositions* here mean those taken in magistrates' or coroners' courts.

Depositions when used in cross-examination.] After the passing of the Prisoner's Counsel Act, 1836 (6–7 W. 4, 114), the judges met and drew up five rules with regard to the practice on trials for felony, three of which related to the use of depositions on cross-examination of the witnesses for the crown. They are all set out in 7 *C. & P.* 676, and those three in *T.* s. 1449 *n.* who remarks that since the statute of 1865 they "would appear to be no longer in force." Consequently they are not reproduced here.

The effect of these rules was that the depositions returned by the magistrates before whom the preliminary inquiry took place must, if anything said upon that inquiry was to be used for the purpose of discrediting a witness, be first put in evidence; but these rules expressly recognised that what appeared upon the depositions was not in any way conclusive as to what passed on that occasion, which, after the depositions had been once read, might be proved by the witness's admission, or, if it was material to the issue, by other witnesses who were present. This appears to be the view taken by Erle J. in *Curtis*, 2 *C. & K.* 763 (1848).

Since the passing of the Act of 1865 (p. 118), "the settled practice in criminal courts has been as follows:—A witness may be cross-examined as to what he said before the magistrate, the counsel cross-examining may show the witness the deposition, and ask him whether he still adheres to the statement he has made in court, without the counsel reading the deposition in court or putting it in evidence, but the counsel is then bound by the answer of the witness, unless the deposition is put in to contradict him, and it is not admissible to state that the deposition does contradict him unless it is so put in." *T.* s. 1449–50. In *Garner*, 6 *T. L. R.* 110, 54 *J. P.* 424 (1889), the Court for Crown Cases Reserved held that the judge or chairman at any time before verdict may read to the jury depositions which have not been

put in, though they have been used in cross-examination by the prosecuting counsel.

It has been suggested that there is a difference between *adding* to and *contradicting* depositions; *per* Alderson B. in *Coveney*, 7 *C. & P.* 667 (1837), p. 53; and there can be no doubt that, as a general principle, you may add to but not vary written evidence. See *T.* ss. 893–4: *Phips.* Bk. 2, ch. 46, and next par.

Depositions used as substantive evidence or to impeach credit—how proved—informalities—loss.] When depositions taken before the magistrate are used to supply the testimony of an absent witness, there is then considerable authority for saying that the return of the magistrate is the best and only evidence as to what was said before him. That it is the best evidence has always been acknowledged, and was laid down by Lord Mansfield in *Fearshire*, 1 *Leach* 202 (1779), where apparently the deponent was absent; and that parol evidence cannot be received to add to or vary the deposition has also generally been acknowledged, and was so said by Holroyd J. in *Thornton*, 2 *Ph. & Arn. Ev.* 104, 10*th ed. n.* (1817). But this is not borne out by *Ward*, 2 *C. & K.* 759 (1848). (Neither of these cases refers to absent witnesses.)

Obviously, when a deposition of an absent witness is put in, there is greater risk in adding to or varying that document by oral testimony, than if the witness is present, but these considerations do not apply with equal force to depositions produced for the purpose of contradicting or lessening the credit of a present witness. For, in the first place, many matters which do not appear material to the charge at the preliminary inquiry, and which, therefore, might not be returned, may become exceedingly important for the purpose of testing the truth of the testimony of a witness; and, moreover, the witness being himself then and there present, his own memory and conscience can be searched as to what was really said before the magistrate.

The result suggested is, that to discredit a witness the depositions may be added to but not varied; but, when they are used as substantive evidence in the absence of the deponent, the return of the justices is final and conclusive; but for this distinction there is no express authority.

Until the prisoner could give evidence, he was in the position of an absent witness; hence, in perjury, his deposition could be read against him, but nothing else was allowed. See *Wylde*, p. 684.

There is still one difficult question which is not unlikely to rise, and which has not yet been discussed; *i.e.* whether, in any case, if no deposition be returned by the magistrate, or one which from some *informality* cannot be used, other evidence ought to be received of what was said by the witness. It would seem that, on general principles, all the usual evidence would be let in in such a case, and this view is maintained, 3 *Russ. Cri.* 570, note 3, Bk. 5, ch. 4, s. 3 (*g*) in opposition to a contrary one. In *Reed, M. & M.* 403 (1829), an examination of a prisoner (who must have been a witness) by a *coroner* was inadmissible, owing to an irregularity in taking it; the coroner was allowed to give parol evidence of it. See *T.* ss. 400, 894, 1754. Cf. *Reason*, at 32 (*St. Tr.*), p. 30.

If depositions are lost, after diligent search (p. 8), copies proved to be correct by the magistrate's clerk may be used. *Shellard*, 9 *C. & P.* 277 (1840), p. 356; *T.* s. 1447. Cf. p. 53.

As to taking and proving the deposition of a child under the Prevention of Cruelty to Children Act, see p. 327.

Death, illness, &c., of witness.] Depositions are admissible as substantive evidence at common law, should the witness be either dead; 1 *Hale, P. C.* 305;

Westbeer, p. 802 (1739, information on oath of dead accomplice; no opportunity of cross-examination; strong corroboration held to be necessary), p. 433; *L. Morley* and *Bromwich*, 1 *Levinz* 180; 6 *St. Tr.* 776; *Kel.* 55 (1666—coroner's depositions), p. 624; see p. 66; *Paine*, 1 *Salk.* 281; 1 *L. Raymond*, 729, p. 657 (1695—rule not to be extended beyond felony); *T.* s. 472; or be in such a state as never to be likely to be able to attend the assizes; *Hogg*, 6 *C. & P.* 176 (1833); *Wilshaw*, *Carr & M.* 145 (1841—magistrate or clerk, if convenient, to be called); or if the witness be kept away by the practices of the prisoner; *L. Morley*, above; *Guttridge*, 9 *C. & P.* 471 (1840), p. 169; *Scaife*, 17 *Q. B.* 238; 20 *L. J. M. C.* 229; 2 *Den.* 281 (1851), pp. 60, 260; or is insane, *Inhabs. of Eriswell*, 3 *T. R.* 720 (1790), p. 66. The admissibility of depositions is *now* governed by 11–12 V. 42, 17: "In all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if, upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if it also be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." Cf. p. 264. By 30–1 V. 35, 3 (p. 827), provision is made for taking the depositions of witnesses for the *defence*, and by s. 5 for the allowance of their expenses. By ss. 6, 7, provision is made for taking the depositions of persons dangerously ill and not likely to recover, and for rendering such evidence admissible in the event of the death of such persons (p. 33). The proviso to s. 6 requires that notice of the intention to take the statement is to be served on the person against whom it is proposed to be read in evidence: and this *must* be a notice in writing, and the statement is inadmissible against a prisoner where he has only received oral notice of the intention to take the statement, although he was present when it was taken. *Shurmer*, 17 *Q. B. D.* 323; 55 *L. J. M. C.* 153; 55 *L. T.* 126; 34 *W. R.* 656; 50 *J. P.* 743 (1886), *C. C. R.*

A prisoner's deposition may be used at the trial. *Bird*, p. 51.

None of the previous statutes contained any directions as to *when* the depositions should be considered admissible. It will be observed that only two cases are mentioned in the above statute, "where the witness is dead, or so ill as not to be able to travel" (but in *Austin*, below, Coleridge J. thought there might be other cases). It is not said in the statute that the deposition

would be admissible if the witness were kept out of the way by the procurement of the prisoner, but that is well established at common law (p. 59). See *T.* ss. 472–8. However, in *Scaife* (p. 59), where the prisoner was indicted together with Rooke and Smith for larceny, evidence was given that by the procurement of Smith one of the witnesses for the prosecution had been kept out of the way, and her deposition was tendered; the evidence was admitted to be receivable as against Smith (who was acquitted), but it was said that it was no evidence against Scaife and Rooke. The case came before the Court of Queen's Bench, and it was held that the learned judge ought to have told the jury that the evidence applied to the case of Smith only, and not to that of either of the other prisoners, and a new trial was granted to Scaife and Rooke. Incidentally, therefore, the admissibility of the depositions as against a prisoner who has himself procured the absence of a witness, is recognised by this case.

There does not appear to be any criminal case in which the depositions have been admitted on the ground of the witness being insane either before or since the statute. In civil inquiries this is considered a good ground of admission; *Eriswell*, p. 59; and it is said in *Marshall*, *C. & M.* 147 (1841), that Coltman J. thought it a good ground in criminal cases also (though the insanity was only temporary, but see *T.* s. 478), cf. *Peacock*, p. 62. It is not a sufficient ground of admission that the witness cannot be produced on account of his absence in a foreign country. *Austin*, 25 *L. J. M. C.* 48; 7 *Cox C. C.* 55 (1856).

As to when a witness will be considered so ill as not to be able to travel, the following cases have been decided. Where the physician stated that the witness could not speak or hear from paralysis, and that if brought to court he would not be able to give evidence, yet that he might be brought there without danger to life, though he, as his physician, would not permit the witness "to roam abroad if he knew it," it was held by the Court for C. C. R. that the deposition was rightly received. *Cockburn*, *Dears. & B. C. C.* 203 (1857). There may be incidents in regard to a state of pregnancy which may bring the case within the statute. *Stephenson*, *L. & C.* 165; 31 *L. J. M. C.* 147 (1862); and see *Goodfellow*, 14 *Cox C. C.* 326 (1879), and *Wellings*, below; also *Butcher*, p. 52. Where a witness came to the assizes, but returned home by the advice of a medical man, who deposed that it would have been dangerous for the witness to remain, Parke B. held that the witness was "unable to travel" within the meaning of this section, and allowed his depositions to be read. *Wicker*, 18 *Jur.* 252 (1854). A superintendent of police having seen a policeman in bed two days before the trial stated that he appeared ill, and that when he tried to get out of bed he could not stand but he was unable to state what was the matter with him, "except that he believed it to be rheumatics," and no medical man was called to be examined as to his condition. Held, that the deposition could not be admitted. *Per* Piggott B., *Williams*, 4 *F. & F.* 515 (1865). The witness, Mary Lee, whose deposition it was proposed to read, lived not far from the court. Her medical attendant was called, and said, "I know Mary Lee; she is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous to her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the court." It was held by the Court for C. C. R. that the deposition was not admissible, and Lord Coleridge C.J. who had admitted the deposition, in giving judgment quashing the conviction, said "it would be dangerous to admit any such latitude of construction." *Farrell*, *L. R.* 2 *C. C. R.* 116; 43 *L. J. M. C.* 24 (1874). See

also *Welton*, 9 *Cox C. C.* 296 (1862); *Bull*, 12 *Cox C. C.* 31 (1871—48 hours since witness last seen by doctor, and might have recovered—deposition refused).

It is a question for the judge at the trial to determine whether the proof of a witness being so ill as not to be able to travel is sufficient; and the Court for C. C. R. will not interfere with the exercise of his discretion. *Stephenson*, above; *Wellings*, 3 *Q. B. D.* 426; 47 *L. J. M. C.* 109 (1878).

The inability of the witness to attend at the trial need not be permanent. Before the statute, it seems to have been doubted whether a merely temporary illness was a sufficient ground for admitting the deposition. *T.* s. 481; in *Savage*, 5 *C. & P.* 143 (1831) it was rejected. But there can be no doubt that a judge would now exercise his discretion and decide whether, in the interests of justice, it were better to read the deposition, or to adjourn the trial in order to obtain the oral testimony of the witness. *Tait*, 2 *F. & F.* 553 (1861), where Crompton J. postponed the trial to the next assizes, thinking the statute gave him a discretion. As to the absence of a child witness under the Prevention of Cruelty to Children Act, see p. 327.

Condition of absent witness—how proved.] A medical certificate, however authentic in itself, is no legal evidence of the state of the witness. His condition must be proved on oath to the satisfaction of the judge who tries the case. *Stephenson, &c.*, p. 60. It appears to be the established practice that, in the case of a witness being alleged to be ill, the doctor, if he be attended by one, *must* be called to prove his condition; *Riley*, 3 *C. & K.* 116 (1851), but that where a witness is not attended by a surgeon—especially if permanently ill—other evidence that the witness is unable to travel is receivable. In *Philips*, 1 *F. & F.* 105 (1858), Erle J. said, "The evidence, no doubt, is as strong as it can be, short of that of a medical man, but the case may be easily imagined of a person extremely unwilling to appear as a witness, and so well feigning himself to be ill as to deceive any one but a medical man"; and the deposition was not allowed to be read to the grand jury. Cf. *Clements*, p. 64.

Depositions, to be admissible, must be taken in proper form.] To render a deposition of any kind admissible in evidence in any case, it must be proved to have been formally taken. The requirements of 11–12 V. 42, 17, p. 59, must be proved, by the party tendering the evidence, to have been complied with; though the usual presumptions (p. 17) in favour of the proceedings having been regular, will be made, if the depositions are in form correct. As to the unsworn deposition of a child, see p. 327, and as to judge's notes, p. 66.

Mode of taking depositions—caption.] The title or *caption* of the deposition need state no more than that it is the deposition of the witness, and also the particular charge before the magistrate to which the deposition had reference. Where, therefore, upon the trial of a prisoner for unlawfully obtaining a promissory note by false pretences, the deposition of the witness, proved to have been regularly taken before the committing magistrate, stated, by way of caption, that it had been taken *in the* presence, &c., the prisoner, "who is now charged . . . for obtaining money and other valuable security for money," &c.; it was held, that such caption charged an offence against the prisoner with sufficient distinctness, and that the deposition had been properly received, "and there is no authority requiring any title or . . . caption to the examination." *Langbridge*, 1 *Den. C. C. R.* 448; 18 *L. J. M. C.* 19 (1849). One caption at the head of the body of the depositions taken in the case is sufficient, and the particular deposition sought to be

given in evidence need not have a separate caption. *Johnson*, p. 29. So where the depositions had one caption, which mentioned the names of all the witnesses, and at the end one jurat [the official statement that the preceding contents were duly "taken and sworn"], which also contained the names of all the witnesses, and to which was the signature of the magistrate, and each witness signed his own deposition, Williams J. was of opinion that they were correctly taken. *Young*, 3 *C. & K.* 106 (1850). A deposition without a caption, "showing on what charge it was taken," is inadmissible, though otherwise formally taken. *Newton*, 1 *F. & F.* 641 (1859).

Mode of taking depositions—presence of prisoner—opportunity of cross-examination.] The prisoner must have an opportunity of cross-examining the witness. Where the prisoner was not present during the examination, until a certain part of the deposition, marked with a cross, at which period he was introduced, and heard the remaining part of the examination, and when it was concluded, the whole was read over to him; Chambre J. refused to admit that part of the depositions previous to the mark which had not been heard by the prisoner. *Forbes, Holt, N. P. R.* 599, *n.* (1814). But a different rule was acted upon in the following case. The prisoner was indicted for murder, and the deposition of the deceased was offered in evidence. It appeared that a charge of assault having been preferred against the prisoner, the deposition of the deceased had been taken *on that charge*. The prisoner was not present when the examination commenced, but was brought into the room before the three last lines were taken down. The oath was again administered to the deceased in the prisoner's presence, and the whole of what had been written down was read over to him. The deceased was then asked, in the presence of the prisoner, whether what had been written was true, and he said it was perfectly correct. The magistrate then, in the presence of the prisoner, proceeded to examine the deceased further, and the three last lines were added to the deposition. The prisoner was asked whether he chose to put any questions to the deceased, but did not do so. An objection was taken that the prisoner had not been present. The deposition, however, was admitted, and by a majority of ten to one of the judges held rightly admitted. *Smith, Russ. & Ry.* 339; 2 *Stark. N. P.* 208 (1817), p. 65. In *Beeston, Dears. & P. C. C.* 405 (1854), p. 65, where the deposition was taken "in fact" though not technically, on the charge in the indictment, but "*semble* if the charge . . . had been substantially different the deposition would *not* have been admissible" (see p. 65), Alderson B. stated that he still thought he was right in the objection which, as counsel for the prisoner, he took to the admissibility of the deposition in *Smith*, upon the ground that "the prisoner had not a sufficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answers and seeing his manner of answering, and that so much of the evidence as had been taken in the prisoner's absence was inadmissible." And Platt B. in *Johnson*, 2 *C. & K.* 394 (1846), very strongly reprobated the practice of taking depositions in the absence of the prisoner (and the magistrates), and then supplying the omission by reading them over when they arrived, and asking him if he would like to put any questions to the witnesses. *Additional* depositions were taken in the absence of the prisoner (but it was not sought to read these); held, not to affect a previous confession. *Bell*, p. 55. The law presumes that if the prisoner was present he had a full opportunity of cross-examination, but this presumption may be rebutted. *Peacock*, 12 *Cox C. C.* 21 (1870—accused insane), p. 60; see *Arnold*, p. 63, and *Painter*, p. 64.

Mode of taking depositions—must be in presence of a magistrate.] A person whilst before a magistrate had a full opportunity of cross-examining by his

attorney and a note of the heads of the examination was taken by a clerk. Afterwards another clerk, not present before, examined the witnesses from the notes so taken in the presence of the prisoner, and, in the absence of the magistrate, wrote down the answers and obtained the signatures of the witnesses. The prisoner's attorney was not there, though he might have been if he had liked, and the prisoner who was present was not asked if he would then cross-examine. The prisoner and witnesses were then taken before the magistrate, and the evidence taken before the clerk was read over to them. The prisoner was not then asked if he would cross-examine, nor was his attorney present, though he might have been. The magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate signed the depositions. It was held by the Court for C. C. R. that the depositions were inadmissible, because they were not taken in accordance with the statute. *Watts*, 9 *Cox C. C.* 395; 33 *L. J. M. C.* 63; *L. & C.* 339 (1863); conviction quashed. See also *Christopher*, p. 118 (additions to a deposition).

Mode of taking depositions (both sides)—should be fully taken and returned.] Parke B. in *Thomas*, 7 *C. & P.* 817 (1837), pp. 630, 632, said, "In future it will be desirable that" magistrates "should be extremely careful in preparing depositions, and should make a full statement of all the witnesses say upon the matter in question." This is not less true since the statute, p. 59. Where there was an omission, in the depositions, of a conversation which was sworn to at the trial, and which the witness said he had told to the magistrate, Lord Denman C.J. thought the complaint of the prisoner's counsel, that such omission was unfair to the prisoner, was well founded. *Grady*, 7 *C. & P.* 650 (1836). The same learned judge expressed an opinion that although in a case of felony the committing magistrate need not *bind over* all the witnesses who have been examined before him in support of the charge, but only those whose evidence is material to the charge, it was very desirable that all which had been given in evidence before the magistrate should be transmitted to the judge. *Smith*, 2 *C. & K.* 207 (1845).

Depositions of the prisoner's witnesses are now regulated by 30–1 V. 35, 3, p. 827. If the prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate and returned. *Potter*, 7 *C. & P.* 650 *n.* (1836). Nothing should be returned as a deposition against the prisoner, unless the prisoner had an opportunity of cross-examining the person making the deposition. *Per* Lord Denman C.J., *Arnold*, 8 *C. & P.* 621 (1838; prisoner absent.) Where a witness has undergone several examinations, it is proper to return them all. Thus, where a witness for the prosecution had made three statements at three different examinations (once as an accused person), all of which were taken down by the magistrate, but the only deposition returned was the last taken, that on the day the prisoner was committed, Alderson B. said that every one of the depositions ought to have been returned, as "it is of the last importance that the judge should have every deposition that has been made," that he may see whether or not the witnesses have at different times varied their statements, and if they have, to what extent they have done so. Magistrates ought to return to the judge all the depositions that have been made at *all the examinations* that have taken place respecting the offence which is to be the subject of a trial; *Simons*, p. 36; and whether of witnesses bound over for the prosecution or not (*i.e.* witnesses for the prisoner). *Per* Vaughan J., *Fuller*, 7 *C. & P.* 269 (1836).

Wilde C.J. was of opinion that where in a case of felony a person of weak intellect was examined, the magistrate's clerk should take down in the

depositions the questions put by the magistrate and the answers given by the witness as to the witness's capacity to take an oath. *Painter*, 2 *C. & K.* 319 (1846); cf. *Peacock*, p. 62.

Mode of taking depositions—signature.] The depositions are directed to be signed by the witnesses and the magistrates (p. 59). It seems that the signature of one magistrate is sufficient (see the latter words of the section, p. 59). No proof is necessary of the signature either of the magistrate or the witness. "It is the magistrate's duty to sign every deposition (the witness having first signed it) as the proceedings go on"; *per* Lord Denman C.J., *Lord Mayor of London*, 5 *Q. B.* 564; 13 *L. J. M. C.* 67 (1844), p. 66; and if each deposition is signed on the last sheet, each separate sheet need not be signed by the magistrate; *Carrol*, 11 *Cox C. C.* 322 (1869). Whether one signature by the magistrate at the foot of the whole body of the depositions is sufficient, has been much discussed. Where a prisoner was charged with forging the acceptance of one Winter, who had died previous to the trial, the magistrates' clerk proved Winter's examination to have been duly taken in the prisoner's presence, and that he was cross-examined by his attorney; on the prosecutor tendering the examination in evidence, it was discovered that, although the examination itself was duly signed by two magistrates, the cross-examination, which had been taken on a subsequent day, was not subscribed by them. The examinations, however, of two witnesses, called by the prisoner, and taken at the same time as the cross-examination, were pinned up along with it, and the last sheet of the whole was signed by the magistrates. Alderson B., after consulting Parke B., said that if the clerk could state that the sheets were all pinned together at the time the magistrates signed the last, he thought he could not reject the examination of Winter, but must receive the whole in evidence. The clerk having no recollection of the subject, one of the magistrates, who happened to be in court, was called. He said that the depositions were all accurately taken, and when he signed the depositions they were lying on the table, but he could not state they were pinned together. Alderson B. thereupon rejected both the examination and cross-examination (which, however, were all subsequently read at the instance of the prisoner). *France*, 2 *Moo. & R.* 207 (1839). But where the depositions were on separate sheets, but under the one caption "Examination of J. J. Hill and others in the presence of the prisoners, &c.," and the whole were attached together, not at the time of signature, but subsequently by the magistrates' clerk, Pollock C.B. admitted them in evidence. *Lee*, 4 *F. & F.* 65 (1864). The schedule (M) to the Act gives the following form of conclusion:—"The above depositions of *C. D.* & *E. F.* were taken and [*sworn*] before me, &c.," and where the depositions had been pinned together and the magistrate had signed the last sheet, Cockburn C.J., overruling himself in *Richards*, 4 *F. & F.* 860 (1866), said the depositions were sufficiently signed, and Byles J. said if all the depositions were on one sheet, one signature would be enough, and it could make no difference that the sheets were attached by tape or string or in any other way. *Parker*, *L. R.* 1 *C. C. R.* 225; 39 *L. J. M. C.* 60 (1870).

The mode of taking depositions of witnesses for the defence is regulated by the 30–1 V. 35, 3, p. 827.

Depositions—for what purposes available.] If the deposition be admissible at all, it is admissible for all the purposes for which ordinary evidence is admissible, and may be used either for or against the prisoner. It may be used before the grand jury in the same way as before the petty jury. *Clements*, 2 *Den. C. C.* 251; 20 *L. J. M. C.* 193 (1851); cf. *Philips*, p. 61. In *Gerrans*, 13 *Cox C. C.* 158 (1876), p. 160, Denman J. allowed a deposition

to be sent before the grand jury without first proving the illness of the witness and the due taking of the deposition.

Depositions—admissible on trial of what offences.] Most of the cases which have actually occurred on this point are those in which the inquiry before the magistrates has been into an injury done to the witness, which, from subsequent circumstances, has resolved itself into a more serious charge. The question has then arisen, whether, if the witness be unable to attend at the trial, his deposition is admissible, as having been given on a different charge from that then made. All the cases before 11–12 V. 42, 17, were in favour of the admissibility of the deposition under such circumstances. In *Smith*, p. 62, the prisoner was indicted for murder. The prisoner had been taken before the magistrate upon a charge of assault upon the deceased and also of robbing a manufactory, where the deceased was employed as night-watchman. Ten judges thought that this did not prevent the deceased's deposition being read at the trial; four relying on *Radbourne*, 1 *Leach* 458 (1787), p. 67, without which they would have doubted. It seems to have been thought that the statute made some difference in this respect, and the deposition was rejected once or twice under similar circumstances, but in *Beeston*, p. 62, the subject was fully considered; there the prisoner was charged before the magistrate with feloniously wounding J. A. with intent to do him grievous bodily harm. J. A. subsequently died of the wound, and on the trial of the prisoner for the murder, the deposition of J. A. was offered and received. The point was reserved and fully argued before the Court for C. C. R., where it was unanimously held that the deposition in this case would have been admissible at common law, and the statute "was not intended to restrict the operation of" the common law. The important thing is a full opportunity of cross-examination on all points material to one charge as well as to the other, p. 62. So on a charge of uttering a forged note, the original charge having been one of false pretences, arising out of the same transaction, and being in fact identical. *Williams*, 12 *Cox C. C.* 101 (1871).

Prisoner entitled to copies of the depositions taken before a magistrate—his own statement not a deposition—witness not examined by magistrate.] By 11–12 V. 42, 27, "at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and shall be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed on payment of a reasonable sum for the same, not exceeding at the rate of three half-pence for each folio of 90 words." See also 30–1 V. 35, 3, 4, p. 827.

By s. 4 of 6–7 W. 4, 114, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had." (*The Statutes Revised: 2nd ed.* 1892.)

It has been held by Littledale J. and Parke B. that a prisoner is not entitled to a copy of his own statement returned by the committing magistrate along with the deposition of the witnesses. *Aylett*, 8 *C. & P.* 669 (1838). As the note there says, this decision is in conformity with the strict letter of the Act, but it may be doubted whether it accords with the intention of the legislature; where the case for the prosecution, as in *Greenacre*, pp. 48, 151, 591, 617, 650, depends chiefly on contradictions of the prisoner's statement before the magistrate, it seems most reasonable that

his counsel should be furnished with a copy of such statement; at all events, according to the principles laid down by Littledale and Coleridge JJ. in *Greenacre* (where a coroner's depositions were allowed a prisoner, although the coroner was not bound to return them to the court), the judges being in possession of the depositions, may direct their officer, if they think it will conduce to the ends of justice, to furnish a copy. Although it is a matter for strong comment to the jury, yet it is no objection in point of law that the prisoner has had no notice of the name of a witness not called before the magistrate and of the substance of his evidence, if relevant, against him; *Greenslade*, 11 *Cox C. C.* 412 (1870); and it there appears that the report of the ruling to the contrary of Willes J. in *Stignani*, 10 *Cox C. C.* 552 (1867) is incorrect.

The statute (*i.e.* s. 3 (repealed) of 6–7 W. 4, 114, corresponding to s. 27 above) did not apply to the case of prisoners committed for further examination; but only to those who have been fully committed for trial. *The Lord Mayor of London*, p. 64. When therefore a prisoner had been committed to gaol until he should give sufficient sureties for keeping the peace and for appearing at the sessions, where he was discharged, it was held, on a rule for mandamus to justices to furnish copies of the depositions taken against him, that he was not entitled to them. *Ex parte Humphrys*, 19 *L. J. M. C.* 189 (1850).

Depositions taken before a coroner.] By the Coroners Act, 1887 (50–1 V. 71, 4), "It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material; and any such deposition shall be signed by the witness, and also by the coroner."

By s. 5 (1), "Where a coroner's inquisition charges a person with the offence of murder or of manslaughter . . . the coroner . . . shall bind by recognizance all such persons examined before him as know or declare anything material touching the said offence, to appear at the next court of oyer and terminer or gaol delivery at which the trial is to be, then and there to prosecute or give evidence against the person so charged."

(3) "The coroner shall deliver the inquisition, deposition, and recognizances, with a certificate under his hand that the same have been taken before him, to the proper officer of the court in which the trial is to be, before or at the opening of the court."

What has already been said with respect to depositions taken before justices before 11–12 V. 42, is for the most part applicable to depositions taken before the coroners. See *Butcher*, p. 52. Where a coroner had neglected to read over a deposition of a witness (since dead), made in prisoner's presence, and to get his signature, the judge at the trial rebuked him, as if he, too, had died, the deposition could not have been proved: he declined to admit that a judge's notes were evidence, and so a coroner's were not. *Plummer*, 1 *C. & K.* 600 (1844), p. 601. In one respect, however, an important distinction has been taken between depositions before a magistrate and those taken before the coroner; the latter, as it is alleged, being admissible, although the prisoner was not present when they were taken. This is stated in a book of reputation, *B. N. P.* 242, on the authority of two cases, *Bromwich*, p. 59, and *Thatcher* v. *Waller*, *Thos. Jones* (1677), 53, and it was done in *Stockley*, pp. 638, 645, where prisoner having absconded from 1753 to 1771, the depositions of three witnesses at the inquest, since dead, were read. But this doctrine has been strongly doubted. *T.* s. 494. It was also said by Buller J. in *Eriswell*, *Inhabs. of*, p. 59, that depositions taken before the coroner, in the absence of the prisoner, are admissible. It has been

observed, however, that his lordship did not, as it seems, intend to make a distinction between these depositions and those taken before a magistrate, but referred to *Radbourne*, p. 65, as an authority (*on the absence* of the prisoner), though in that case the depositions were in fact taken *in the presence* of the prisoner. L. Kenyon, also, in the same case, appears to have considered that depositions before a magistrate and before a coroner were on the same footing. The reasons given in support of the distinction are that the coroner's inquest is one "of office," and "is a transaction of notoriety, to which every person has access," 3 *T. R.* 722; and that "the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be fair and impartially taken," *B. N. P.* 242. Hotham B. is stated to have received depositions taken before the coroner, though it was objected that the defendant had not been present. *Purefoy, Peake, Ev.* 61, *5th ed.* (1794). The authorities in favour of such evidence being admitted are not very satisfactory, whereas there are strong authorities against it. See 3 *Russ. Cri.* 572 *n.*, Bk. 5, ch. 4, s. 3, and *T.* as above. In *Wall* (1830—cited *Russ.*), a coroner's deposition was refused, partly because the witness may have been insane, and partly because there was no "charge" before the coroner though the prisoner was there, and in *Rigg*, 4 *F. & F.* 1085 (1866), Smith J. refused to admit the deposition before the coroner, of a sick witness. It has also been remarked that it appears to be as regular for the coroner to take the depositions in the absence of the prisoner as it is for a justice to take the evidence in his presence. "And it seems an unreasonable and anomalous proposition to hold that on a trial for murder upon the coroner's inquest, a deposition taken before him, in the absence of the prisoner, is receivable in evidence; but that, if the trial takes place on a bill of indictment, a deposition so taken before a magistrate is not receivable. The same principle which excludes in the one case ought, if it is just and sound, to exclude also in the other." 2 *Phil. & Arn. Ev.* 109, 110, 10*th ed.*

Depositions, taken before a coroner, of a witness too ill to attend, may be sent before the grand jury. *Mooney*, 9 *Cox C. C.* 411 (1863). See also p. 52.

Depositions in India, abroad, &c.] By 13 G. 3, 63, 40, in cases of indictments or informations in the King's Bench, for misdemeanors or offences committed in India, that court may award a mandamus to the judges of the supreme court, &c., who are to hold a court for the examination of witnesses, and receiving other proofs concerning the matters in such indictment or information; and the examination publicly taken in court shall be reduced to writing, and shall be returned to the Court of King's Bench, in the manner directed by the Act, and shall be there allowed and read, and deemed as good evidence, as if the witness had been present. The provisions of this section are extended by 6–7 V. 98, 4, to all indictments or informations in the Queen's Bench for misdemeanors or offences committed against the Acts passed for the suppression of the slave trade (p. 701) in any places out of the United Kingdom, and within any British colony, settlement, plantation, or territory. See also 22–3 V. 21, 16.

And by 33–4 V. 52, 15, foreign warrants of arrest and copies of depositions shall be deemed to be duly authenticated for the purposes of this Act (Extradition), if authenticated in the manner following; if the warrant of arrest purports to be signed by a judge, magistrate, or officer of the foreign state, where the same was issued, if the copies of the depositions purport to be certified under the hand of the judge, magistrate, or officer to be true copies of the original depositions; if the certificate or document of conviction purports to be certified by the judge, magistrate, or officer where the conviction took place; and if in every case they are authenticated by the oath

of some witness or by being sealed with the official seal of the minister of justice or some other minister of state; and all courts of justice and magistrates in her Majesty's dominions shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof. Cf. p. 143.

Depositions with regard to prosecutions for offences committed abroad by persons employed in the public service, are regulated by 42 G. 3, 85. *T.* ss. 500, 501.

By consent.] Depositions are sometimes taken with defendant's consent in prosecutions for misdemeanors when the witness is about to leave the country. *Morphew*, 2 *M.* & *S.* 602 (1814), where L. Ellenborough said there was a precedent on the impeachment of Warren Hastings. *Anon.*, 2 *Chitty*, 199 (1816). But if the trial comes on before the departure of the witness, or after his return, the depositions cannot be read. *Anon.*, 2 *Salk.* 691; 12 *Mod.* 493 (1701); *Patterson* v. *Evans*, 1 *Chit.* 89 (1819).

Depositions under Merchant Shipping Act, 1894—part of s. 691.] By 57–8 V. 60, 691, "upon due proof" that a witness cannot be found in the United Kingdom (if the proceeding is there instituted), a deposition made out of the United Kingdom by him on oath in relation to the same subject-matter before any justice, &c., in presence of the accused if the proceeding is criminal, is admissible. The deposition must be authenticated by the signature of the judge, &c., which need not be proved. The judge must certify that the accused was present. Where an officer of the Board of Trade, after the examination of the official records, stated that the ship of which the witnesses were officers had never been in this country, it was held sufficient evidence (under a previous Act) of their not being in the United Kingdom. *Conning*, 11 *Cox C. C.* 134 (1868); *Anderson*, 11 *Cox C. C.* 154 (1868); in *Stewart*, p. 17, the witnesses, seamen in a British ship were proved by affidavit to be still at sea; the depositions were read to the grand jury and the trial adjourned to the next assizes, when on a further affidavit of like effect the judge ordered the trial to proceed.

INDICTMENT.—WHAT EVIDENCE IS PROPER TO THE ISSUES.

Nature of the issue raised in criminal cases.] It is a general rule, both in civil and criminal cases, that the evidence shall be confined to the point in issue. In order to point out what evidence is *necessary* and what evidence is *admissible* upon a criminal indictment traversed by a plea of not guilty (p. 77), it is essential first to discover what is the issue raised in such a case.

A statement of the rule with regard to indictments was laid down by Mellish and Brett JJ. A. in the considered judgment of the Court of Appeal in *Aspinall*, 2 *Q. B. D.* 48; 46 *L. J. M. C.* 145; 13 *Cox C. C.* 563, 231 (1876), and referred to by the latter judge in *Bradlaugh* v. *R.*, 3 *Q. B. D.* 607; 48 *L. J. M. C.* 5 (1878), pp. 199, 567, as the result of a laborious examination of the cases. "Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment must therefore contain an allegation of every fact necessary to constitute the criminal charge preferred by it. As, in order to make acts criminal, they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they were committed, were done with a peculiar intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, that negative must be alleged."

By s. 17 of 42–3 V. 49, the Summary Jurisdiction Act, 1879, a person charged before a court of summary jurisdiction with an offence in respect of which he is liable on summary conviction to more than three months' imprisonment, and which is not an assault, may claim to be tried by a jury, and thereupon the offence shall be treated as an indictable offence. It is not, however, necessary that the indictment should contain an averment that the prisoner has claimed this right. *Chambers*, 65 *L. J. M. C.* 214 (1896), C. C. R. "Averments are preliminary or prefatory or subsidiary statements in an indictment, which the prosecutor proposes to verify in support of the charge as an element in constitution or aggravation of the offence. They are in some cases described as inducements when they merely lead up to the main allegations." (*Encyc. Laws of England: art.* "Indictment.")

Statutes relating to form of indictment.] See p. 70 and p. 257. By 14–15 V. 100, 9, "If upon the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or

misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

By 24–5 V. 96, 41, "If upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried." But there cannot be a verdict of common assault, p. 755.

S. 12 of 14–15 V. 100 is, "If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court, before which such trial may be had, shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony; in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor." See p. 409 and p. 731.

So as to embezzlement and larceny, and *vice versâ*, by 24–5 V. 96, 72, see p. 376. As to a verdict of simple larceny on an indictment for compound, see p. 563.

By 24–5 V. 96, 94, "If upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property."

Other statutes relating to the form of indictments, which affect the issues raised by them are 24–5 V. 94, by which it is enacted, that an accessory before the fact to any felony may be *indicted* in all respects as if he were a principal felon; 24–5 V. 100, 60, p. 331, by which a woman indicted for the murder of a child may be found guilty of endeavouring to conceal its birth; 24–5 V. 96, 88 (amended 56–7 V. 54, Sch. I.), p. 405, by which a person indicted for obtaining property by false pretences shall not be acquitted of the misdemeanor if the facts amount to larceny; 14–15 V. 19, 5, by which a person indicted for feloniously wounding may be found guilty of unlawfully wounding only, pp. 496, 799; and 46–7 V. 51, 52, p. 284. Cf. p. 170. For the various verdicts which may be returned under 48–9 V. 69, see pp. 725, 726–7, 731.

Divisible averments—sufficient to prove what constitutes an offence.] There is one rule of liberal construction applied to criminal indictments which does not depend on recent legislation, and which stands in somewhat curious contrast to the general body of rules adopted in former times. It is generally known as the rule of divisibility of averments, and may be stated thus: that if in the indictment an offence is stated which includes within it an offence of minor extent and gravity *of the same class*, then the prisoner may be convicted on that indictment of the minor offence, though the evidence fail as to the major. Thus, upon an indictment

for *murder*, the prisoner may be convicted of manslaughter. *Mackalley*, 9 *Co. Rep.* 65 *b* (1612), pp. 613, 641; *Co. Litt.* 282 (*a*). And where a man was indicted under (repealed) 1 J. 1, 8, for stabbing *contra formam statuti*, it was held that the jury might acquit him upon the statute, and find him guilty of manslaughter at common law. *Harwood*, *Style* 86 (1648); 2 *Hale*, *P. C.* 302. Where a man is indicted for burglary and larceny, the jury may find him guilty of the simple felony and acquit him of the burglary. So of robbery with "putting in fear" and felony (larceny). *Hale*, *ib.* So where the indictment was for burglary and larceny, and the jury found the prisoner guilty only of stealing to the amount of 40*s.* in a dwelling-house, though there was no separate count for this, the judges were of opinion that the conviction was good. *Withal*, 1 *Leach*, 88 (1772); 2 *East*, *P. C.* 517, p. 315; *Compton*, 3 *C. & P.* 418 (1828). So, on an indictment for stealing in a dwelling-house, a person therein being put in fear (once a capital offence), the prisoner may be convicted of the simple larceny. *Etherington*, 2 *Leach*, 671 (1795); 2 *East*, *P. C.* 635. And in all cases of larceny, where, by statute, circumstances of aggravation ("compound larceny," p. 523) subject the offender to a higher punishment, on failure in the proof of those circumstances, the prisoner may be convicted of the simple larceny. Thus, on an indictment for horse-stealing under a statute, the prisoner may be found guilty of a simple larceny. *Beaney*, *Russ. & Ry.* 416 (1820). But "where upon an indictment for robbery from the person, a *special verdict* was found, stating facts which, in judgment of law did not amount to a taking from the person, but showed a larceny of the party's goods; yet as the only doubt referred to the court by the jury was, Whether the prisoners were or were not guilty of the felony or robbery charged against them in the indictment, the judges thought that judgment, as of larceny, could not be given upon that finding, but they remanded the prisoners to be tried upon another indictment for that offence" (viz. grand larceny). *Francis*, p. 756. In *Jennings*, 1 *Dears. & B. C. C.* 447 (1858), the indictment charged that the prisoner, whilst the servant of A., stole the money of A. It appeared that the prisoner was not the servant of A., but the servant of B., and that the money which he stole was the money of B., but in the possession of A. as the agent of B.; the prisoner was convicted, and the court held the conviction good, saying, that the allegation in the indictment as to the prisoner being a servant might be rejected as surplusage. But where the prisoner was indicted under 24–5 V. 99, 12, p. 337, for uttering counterfeit coin after a previous conviction for a like offence, and the jury found him guilty of the uttering, but negatived the previous conviction which makes it a felony, it was held that he could not be convicted of the misdemeanor of uttering, on the ground that on an indictment for felony there can be no conviction for misdemeanor, except by statutory enactment. *Thomas*, *L. R.* 2 *C. C. R.* 141; 44 *L. J. M. C.* 42 (1875), p. 162; and see p. 343.

In misdemeanors, as well as in felonies, the averments of the offence are divisible. Thus, in an information for a libel, it was stated that the defendants *composed*, *printed*, *and published* the libel; the proof extended only to the publication; but L. Ellenborough held this to be sufficient. *Hunt*, 2 *Camp.* 584; 31 *St. Tr.* 367 (1811), p. 575. So, where an indictment charges that the defendant "*forged and caused to be forged*," it is sufficient to prove either one or the other (but "forged *or* caused, &c.," is bad). *Per* L. Mansfield, *Middlehurst*, 1 *Burr.* 400 (1757). Upon an indictment for obtaining money under false pretences it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient. *Hill*, *Russ. & Ry.* 190 (1811); see p. 419. So, upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. *Rhodes*, 2 *L. Raym.* 886 (1704), pp. 686,

689. So, on an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy, to prevent one workman from working. *Bykerdike*, 1 *M. & Rob.* 179 (1832). As to assault, see pp. 255, 496. As to rape, see p. 725.

With regard to the extent of the property as to which the offence has been committed, the averments in the indictment are divisible. Whatever quantity of articles may be stated in an indictment, for larceny to have been stolen, the prisoner may be convicted if *any one* of those articles be proved to have been stolen. Cf. p. 419 and p. 560. Where the prisoner was indicted, for that he, being a post-boy and rider employed in the business of the post office, feloniously stole and took from a letter a bank post bill, a bill of exchange for 100*l.*, a bill of exchange for 40*l.*, and a promissory note for 20*l.*, and it was not proved that the letter contained a bill of exchange for 100*l.*, the prisoner being convicted, it was held by the judges, that the statement in the indictment not being descriptive of the letter but of the offence, the conviction was right. *Ellins, Russ. & Ry.* 188 (1810), pp. 711, 712. So, upon an indictment, alleging that the defendant took "extorsively" twenty shillings, it is sufficient to prove that he took one shilling. *Per* Holt C.J., *Burdett*, 1 *L. Raym.* 149 (1696), pp. 670, 671. Where in an indictment for embezzling it was averred that the prisoner had embezzled bank notes for 1*l.* each, and some for other sums, and the evidence was, that he had embezzled five notes for 1*l.* only, this was held sufficient. *Carson, Russ. & Ry.* 303 (1815).

So where a person is charged with having committed the offence in two capacities, it would seem that proof of his employment in either is sufficient. Where a person was indicted in the first and third counts as a "clerk employed in sorting and charging letters in the post office," and it appeared that he was only a sorter and not a charger of letters, the judges were inclined to think that he might have been convicted on these counts by a special finding, that he was a sorter only; on the second and fourth counts, charging him "as being a person employed in the business relating to the General Post Office," he was found guilty, but judgment was arrested on the ground that as he had been acquitted on the first and third counts, there was no proof that he was employed by the post office otherwise than as a sorter. *Shaw*, 2 *W. Bl.* 789; 1 *Leach*, 79 (1771); 2 *East, P. C.* 580; see p. 711.

So on an indictment charging several persons with a joint offence, any one of them may be convicted. But they cannot be found guilty separately of separate parts of the charge. Where A. and B. were indicted for stealing in a dwelling-house to the value of 6*l.* 10*s.*, and the jury found A. guilty as to part of the articles, to the value of 6*l.* (a capital offence), and B. guilty as to the residue (simple larceny), the judges held, that judgment could not be given against both; but that on a pardon or *nolle prosequi* as to B., it might be given against A. *Hempstead, Russ. & Ry.* 344 (1818).

The same is the case when, as sometimes occurs, more than one intent is laid in the indictment; in which case it is sufficient to prove any one that constitutes an offence. Thus on an indictment charging the defendant with having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with intent to bring the administration of justice into contempt, Bayley J. informed the jury that if they were of opinion that the defendant had published the libel with *either* of those intentions, they ought to find him guilty. *Evans*, 3 *Stark. N. P.* 35 (1821). So where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her, and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention carnally to know her, Holroyd J. held, that the averment of intention was divisible. *Dawson*, 3 *Stark. N. P.* 62 (1821).

Averments which need not be proved.] Where an averment of intent is unnecessarily introduced in an indictment, it may be rejected. *Jones*, 2 *B. & Ad.* 611 (1831).

By a strange inconsistency it was necessary under the old law to aver with great particularity both *time* and *place;* but in no case, except where the offence was limited in respect of time or place, need it have been proved as laid. *Townley, Fost.* 7, p. 178; *Levy*, 2 *Stark. N. P.* 458 (1819); *Aylett* 1 *T. R.* 63 (1785). Whether, where value was not of the essence of the indictment, it was ever necessary to aver it, is doubted by Hawkins (1 *P. C.* 43, Bk. 2, ch. 25, s. 75), "for any other purpose than to aggravate the fine."

Now by 14–15 V. 100, 24, "no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, . . . nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or a day that never happened, . . . nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil in any case where the value or price, or the amount of damage, injury, or spoil is not of the essence of the offence." Cf. p. 776. By the above s. also it is no longer necessary to conclude an indictment "against the form of the statute(s)"—as "matter unnecessary to be proved." *Castro* v. *R.*, 6 *App. Cas.* 229; 50 *L. J. Q. B.* 497; 14 *Cox C. C.* 436, 546 (1881); *H. L.* 5 *Q. B. D.* 490; *C. A.*, pp. 174, 220, 679. The conclusion "against the peace of" the Crown is an allegation that the defendant is a British subject, if in fact he is. *Sawyer, Russ. & Ry.* 294 (1815) and *Jameson*, p. 217.

Notwithstanding these provisions, indictments frequently contain averments of time, place, and value, although they be not, as the phrase is, of the essence of the offence. But the statement of them in no way restricts the proof which may be given under the indictment. Cf. p. 776.

Amendment.] The nature and extent of powers of amendment will be considered under the head of *Practice*, p. 176. It is not often considered worth while to take an objection which would only produce an amendment.

Effect of the above rules and provisions.] It is evident that the effect of the above rules and provisions is to affect the nature of the issues raised by criminal pleadings. Frequently, indeed generally, a *single* count in an indictment traversed by a single plea of not guilty is capable of raising several issues more or less distinct from that which appears upon its face. No doubt the prosecutor will not be allowed to inquire into several felonies at the same time merely because they all fall within the words of the indictment; he will in general be put to his election upon which he will proceed. See p. 172. But what is meant is that there may be several issues arising out of *one* count. In considering, therefore, what evidence is proper to the issue in criminal cases, we must always bear in mind that we may have to look for the issue beyond the mere words of the indictment.

Substance of the issue to be proved as laid.] The substance of the issue must be proved as laid. What follows must, of course, be taken subject to the powers of amendment above referred to, and it must also be recollected that in certain offences descriptive averments need only be of the most general kind.

The descriptive averments in an indictment are either of property, person, time, place, value, or mode of committing an offence. The decided cases on each of these averments will be given in their order.

Averments descriptive of property.] Most of the cases of variance in the allegation and proof of property have occurred with respect to animals, p. 318. See the note in *C. & P.* to *Halloway*, p. 428. See as to live turkeys, *Edwards*, *Russ. & Ry.* 497 (1823), p. 428. As to cows, *Cook*, 2 *East, P. C.* 616; 1 *Leach*, 105 (1774). And as to a mare, *Chalkley*, *Russ. & Ry.* 258 (1813); and *Welland*, *Russ. & Ry.* 494 (1822). Probably in every one of these cases there would now be amendment. As to the owner, see pp. 422, 557, and below. Cf. p. 477.

Averments descriptive of person.] The name both christian and surname of all persons mentioned in the indictment must, unless amended, be proved as laid. But if the name be that by which a person is usually called or known, it is sufficient. *Norton*, *Russ. & Ry.* 510 (1823); *Anon.*, 6 *C. & P.* 408 (1834); see also *Berryman*, 5 *C. & P.* 601 (1833). Where in an indictment the prosecutor, a boy, was called D., and he stated that his right name was D., but that most persons who knew him called him P., and that his mother had married two husbands, the first named P. and the second D., and that he was told by his mother that he was the son of the latter, and that she used always to call him D., Williams J., after consulting Alderson B., held that the evidence that the boy's mother had always called him D. must be taken to be conclusive as to his name, and that therefore he was rightly described in the indictment. *Williams*, 7 *C. & P.* 298 (1836). Upon an indictment for the murder of a bastard child, described in the indictment as "George Lakeman Clark," it appeared it had been christened "George Lakeman," being the names of its reputed father; that it was called George Lakeman, and not by any other name known to the witnesses; and that the mother called it George Lakeman. There was no evidence that it had obtained, or was called by its mother's name of Clark. The judges held, that as this child had not obtained his mother's name by reputation, he was improperly called *Clark* in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. *Clark*, *Russ. & Ry.* 358 (1818). Where an unmarried woman was robbed, and after the offence committed, but before the bill was presented to the grand jury, she married, and the indictment described her by her maiden name, this was held to be sufficient. *Turner*, 1 *Leach*, 536 (1790). Although where there are father and son of the same name, and that name is stated without any addition, it shall be *primâ facie* intended to signify the father; *Wilson* v. *Stubbs*, *Hob.* 330 (1621); *Sweeting* v. *Fowler*, 1 *Stark.* 106 (1815); yet on an indictment containing the name without addition, it may be proved that either the father or son was the party intended. Thus on an indictment for an assault upon Elizabeth Edwards, it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; the defendant being convicted, the conviction was held good. *Peace*, 3 *B. & Ald.* 579 (1820). So where an indictment laid the property of a house in J. J., it was held by Parke J. to be supported by proof of property in J. J. the younger. *Hodgson*, 1 *Lew. C. C.* 236 (1831); *per* Bolland B., *Bland*, *ib.* (1832).

An indictment is good, stating that the prisoner stole or received the goods of a person *to the jurors unknown*; but in case the owner of the goods be really known, an indictment alleging the goods to be the property of a person unknown, would be improper, and the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. 2 *East, P. C.* 651. Where the property in a plundered wreck was laid in one count as belonging to a certain person named, and in another as belonging to persons unknown, and the prosecutor failed to prove the christian names of the persons mentioned in the first count; it was held by

Richards C.B. that he could not resort to the second count, saying, "How can I say that the owners are unknown?" and prisoner was acquitted. *Robinson, Holt, N. P. C.* 595 (1817), p. 561. An indictment against the prisoner as accessory before the fact to a larceny, charged that *a certain person to the jurors unknown*, feloniously stole, &c., and that the prisoner incited the said person unknown to commit the said felony. The grand jury had found the bill upon the evidence of one Charles Iles, who confessed that he had stolen the property, and it was proposed to call him to establish the guilt of the prisoner, but Le Blanc J. interposed and directed an acquittal. He said he considered the indictment wrong, in stating that the property had been stolen by a person unknown, and asked how the witness, who was the principal felon, could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. *Walker*, 3 *Camp.* 264 (1812), p. 733; cf. *Blick*, 4 *C. & P.* 378 (1830), p. 460. But where an indictment stated that a certain person to the jurors unknown, burglariously entered the house of H. W., and stole a silver cream jug, &c., which the prisoner feloniously received, and it appeared that amongst the records of indictments returned by the same grand jury, there was one charging M. as principal in the burglary, and the prisoner as accessory in receiving the cream jug; that H. W.'s house had been entered only once, and that she had lost only one cream jug, and that she had preferred two indictments; it was held by the judges, that the prisoner was properly convicted, the finding of the grand jury on the bill, imputing the principal felony to M., being no objection to the other indictment. *Bush, Russ. & Ry.* 372 (1818), p. 733. See also *Caspar*, 2 *Moo. C. C.* 101 (1839), where an indictment charging that "a certain evil-disposed person" feloniously stole, &c., that A. B. feloniously incited him to do so, and that C. D. and E. F. feloniously received, &c., was held bad against A. B. (because the statement as to the stealer was "too uncertain to support the charge against" A. B. as accessory before the fact, but good against C. D. and E. F. as for a substantive felony).

Where on an indictment for maliciously shooting A. Sandon, in the dwelling-house of *James* Brewer and *John* Sandy, it appearing in evidence that it was in the dwelling-house of *John* Brewer and *James* Sandy, the court said, that as the prosecutor had thought proper to state the names of the owners of the house where the fact was charged to have been committed, it was a fatal variance. *Durore*, 1 *Leach*, 351 (1784); 1 *East, P. C.* 415 (stated to be *in favorem vitæ*). "So where the indictment was for breaking, &c., the house of J. Davis, with intent to steal the goods of J. Wakelin, in the said house being, and there was no such person who had goods in the house, but J. W. was put by mistake for J. D., the prisoner was entitled to an acquittal, and it was ruled that the words '*of J. W.*' could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods; and without such words the description of the offence would be incomplete." *Jenks*, 2 *East, P. C.* 514 (1796).

Before the extensive powers of amendment which now exist were conferred, a variance in the spelling of material names as laid and proved was got over by the rule of *idem sonans*, as it was called. Thus where the name in the indictment was *John Whyneard*, and it appeared that the real name was *Winyard*, but that it was pronounced *Winnyard*, the variance was held to be immaterial. *Foster, Russ. & Ry.* 412 (1820); cf. *Tannet, ibid.* 351 (1818), p. 403. So *Segrave* for *Seagrave*, *Williams* v. *Ogle*, 2 *Str.* 889 (1731). *Benedetto* for *Benidito*, *Abithol* v. *Benidito*, 2 *Taunt.* 401 (1810). But it would scarcely ever now be necessary to resort to this rule.

It has always been usual to treat the addition to a name as surplusage. Thus the prisoner was indicted for stealing the goods of James Hamilton,

Esq., commonly called Earl of Clanbrassil, in the kingdom of Ireland; and it appeared that he was an Irish peer. The judges were of opinion that "James Hamilton, Esq.," was a sufficient description of the person and degree of the prosecutor, and that the subsequent words, "commonly called Earl of Clanbrassil, in the kingdom of Ireland," might be rejected as surplusage. But they conceived that the more correct and perfect mode of describing the person of the prosecutor would have been "James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland," and as that more perfect description appeared upon the face of the indictment, by considering the intervening words, "commonly called," as surplusage, they thought that the indictment was good. *Graham*, 2 *Leach*, 547 (1791). So where the prisoner was indicted for stealing the goods of A. W. Gother, *Esq.*, Burroughs J. held that the addition of "esquire" to the name of the person in whom the property was laid—who admitted that he was not of that rank—was mere surplusage and immaterial. *Ogilvie*, 2 *C. & P.* 230 (1828).

Where a person has a name of dignity, that is the proper name by which to describe him, for it is the name itself and not an addition merely. *Graham*, above. But if the christian names are given, they must be given properly. *Frost, Dears. & P. C. C.* 474; 24 *L. J. M. C.* 116 (1855), p. 177.

Where the only evidence of the christian name of the prosecutor was that of a witness who had seen him sign his name, it was held to be sufficient. *Toole, Dears. & B. C. C.* 194 (1857).

Averments descriptive of time.] As has been said (p. 73), in general, no time need be alleged in the indictment, or, if alleged, it need not be proved. But if it be of the essence of the offence, as in burglary (p. 313), or the non-surrender of a bankrupt at the time appointed (p. 268), then it must, subject to the power of amendment, be strictly proved as laid. *Brown, M. & M.* 163 (1828).

Averments descriptive of place.] In some particular cases it is necessary to prove the parish or place named in the indictment. Thus, as in an indictment against a parish for not repairing an highway, the situation of the highway within the parish is a material averment, it must be proved as laid. *Inhabs. of Hartford*, 1 *Cowp.* 111 (1779). So if the statute upon which the indictment is framed, gives the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. *Glossop*, 4 *B. & A.* 616 (1821).

So where the offence is in its nature local, the name of the parish or place must be correctly stated in the indictment, and proved as laid; as, for instance, on an indictment for stealing in the dwelling-house, &c., for burglary, for forcible entry, or the like. 3 *Russ. Cri.* 436; *Saunders on Indictments*, 3*rd ed.*, p. 13.

Where an injury is partly local and partly transitory, and a precise local description is given, the local description becomes descriptive of the transitory injury, and should be proved as laid. *Russ., ib.*, citing *Cranage*; 1 *Salk.* 385 (1713). So where the name of a place is mentioned, not as a matter of venue, but of local description, it should be proved as laid, although it need not have been stated: pp. 177, 502. Thus where an indictment (under the repealed statute 57 G. 3, 90) charged the defendant with being found armed, with intent to destroy game in a certain wood, called the Old Walk, in the occupation of J. J., and it appeared in evidence that the wood had always been called the Long Walk and never the Old Walk, the judges held the variance fatal. *Owen*, 1 *Moo. C. C.* 118 (1826).

Of course many such variances would now be readily amended.

Averments descriptive of value.] There are many cases in which the

allegation of value is material, either because the value is of the essence of the offence, as in an indictment against a bankrupt for concealing or embezzling part of his estate to the value of 10*l.* (p. 261), or as enhancing the punishment, as in an indictment under the 24–5 V. 96, 60, for stealing in a dwelling-house to the amount of 5*l.* (p. 370). But any error in this respect can generally be rectified either by amendment or by the rule of divisible averments, p. 70.

Averments descriptive of the mode of committing the offence.] The description of the mode of committing the offence must be proved as laid, if not amended. But the substance only of such averments need be proved. 1 *East, P. C.* 341; 2 *Hale, P. C.* 185. Thus where the prisoner was indicted for administering to one H. M. G., a single woman, divers large quantities of the *decoction* of a certain drug, called savin, with intent to procure the miscarriage of the said H. M. G.; and it appeared that the prisoner had prepared the medicine by pouring boiling water over the leaves of a shrub, a process which the medical witnesses stated was an *infusion* and not a *decoction*, Lawrence J. overruled an objection taken on this ground. He said that infusion and decoction were *ejusdem generis*, and that the question was, whether the prisoner administered any matter or thing with intent to procure abortion. *Phillips*, 3 *Camp.* 73 (1811). Where an indictment charges that A. gave the mortal stroke, and that B. and C. were present, aiding and abetting, if it appears that B. was the person who gave the stroke, and that A. and C. were present aiding and abetting, they may all be found guilty of murder or manslaughter, at common law, as circumstances may vary the case. "The identity of the person supposed to have given the stroke, is but a circumstance, and in this case a very immaterial one,—the stroke of one is, in consideration of law, the stroke of all." "The person actually giving the stroke is no more than the hand or instrument by which the others strike." *Foster, C. C.* 351; 1 *Hale, P. C.* 437, 463; 2 *Ib.* 344, 345.

Evidence confined to the issue.] We have considered what evidence is *necessary;* we have now to consider what evidence is *admissible* as relevant to the issue. See p. 69, where the general rule is laid down. "In criminal proceedings" it has been observed (3 *Russ. Cri.* 403), "the necessity is stronger, if possible, than in civil cases, of strictly enforcing the rule . . . for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer."

No objection that other offences are disclosed.] The notion that it is in itself an objection to the admission of evidence that it discloses other offences, especially where they are the subject of indictment, *Smith*, 2 *C. & P.* 633 (1827), is now exploded. *Salisbury*, 5 *C. & P.* 155 (1831), p. 712; *Clewes*, p. 42; *Richardson*, 2 *F. & F.* 343 (1860), p. 85; *Rearden*, 4 *F. & F.* 76 (1864); *Cobden*, 3 *F. & F.* 833 (1862); *Proud*, 1 *L. & C.* 97 (1861), p. 382; *Ollis*, 19 *Cox C. C.* 554; (1900) 2 *Q. B.* 758 (evidence on a previous *acquittal* admissible); C. C. R. by a majority; *Bond* (1906), 2 *K. B.* 389, p. 233; 75 *L. J. K. B.* 693; 21 *Cox C. C.* 252; C. C. R. by a majority (evidence showing a system which negatives the defence of ignorance or accident), and numerous other cases, including *Makin*, pp. 79, 83, and *Wyatt*, p. 83, many of which are mentioned in *Bond.* If the evidence is admissible on general grounds, it cannot be resisted on this ground. Thus evidence may be given, not only of the guilty act charged itself, but of

other acts so closely connected therewith, as to form part of one chain of facts which could not be excluded without rendering the evidence unintelligible. Thus L. Ellenborough, having cited in *Whiley*, 2 *Lea.* 985; 1 *New. Rep. B. & P.* 92 (1804), pp. 80, 81, a case where a man committed three burglaries in one night, and stole a shirt at one place and left it at another, and they were all so connected that the court heard the history of all three burglaries, remarked, "If crimes do so intermix, the court must go through the detail." The prisoner, who had been in the employ of the prosecutrix, was indicted for stealing six shillings; the son of the prosecutrix, suspecting the prisoner, had marked a quantity of money, and put it into the till, and the prisoner was watched by him; on the first examination of the till it contained 11*s.* 6*d.* The prosecutrix's son having received another shilling from a customer, put it into the till; and another person having paid a shilling to the prisoner, he was observed to go to the till, to put in his hand and to withdraw it clenched. He then left the counter, and was seen to raise his clenched hand to his waistcoat pocket. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when it was objected that this would be to prove several felonies. The objection being overruled, the prosecutrix's son proved that, upon each of the several inspections of the till, after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been convicted, the Court of King's Bench, on an application for staying the judgment, were of opinion that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts which were all part of one entire transaction. *Ellis*, 6 *B. & C.* 145 (1826), p. 193. In *Firth*, 38 *L. J. M. C.* 54; *L. R.* 1 *C. C. R.* 172 (1869), the abstraction of gas from a pipe for several years was considered to be one transaction; and even if there were separate takings yet in such a case they would afford evidence of one continuous felony. Cf. *Long*, 6 *C. & P.* 179 (1833).

In some cases the offence itself consists of a series of transactions, as on indictments for barratry (p. 270), keeping a common bawdy-house (p. 662), uttering (p. 336), conspiracy (p. 357), and other cases. In all these cases, of course, evidence of any act is admissible which goes to make up the offence. The principle is explained by L. Hardwicke C. (see p. 662), "This is the practice in all cases where the general behaviour or quality or circumstance of the mind is the thing in issue. . . . Wherever the general life or conversation is put in issue, it is notice to the person who is charged that she should be prepared to take off the weight of that evidence; but where it comes in collaterally, you shall be confined to general evidence." This, he had explained, happens in criminal prosecutions *generally*, where "character" is not the particular thing to be tried; "and when that is the case, they are not supposed to be prepared with evidence"—a case contrasted with those (gaming-house cases, &c.) "where the character is the particular issue to be tried." See p. 85. In *Welman, Dears. & P. C. C.* 188; 22 *L. J. M. C.* 118 (1853); 6 *Cox C. C.* 153; 17 *Jur.* 421; 1 *W. R.* 361, pp. 408, 421, &c., a case of false pretences, the evidence showed that the prisoner in July, 1850, called upon the prosecutrix and made false representations relative to a benefit club, but failed on this occasion to obtain any money. In August of the same year the prisoner again called about the club, and referred to the previous conversation. It was held that it was for the jury to say whether these conversations were so connected as to form one continuing representation; and that if so, they might connect them.

Subornation of witnesses.] Evidence of this as to the trial, may be given in it. *Watt*, 20 *Cox C. C.* 852 (1905): cf. p. 48 and p. 89.

Evidence to identify.] Sometimes evidence which would be otherwise inadmissible becomes so either as serving to identify the prisoner, or some article in his possession, connected with the crime. Thus, in arson, evidence has been admitted to show that property which had been taken out of the house at the time of the fire, was afterwards discovered in the prisoner's possession. *Rickman*, 2 *East, P. C.* 1035 (1789), p. 246. So where upon an indictment for robbing A., there being another against the prisoners for robbing B. of a watch, it appeared that A. and B. were travelling in a gig, when they were stopped and robbed, Littledale J. held, on the trial of the first, that evidence might be given that B. lost his watch at the same time and place, and that it was found on one of the prisoners, but that evidence was not admissible of the violence that was offered to B. One question in the case was, whether the prisoners were at the place in question when A. was robbed, and as proof that they were, evidence was admissible that one of them had got something which was lost there at the time. *Rooney*, 7 *C. & P.* 517 (1856). So upon an indictment for stabbing, in order to identify the instrument, evidence may be adduced of the shape of a wound given to another person by the prisoner at the same time, although such wound be the subject of another indictment. *Per* Gaselee and Parke JJ., *Fursey*, 6 *C. & P.* 81 (1833). Cf. p. 81. See *Plumer*, p. 712, as to letters found on a prisoner.

Evidence as to motives, intention, or knowledge.] The general rule was thus laid down in *Makin*, p. 83, by L. Herschell C.: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." Cf. *Bond*, p. 77. This rule is conveniently illustrated in three classes of case, in which, from the nature of the offence itself, this species of evidence is frequently necessary; viz. conspiracy, uttering forged instruments and counterfeit coin, and receiving stolen goods. In these the act itself which is the subject of inquiry is almost always of an equivocal kind, from which *malus animus* cannot, as in crimes of violence, be presumed; and almost the only evidence which could be adduced to show the guilt of the prisoner would be his conduct on other occasions. As to arson, see p. 246.

Evidence as to motives, &c.—Conspiracy.] The evidence in conspiracy is wider than, perhaps, in any other case, other principles as well as that under discussion tending to give greater latitude in proving this offence. See p. 348. Taken by themselves the acts of conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances. Thus, on the trial of an indictment against several persons for a conspiracy in unlawfully assembling for the purpose of exciting discontent or disaffection, as the material points for the consideration of the jury are the general character and intention of the assembly, and the particular case of the defendant as connected with that general character, it is relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organised in the same manner and acting in concert. It is relevant also to show, that early on the day of the meeting on a spot at

some distance from the place of meeting (from which spot bodies of men came afterwards to the place of meeting), a great number of persons, so organised, had assembled, and had there conducted themselves, in a riotous, disorderly or seditious manner. Upon the same principle, on the same indictment, it is relevant to produce in evidence resolutions put by one of the defendants as chairman at a large assembly in another part of the country for the same professed object and purpose as were avowed at the meeting in question; for, in a question of intention, it is most clearly relevant to show, against that individual, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. *Hunt*, p. 4, at 573, 574 (*B. & Ald.*); p. 220.

Evidence as to motives, &c.—Uttering forged instruments or counterfeit coin.] There is no case in which this kind of evidence is more used than in indictments for uttering forged instruments (pp. 472, 479) or counterfeit coin (p. 341), by far the most difficult point being to ascertain whether the prisoner did so innocently or with a guilty knowledge. The following cases have been decided under this head.

The prisoner was charged with uttering a bank of England note, knowing it to be forged; evidence was offered that the prisoner had uttered another note forged in the same manner, by the same hand, and with the same materials, three months previously, and that two ten pound notes and thirteen one pound notes of the same fabrication, had been found on the files of the bank, on the back of which there was the prisoner's handwriting, but it did not appear when the company received them. This evidence was admitted, and the majority of the judges were of opinion that it was admissible, subject to observations as to the weight of it, which would be more or less considerable, according to the number of the other notes, the distance of the time at which they had been put off, and the situation in life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the course of business. *Ball, Russ. & Ry.* 132; 1 *Campb.* 324 (1807), p. 201. The prisoners were indicted for uttering, in March, bank notes, knowing them to be forged. To prove their guilty knowledge, evidence was allowed that in February they had uttered, on three occasions, forged bank notes to three different persons, and that on being asked at each place for their names and places of abode, they gave false names and addresses. Lord Ellenborough said, that it was competent for the court to receive evidence of other transactions, though they amounted to distinct offences, and of the demeanor of the prisoner on other occasions, from which it might be fairly inferred that he was conscious of his guilt whilst he was doing the act charged in the indictment. As to demeanor, he cited *Tattershall* (1801), p. 49, to show that the jury might, from a prisoner's conduct on one occasion, infer his knowledge on another. Heath J. said, "The charge in this case puts in proof the *knowledge* of the person, and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances." *Whiley*, p. 78.

It is not necessary that the other forged notes of which knowledge is proved should be of the same description and denomination as that charged in the indictment. The point was doubted in *Millard, R. & R.* 245 (1813), p. 81; but in a series of cases *Harris, Balls, Warshaner*, or *Moses*, 7 *C. & P.* 416–31; 1 *Moo. C. C.* 466–73 (1836) the prisoners were indicted for forging and uttering a note in the *Polish* language. In support of the *scienter* the prosecutor gave evidence of the particulars of a meeting at which one of the prisoners agreed with the prosecutor, an agent of the Austrian government, to make him 1,000 Austrian notes for fifty florins. This evidence was objected to on the part of the prisoner, as it was a transaction not relative to *Polish* notes,

besides which no Austrian notes were in fact made. Littledale J. however, admitted the evidence, and the judges held the evidence admissible. And *Foster*, p. 82, supports the same view: for the same principle would apply to indictments for uttering forged instruments as to indictments for uttering counterfeit coin.

Whether evidence is admissible of uttering other forged instruments where these are uttered subsequently to that with which the prisoner is charged seems to some extent doubtful. In one case the prosecutors offered to prove the uttering of another forged note five weeks *after* the uttering which was the subject of the indictment; but three judges held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the *same manufacture*. *Taverner, Carr. Sup.* 195, 1*st ed.* (1809), in *Smith* 4 *C. & P.* 411 (1831). Where in an indictment for knowingly uttering a bill with a forged acceptance, it being proposed, for the purpose of proving the guilty knowledge, to give in evidence other forged bills of exchange *precisely similar*, with the same drawers' and acceptors' names, uttered by the prisoner about a month after the uttering of the bill mentioned in the indictment, Gaselee J., after consulting Alexander C.B., was disposed to allow the evidence to be received (but it was not offered). *Ibid.* Cf. *Foster*, p. 82. The prisoner was the stamp distributor of the Queen's Bench Div. in Ireland. In the process of stamping, a second sheet placed inadvertently beneath the sheet to be stamped receives an impression. These second sheets are called blinds. These the prisoner obtained and sold. The defence was that he obtained them innocently, though the person selling them to him might have been fraudulent. To meet this defence evidence was admitted of several documents with similar "blind" stamps, identified by the prisoner's mark, and it was held in Ireland (C. C. R.) they were rightly admitted as evidence of guilty knowledge. *Colclough*, 15 *Cox C. C.* 92 (1882).

But no doubt there would be some limits both as to time and circumstances beyond which evidence of uttering forged instruments on other occasions would not be permitted. What these limits are it is for the judge in his discretion to determine; they will probably be wider in forgery and coining than in some other cases, receiving stolen goods, for instance. *Green*, 3 *C. & K.* 209 (1852); *Salt*, 3 *F. & F.* 834 (1862) where Williams J. said, "The judge reposes confidence in counsel that they will not give in evidence what has no tendency to prove guilty knowledge but only to prejudice the prisoner"; and see as to cases of false pretences, p. 84.

The *possession* also of other forged notes by the prisoner is evidence of his guilty knowledge. The prisoner was indicted for uttering a bill of exchange upon Sir James Esdaile and Co., knowing it to be forged. It was proved that, when he was apprehended, there were found in his pocket-book three other forged bills, drawn upon the same persons. The judges were all of opinion, that these forged bills found upon the prisoner at his apprehension were evidence of his guilty knowledge. *Hough, Russ. & Ry.* 120 (1806). In order, however, to render such evidence admissible, it must, it seems, be first satisfactorily proved that the other notes were forged, and they ought to be produced. *Millard*, p. 80; *Cooke*, 8 *C. & P.* 586 (1838), p. 479; and see *Forbes*, 7 *C. & P.* 224 (1835), pp. 474, 479. See, too, *Brown*, 2 *F. & F.* 559 (1861), p. 479. "It would seem that presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received." 1 *Phill. Ev.* 511 *n.*, on *Phillips*, p. 82, where note *not* charged was destroyed. As to the non-production of a chattel, see *Francis*, p. 1.

On the trial of indictments for uttering or putting off counterfeit coin, knowing it to be counterfeit, it is the practice, as in cases of forgery, to receive proof of more than one uttering, committed by the party about the

same time, though only one uttering be charged in the indictment. 1 *Russ. Cri.* 241; 3 *ib.* 411. In *Whiley* (p. 78) it was stated by the counsel for the prisoner, that upon an indictment for uttering bad money, the proof is always exclusively confined to the particular uttering charged in the indictment. Upon this, Thompson B. observed, "I by no means agree . . . that the prosecutor cannot give evidence of another uttering *on the same day*, to prove the guilty knowledge. Such other uttering cannot be punished, until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer*; but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad." Also proof of the prisoner's conduct in such other utterings (as, for example, that he passed by different names) is for the same reason clearly admissible. See *Tattershall*, p. 80; *Phillips*, 1 *Lew. C. C.* 105 (1829): but not of conduct or words *collateral* to such other utterings.

The admissibility of evidence of *subsequent* utterings of counterfeit coin was definitely decided by the Court for C. C. R., *Foster*, 24 *L. J. M. C.* 134 (1855), p. 81. "The uttering of a piece of bad silver," said the court, "although of a different denomination from that alleged in the indictment, is so connected with the offence charged, that the evidence of it was receivable." Cf. as to the difference of denomination, *Harris*, &c., p. 80. *Connection* between *subsequent* acts and those charged is the test. *Smith*, 20 *Cox C. C.* 804 (1905): C. C. R., p. 421.

Evidence as to motives, &c.—Larceny and Receiving stolen goods.] With regard to the case of a receiver of stolen goods, it has been frequently held that as the question is one entirely of guilty knowledge, evidence of receiving other goods of a similar nature, stolen from the same prosecutor, may be given; even though indictments are pending for the other larcenies. But no such evidence ought to be admitted if the offence charged is substantially stealing, and if it has been properly admitted under statute, p. 732, or to negative accident, it must be withdrawn from the jury, if no larceny is proved. *Girod*, 70 *J. P.* 574 (1906): C. C. R. As to the period, within which possession of other stolen property may now be proved, by statute, see pp. 732-3. Before the statute, the other occasions on which the stolen property was received must not be so far removed in point of time as to form entirely different transactions. Where, upon an indictment for receiving, it appeared that the articles had been stolen, and had come into the possession of prisoner at several distinct times, the judge, after compelling the prosecutor to elect upon which act of receiving he would proceed, told the jury that they might take into their consideration the circumstance of prisoner having the various articles of stolen property in her possession, and pledging, or otherwise disposing of them at various times, as an ingredient in coming to a determination, whether, when she received the articles for which the prosecutor elected to proceed, she knew them to have been stolen. *Dunn*, *Moody C. C.* 146 (1826). But where the prisoner being indicted in one count for stealing certain cloth, in another for receiving it knowing it to have been stolen, it was proved that the cloth was stolen in the night of the 2nd and 3rd March, and found in the possession of the prisoner on the 10th March; and it was sought further to give in evidence, in order to show guilty knowledge, that on his house being searched on 10th March, other cloth which had been stolen in the December previous from others, was found, and had been in prisoner's possession in December; the Court for C. C. R. held that such evidence

was inadmissible. Alderson B. in giving his judgment said, "The mere possession of stolen property is evidence *primâ facie* not of receiving but of stealing; and to admit such evidence in the present case would be to allow a prosecutor, in order to make out that a prisoner had *received property*, with a guilty knowledge, which had been stolen in *March*, to show that the prisoner had in the *December* previous *stolen* some other property from another place and belonging to other persons. In other words, we are asked to say, that in order to show that the prisoner had committed one felony, the prosecutor may prove that he committed a totally different felony some time before; such evidence cannot be admissible." *Oddy*, 2 *Den. C. C. R.* 264; 20 *L. J. M. C.* 198 (1851). In *Nicholls*, 1 *F. & F.* 51 (1858), the prisoner was indicted for receiving a quantity of lead knowing it to have been stolen. Cockburn C.J. allowed evidence to be given that on several occasions, between the early part of January and the 11th of February —the date of the stealing charged—the prisoner, in company with another person, had sold lead stolen from the same place, and taken a share of the money. See p. 732, and cf. p. 741. As to general dealers in Ireland, see 3 E. 7, 44, 7.

Evidence as to motives, &c., generally.] In *Makin* v. *Att.-Gen. for N. S. W.*, 1894 *A. C.* 57; 63 *L. J. P. C.* 41, p. 77, the question as to the admissibility of such evidence was fully discussed. See p. 79. In that case the prisoners were charged with the murder of a child whom they had received from the mother on representation of their desire to adopt it, and whose body was subsequently found buried in their garden. It was held that evidence that several other children had been received by the prisoners on similar representations, and that other bodies of infants had been found buried in gardens of houses occupied by the prisoners, was relevant to the issue. So *Rhodes* (1899), 1 *Q. B.* 77; 19 *Cox C. C.* 182; 79 *L. T. R.* 360 (obtaining by false pretences, *subsequent* acts admissible to show a sham business being carried on), C. C. R., p. 160; *Wyatt* (1904), 1 *K. B.* 188; 20 *Cox C. C.* 462 (obtaining credit by fraud; antecedent acts, "negativing accident, inadvertence or negligence"), C. C. R. In *Egerton*, *Russ. & Ry.* 375 (1818), p. 761, the prisoner was indicted for robbing the prosecutor of a coat by threatening to accuse him of a crime. Evidence was admitted by Holroyd J. that the prisoner had made another, but ineffectual, attempt to claim a *l.* note from the prosecutor on the following day to that on which he obtained the coat; and this ruling was confirmed by the judges. In *Voke*, *Russ. & Ry.* 531 (1823), the prisoner was indicted for maliciously shooting at the prosecutor. Evidence was given that the prisoner fired at the prosecutor twice during the day. In the course of the trial it was objected that the prosecutor ought not to give evidence of two distinct felonies, but Burrough J. held that it was admissible (partly on the ground that the two were "one continued transaction" but also) on the ground that the counsel for the prisoner, by his cross-examination of the prosecutor, had endeavoured to show that the gun might have gone off the first time by accident; and the learned judge thought that the second firing was evidence to show that the first was wilful, and to remove the doubt, if any existed, in the minds of the jury. In *Clewes*, pp. 42, 77, &c. upon an indictment for the murder of one Hemmings, it was opened that great enmity existed between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give 50*l.* to have him shot; that the rector *was* shot by Hemmings, and that the prisoner and others who had employed him, fearing that they should be discovered, had themselves murdered Hemmings. Evidence of the malice of the prisoner against the rector was given without objection, and it was then proposed to

show that Hemmings was the person by whom the rector was murdered; this was objected to, but Littledale J. decided that it was admissible as it was necessary to the issue before him. In *Mogg*, 4 *C. & P.* 364 (1830), p. 319, the prisoner was indicted for administering sulphuric acid to eight horses, with intent to kill them. Evidence that the prisoner had frequently mixed sulphuric acid with the horses' corn was objected to, but Parke J. held it was admissible, as showing whether the act was done with the intent charged in the indictment. In *Winkworth*, 4 *C. & P.* 444 (1836), prisoners came with a mob to the prosecutor's house, and one of the mob went up to the prosecutor, and civilly, and as he believed with a good intention, advised him to give them something to get rid of them, which he did. To show that this was not *bonâ fide* advice to the prosecutor, but in reality a mode of robbing him, it was proposed to give evidence of other demands of money made by the same mob at other houses, at different periods of the same day, when some of the prisoners were present. Parke J., having conferred with Vaughan and Alderson BB., said, "We are of opinion, that what was done by the mob, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present, may be given in evidence." He afterwards stated that Lord Tenterden concurred with them in this opinion. In *Geering*, 18 *L. J. M. C.* 215 (1849), the prisoner was indicted for the murder of her husband, in September, 1848, by administering arsenic to him. The prisoner was also charged, in three other indictments, with the murder, of her son George, in December, 1848; of another son, James, in March, 1849; and of an attempt to murder another son, Benjamin, in April, 1849—all by a similar means. On the part of the prosecution, evidence was tendered consisting of a medical *post-mortem* analysis of the intestines, heart, &c., of the husband, and two sons who were dead, and also a medical analysis of the vomit of Benjamin, showing the presence of arsenic in each case. Evidence was also tendered that all the parties lived together, and that the prisoner cooked the victuals. The evidence was objected to, but Pollock C.B. said that the domestic history of the family during the period that the four deaths occurred, was receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not; after consideration he refused to reserve the point. The case of *Garner*, 4 *F. & F.* 346 (1864), is very similar. See also *Cotton*, 12 *Cox C. C.* 400 (1873); *Roden*, *ib.*, 630 (1874—early death of several children); *Heeson*, 14 *Cox C. C.* 40 (1878); *Dale*, 16 *Cox C. C.* 703 (1889).

In *Roebuck*, 25 *L. J. M. C.* 101; *Dears. & B. C. C.* 24; 2 *Jur.* (*N. S.*) 579; 4 *W. R.* 514; 7 *Cox C. C.* 126 (1855), p. 416, the prisoner was indicted for obtaining money from a pawnbroker by falsely pretending that a chain was silver. The chain was of a very inferior metal, and evidence was admitted apparently without objection that twenty-six chains were found on the prisoner, and that these were of similar materials. Evidence which was objected to, was also admitted that the defendant, a few days after the occasion in question, offered a similar chain to another pawnbroker, under similar circumstances. There is no trace of any discussion on these points, but the conviction was affirmed. In *Holt*, p. 421, prisoner was tried for obtaining by false pretences a sum of money from one Hirst. It appeared that the prisoner was employed by his master to take orders for goods, but was forbidden to receive money. On the 30th of April the prisoner obtained from Hirst the sum of nine shillings and sixpence in payment for goods bought by Hirst of the prisoner's master, and which sum the prisoner falsely represented that he had authority to receive: this was the offence charged. Evidence was also tendered that within a week after the 30th of April the

defendant obtained from another customer of his master the sum of eleven shillings by a similar false representation. The evidence was objected to, but received on the ground that it showed the intent of the prisoner when he committed the act charged. The Court for C. C. R. quashed the conviction. Perhaps the ground upon which this decision proceeded was this: that the only shape in which the evidence was admissible, if at all, was for the purpose of showing that the prisoner knew he did not possess the authority which he represented himself to have; and it may have been thought that for this purpose the evidence was not relevant, because, if any *bonâ fide* mistake existed upon this point, it would operate in one case as well as another, so that mere repetition of the act would not, as in many other cases, add anything to the evidence of guilt; though it might seem that this is rather an objection to the weight of the evidence than to its admissibility.

Where the prisoner was indicted for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was held to have been properly admitted to show that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain, which he represented to be a gold chain, but which was not. *Francis*, pp. 1, 421, 479. So as to obtaining credit by fraud other than false pretences, under s. 13, p. 262: *Walford, Law J.*, Feb. 23, 1907: *C. C. R.* (board, lodging, &c.). It was doubtful whether pretences made subsequently to the one charged were admissible; but it seems, both on authority (*Fuidge, L. & C.* 390 (1864), p. 161; 33 *L. J. M. C.* 74; and *Holt*, above, explained in *Smith*, p. 82) and on principle that they are not, *unless both are connected*, on the ground that it is possible the guilty intention may not have arisen until after the acts upon which the charge is founded.

In *Richardson*, p. 77, the prisoner was indicted for embezzlement; three acts of embezzlement were charged in the indictment. It appeared that the prisoner's duty was to make various payments on account of his employers, and to keep weekly accounts of the money so expended. The sums so expended were correctly entered, but in casting up the items at the end of each week the totals were made to exceed the real amount, by sums varying from 1*l.* to 3*l.* The prisoner, in accounting with his master, took credit for the larger sums. For the prosecution, in order to show that this was not the result of innocent mistake on the part of the prisoner, evidence was tendered that in numerous weeks, both before and after that charged in the indictment, similar mistakes, always in favour of the prisoner, had been made. This evidence was objected to, but Williams J. ruled that it was admissible to counteract an obvious defence on the part of the prisoner, and he said that Pollock C.B. entirely agreed with him on the point. So also where the prisoner had to account weekly, and in the indictment he was charged with embezzling the gross weekly amounts, evidence was admitted of the separate items making up the gross amounts, partly on the ground that the fact of having omitted to account for the separate items would go to show that the not accounting was not mere accident. *Balls, L. R.*, 1 *C. C. R.* 328; 40 *L. J. M. C.* 148 (1871), p. 389. In *Stephens*, 16 *Cox C. C.* 387 (1888), C. C. R. p. 389, there were three counts for embezzlement; on the third there was an acquittal, and it was held that the jury on *any* one count might consider the evidence given on either of the others. Where, however, on a charge of arson, "the case turning on identity," there was some evidence that the prisoner had been seen going away from the burning rick, evidence to show that he and his wife had on a previous occasion been seen laughing at another fire on the same premises, and hindering a person from throwing water on it, was refused by Willes J. on the ground apparently that the conduct sought to be proved in reference to the first case did not tend to explain what was alleged to have

occurred in the second. *Harris*, 4 *F. & F.* 342 (1864); but cf. *Grant*, p. 247. In *Gray*, 4 *F. & F.* 1102 (1866), evidence of other claims by the prisoner on other insurance companies in respect of fires was admitted by Willes J. to show that the fire in question was not the result of accident.

Evidence of character of the prisoner.] See p. 78. The general rule is that a prisoner called on his own behalf under the Criminal Evidence Act, p. 829, cannot be asked any question tending to show that he is of bad character; the exceptions are enumerated, s. 1 (*f*), *ib.* The theory, at any rate, on which general evidence of *good* character on behalf of a prisoner is admitted, and the limits within which it must be confined, are settled at common law by the case of *Rowton*, *L. & C.* 520: 34 *L. J. M. C.* 57, p. 123 (1865)—where evidence of prisoner's good character having been given, the prosecution called a witness who, being asked, "What is the defendant's general character for decency and morality of conduct?" replied, "I know nothing of the neighbourhood's opinion, because I was only a boy at [his] school when I knew him; but my own opinion and the opinion of my brothers, who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality"), and are thus stated in the judgment of Cockburn C.J.: "It is necessary to consider what is the meaning of evidence of character. Does it mean evidence of general reputation, or evidence of disposition? I am of opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged; but no one has ever heard the question, What is the tendency and disposition of the prisoner's mind? put directly. The only way of getting at it is by giving evidence of his general character, founded on his general reputation in the neighbourhood in which he lives. That, in my opinion, is the sense in which the word 'character' is to be taken when evidence of character is spoken of. . . . The allowing evidence of good character has arisen from the fairness of our laws, and is an anomalous exception to the general rule. It is quite true that evidence of character is most cogent when it is preceded by a statement showing that the witness has had opportunities of acquiring information upon the subject beyond what the man's neighbours in general would have; and in practice the admission of such statements is often carried beyond the letter of the law in favour of the prisoner. It is, moreover, most essential that a witness who comes forward to give a man a good character should himself have a good opinion of him, for otherwise he would only be deceiving the jury; and so the strict rule is often exceeded. But when we consider what, in the strict interpretation of the law, is the limit of such evidence, in my judgment it must be restricted to the man's general reputation, and must not extend to the individual opinion of the witness. . . . Suppose a witness is called who says that he knows nothing of the general character of the accused, but that he has abundant opportunities of forming an individual opinion as to his honesty, or the particular moral quality that may be in question in the particular case. Surely if such evidence were objected to it would be inadmissible . . . within what limits must the rebutting evidence be confined [p. 123]? I think that that evidence must be of the same character and confined within the same limits." The conviction was quashed, by eleven to two. This view is criticised by Erle C.J. and very strongly by Willes J.; by *T.* s. 350-1 (see also *Best*, ss. 260-2), and by Stephen (*Dig. Ev.*, note 25), who says, "One consequence of the view taken in" *Rowton* "is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his

crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and, according to *Rowton*, the reputation is the important matter. The case is seldom, if ever, acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction."

Where the prisoner gives evidence of good character, and has been previously convicted, this fact may be given in evidence in reply in certain cases; see 24–5 V. 96, 116 (larceny), and 24–5 V. 99, 37, p. 343 (coinage offences). Cf. 61 2 V. 36, 1 (*f*) (ii.), p. 830.

It was held upon 6–7 W. 4, 111, that if a prisoner's counsel elicited, *on cross-examination*, from the witnesses for the prosecution, that the prisoner has borne a good character, a previous conviction might be put in evidence against him, in like manner as if witnesses to his character had been called. *Per* Parke B., *Gadbury*, 8 *C. & P.* 676 (1838). It was "giving evidence" within the proviso in s. 9 (repealed) of 14–15 V. 19; *Shrimpton*, 2 *Den. C. C. R.* 319; 21 *L. J. M. C.* 37 (1851).

"It is not usual to cross-examine witnesses to character, except you have some definite charge to which to cross-examine them." *Per* Alderson B., *Hodgkiss*, 7 *C. & P.* 298 (1836); cf. p. 119.

As to evidence of prisoner's character under 24–5 V. 96, 104, p. 224, see *Tuberfield, ib.*; cf. p. 489. By s. 15 of 34–5 V. 112 (Prevention of Crimes Act, 1871) amended by 54–5 V. 69, 7, in proving the intent of a rogue and vagabond, under 5 G. 4, 83 amended by 36–7 V. 38, to commit a felony it is not necessary to show any particular acts: the intent may be gathered from the circumstances and the known character of the prisoner.

Whether, when a prisoner gives evidence that he is or has been in regular employment (or the like) this is giving evidence of "his own good character" under s. 1 (*f*) (ii.), p. 830, and so lets in a previous conviction, may be doubted, but this view has been sometimes taken in practice. See further, as to prisoner-witness, below. As to prisoner suborning witnesses, see *Watt*, p. 78.

Previous conviction of defendant.] As to highway cases, see pp. 3, 501. In an indictment under 34–5 V. 112, 7, the previous conviction must be proved by the prosecution and therefore disclosed to the jury. *Penfold and Edwards*, 20 *Cox C. C.* 161 (1902), C. C. R., overruling *Brown*, 65 *J. P.* 136 (1901). See pp. 161, 190.

If evidence of a previous conviction has been wrongly admitted, the conviction must be quashed. *Charnock* v. *Merchant*, 19 *Cox C. C.* 443 (1900).

Evidence of character of witness (other than prisoner).] Evidence is also, in all cases, admissible to show that an opponent witness bears such a character and reputation that he is unworthy of belief. But it is not allowed (with the exception of facts which go to prove that the witness is not an impartial one, p. 88) to prove particular collateral facts in order to discredit him. *Watson*, p. 1 (*Stark.* 149), *Layer*, pp. 3, 9. The proposed questions being, "Have you the means of knowing what the general character of this witness was? From your knowledge of his general character, would you believe him on his oath?" *Mawson* v. *Hartsink*, 4 *Esp.* 102 (1802); followed in *Brown*, *L. R.* 1 *C. C. R.* 70; 36 *L. J. M. C.* 59 (1887); L. Ellenborough said, "The question might be put in that way, as it would then be open for the opposite side to ask as to the means of knowing the witness's character, so that it could be judged of what degree of credit was due to

the assertion, from the means that the witness then called had," &c. There is, however, another exception to the above rule—28–9 V. 18, 6, p. 137. The old common law rule was that the person who calls a witness is always supposed to put him forward as a person worthy of belief; he cannot, therefore, if his testimony should turn out unfavourably, give *general* evidence to discredit him; cf. *Bull. N. P.* 297, and *T.* ss. 1404, 1426; but how far now a party may contradict his own witness, see p. 89. And if the character of any witness for credibility be impeached, either by direct evidence or upon cross-examination, his testimony may be supported by general evidence that his character is such that he is worthy of credit.

These are the only cases in which evidence of character can be given *in chief*; as to the cross-examination of witnesses upon their character, see p. 119.

Character of prisoner-witness.]—It seems clear that such cross-examination or evidence to show that a prisoner-witness is *unworthy of belief* is inadmissible (except as under 61–2 V. 36, 1 (*f*), or (*e*), p. 830), for that would tend "to show that he . . . is of bad character." Since the passing of that Act, the following noteworthy cases have occurred: Cross-examination tending to show consent in rape lets in cross-examination under s. 1 (*f*); *Fisher*, see 34 *L. J.* newspaper (1899), p. 100; *Holmes* (1899), the same when prisoner deposes that prosecutrix is "a drunken wastrel"—both *per* Day J.; *T.* s. 1372c, *n.*; co-prisoner incriminated by other's evidence may cross-examine latter, *Hudwen* (1902), 1 *K. B.* 882, C. C. R.; prisoner's answer in cross-examination as to prosecutor's evidence, "it is a lie," and "he is a liar," does not let in such cross-examination—it is only "an emphatic denial," *Rouse* (1904), 1 *K. B.* 882, C. C. R.; prisoner's evidence that he was acting in the matter under the instructions of the detective, called for the crown, *i.e.* as an informer, does not let in such cross-examination, but if prisoner's counsel allows a question to be put as to a previous conviction and answered, without objection, a conviction will not be set aside on that account, *Bridgwater* (1905), 1 *K. B.* 131, C. C. R.; but evidence that one of the witnesses for the crown had committed the crime charged on the prisoner, although it was only a necessary part of the defence, clearly lets in such questions. *Per* Darling J., *Marshall*, 63 *J. P.* 36 (1899).

Evidence to contradict or reinstate a witness.] Any fact material to the issue which has been proved by one side may be contradicted by the other. The only fact material to the issue, with reference to which there is any peculiarity in this respect, is the credibility of a witness. But whether it be to contradict the direct evidence which impeaches the witness's credit, or to contradict the suggestions thrown out by the line of cross-examination, it is clear that, in order to reinstate the witness, no evidence can be used but *general* evidence that he is worthy of credit, in the same way as he may be impeached by *general* evidence that he is not so. *T.* ss. 1470A, 1476.

In a precisely similar manner if a witness, on cross-examination, refuses to admit collateral facts which damage his case or his credit (p. 119), he cannot be contradicted on these points, if they are not otherwise material to the issue. *Spenceley* v. *De Willott*, 7 *East*, 108 (1806), p. 697; *Yewin*, 2 *Campb.* 639 (1811); except under 28–9 V. 18, 6, p. 137. In *Yewin*, when the prisoner's apprentice denied that he had been charged with robbing the prisoner, and that he had said he would be revenged and "fix" him in gaol, the judge declined to allow the fact of the charge to be proved, but allowed the words imputed to be proved, for they were material to prisoner's guilt or innocence. *T.* ss. 1435–6. And after much discussion, the same rule now

holds with respect to the evidence of the woman in charges of rape; and it has been held, on the one hand, that the prosecutrix cannot be contradicted as to whether she has not previously had connection with a man other than the prisoner: *Holmes*, *L. R.* 1 *C. C. R.* 334; 41 *L. J. M. C.* 12; 12 *Cox C. C.* 137 (1871); and, on the other hand, that she may be contradicted as to whether she has previously had connection with the prisoner himself, because that is material to the issue: *Riley*, 18 *Q. B. D.* 481; 56 *L. J. M. C.* 52; 16 *Cox C. C.* 191 (1887), C. C. R.; see pp. 730–1, 256.

The two last-mentioned rules are founded on the necessity which exists of putting some limit on the extent to which an inquiry may be carried, without which proceedings might be spun out to an interminable length. See, however, *Whelan*, p. 89, and as to rebutting evidence, p. 123.

Evidence that a witness is not impartial.] But such immunity, perhaps, does not attach where the fact sought to be proved is that the witness does not stand indifferent between the parties. See *T.* s. 1442; and *Yewin*, above. So also (it seems) it may be proved that a witness has been bribed to give his evidence, *Langhorn*, 7 *How. St. Tr.* 446 (1679), or that a witness has endeavoured to suborn others, *Lord Stafford*, *ib.* 1401, 1458 (1680), which case and *Yewin* were recognised in *Att.-Gen.* v. *Hitchcock*, 1 *Ex. R.* 91; 11 *Jur.* 478 (1847), p. 116. And the same law was assumed by the judges (provided that the alleged corrupter has had an opportunity of denying the allegation) in the *Queen's case*, p. 2, at 311. But the question must be one which goes directly to prove improper conduct or partiality that might be directly proved, and not merely that such conduct has been suggested to the witness. Thus, in *Att.-Gen.* v. *Hitchcock*, a revenue case, the question put to the witness was, whether he had not said that the officers of the Crown had *offered* [not given] him a bribe to give his testimony, which he denied; and on this the Court of Exchequer held that he could not be contradicted. Upon a trial for murder a witness identified the prisoner and was cross-examined as to whether he had not stated that the prisoner was not the murderer. This he denied. The prisoner called A. and B. to prove the witness had so said. The prosecution were allowed to call C. and D. to contradict A. and B. and support the witness. In the same case for the defence E. stated that witness, who identified the prisoner, had told him he could not recognise the prisoner, as he was masked; but this conversation with E., when put to him, he denied; on cross-examination E. said he had reported this conversation to his superior officers, but the prosecution were not allowed to call the superior officers to say this was untrue. May C.J. seemed to regard the question of admissibility as one for the discretion of the judge, cf. *T.* ss. 1399, 1445; but the proper test is whether the evidence is material or irrelevant. *Whelan*, 14 *Cox C. C.* 595; 8 *L. R. Ir.* 314 (1881), p. 123; *Shaw*, 16 *Cox C. C.* 503 (1888). Cf. p. 48 and p. 78.

The important proviso laid down in the *Queen's case* above, applies to acts as well as to statements; if the discovery of the corruption is after the cross-examination, the witness must be recalled.

Evidence to contradict one's own witness.] See p. 87, and *T.* s. 1404. It has already been said, that a party who calls a witness cannot bring general evidence to discredit him; but if a witness state material facts which make against the party who calls him, other witnesses may be called to prove the facts were otherwise. A doubt used to exist whether one could prove that a witness called by him, who has given evidence against him, has made at other times a statement contrary to that made by him at the trial; but now 28–9 V. 18, 3, provides: "a party producing a witness . . . may in case the witness shall, in the opinion of the judge, prove *adverse*, contradict him

by other evidence, or by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked, whether or not he has made such statement." So in a case of rape, where in cross-examination a witness for the prosecution gave particulars of the girl's complaint to her inconsistent with the instructions of counsel for the prosecution, and the latter proposed to ask her in re-examination whether she had not given to the girl's mother a different account of the girl's complaint, viz. that the prisoner was in fact guilty of rape (and to ask the mother whether she did not give her such an account of the complaint), Day J. (after consulting Cave J.) came to the conclusion that the case was within the section, and allowed the questions. *Little*, 14 *Cox C. C.* 319 (1883). See p. 117.

Evidence of former statements to confirm one's own witness.] At one time it seems to have been thought (and occasionally acted on) that a witness might be corroborated by proof of former statements made by that witness. See *Luttrell* v. *Reynell*, 1 *Mod.* 282 (1671); *Freind*, 13 *How. St. Tr.* 32 (1696); *Harrison*, 12 *How. St. Tr.* 860-1 (1692). See also 4 *Hawk, P. C.*, Bk. 2, ch. 46, s. 48. Buller J. originally took this view, *B. N. P.* 294, but in *Parker*, 3 *Dougl.* 242 (1783), the same learned judge said that the case of *Luttrell* v. *Reynell*, and the passage in *Hawkins* were not now law. Cf. *T.* s. 1476 *n.* *Parker* was a prosecution for perjury tried before Eyre B. For the prosecution the depositions of a deceased person were given in evidence, and upon the cross-examination of one of the prosecutor's witnesses, it was proposed to inquire into certain declarations of the deceased person, not on oath, for the purpose of corroborating some facts in the deposition material to the prisoner. Eyre B. rejected the evidence of these declarations, and the Court of King's Bench held the rejection proper. A case (according to 2 *Phill. Ev.* 523 *n.*, 10*th ed.*)—perhaps *Parker*—was referred to by Lord Redesdale in the *Berkeley Peerage case* (p. 26), where he said he always understood that for the purpose of impugning testimony, a previous declaration might be inquired into, but not for that of confirming it. Lord Eldon also concurred in that opinion. In conformity with these later decisions, the rule is laid down by Mr. Phillipps, with this exception, that where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship, in that case, perhaps, in order to repel such an imputation, it might be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. *Ib.*

As to evidence of complaints made at the time in the case of rape, see *Lillyman*, pp. 24, 730.

ATTENDANCE OF WITNESSES.

Mode of compelling the attendance of witnesses—by recognisance.] There are two modes of compelling the attendance of witnesses: first, by recognisance; secondly, by subpœna.

The power to bind witnesses by recognisance to appear and give evidence is now regulated by 11–12 V. 42, 20, by which power is given in all cases, whether of felony or misdemeanor, to bind by recognisance the prosecutor and witnesses to appear and give evidence at the next court of oyer and terminer and general gaol delivery, or the next court of quarter sessions, as the case may be. The same power is exercised by coroners under 50–1 V. 71, 5, in cases of murder and manslaughter. So also witnesses for the defence may now be bound over to appear: 30–1 V. 35, 3, 4; see p. 827.

When a trial is postponed, the presiding judge, exercising the ordinary functions of a justice of the peace, usually binds over the prosecutor and witnesses to appear and give evidence at the next assizes or the next quarter sessions, as the case may be.

If a witness on his examination before a magistrate refuse to be bound over, he may, by the express provisions of 11–12 V. 42, 20, be committed. It seems doubtful whether, *in any case*, a witness can be compelled to find sureties for his or her appearance: certainly not, until he has refused to appear at the trial. *Per* L. Denman, *Evans* v. *Rees*, 12 *A. & E.* 55 (1840); cf. *per* Graham B. 1827, 1 *Stark. Ev.* 82, *2nd ed.* It was once thought that an infant was bound to find sureties in such a case and could be committed in default, on the ground that his own recognisances would be invalid; but it has been since held that infancy is no ground for discharging a forfeited recognisance to appear at the assizes and prosecute for felony. *Ex parte Williams*, 13 *Price*, 673 (1824). In *Smith*, 17 *Cox C. C.* 601 (1892), however, Day J. held that the recognizances of an infant witness could not be estreated, "that being a matter of contract . . . between him and the crown," and that the proper course, therefore, was to subpœna him; if he disobeys, he may be attached for contempt, and he allowed the costs of the subpœna. It is still the practice generally not to take the recognisance of a married woman, but that of her husband, or some person willing to be bound for her, if any such there be; but if no such person be at hand, she herself is frequently bound; and there seems no reason why her recognisance should not be binding where she has separate property, especially since the Married Women's Property Act, 1882.

Formerly it was the practice to estreat indiscriminately all recognisances for the appearance of the prosecutor or witnesses when the witnesses did not appear; but now, by 7 G. 4, 64, 31, it is enacted, that, "in every case where any person bound by recognisance for his or her appearance, or for whose appearance any other person shall be so bound to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy, shall therein make default, the officer of the court by whom the estreats are made out shall, and is hereby required to prepare a list in writing specifying the name of every person so making default, and the nature of the offence in

respect of which every such person, or his or her surety was so bound, together with the residence, trade, profession, or calling of every such person and surety, and shall in such list distinguish the principal from the sureties, and shall state the cause, if known, why each such person has not appeared; and whether by reason of the non-appearance of such person the ends of justice have been defeated or delayed; and every such officer shall, and is hereby required, before any such recognisance shall be estreated, to lay such list, if at a court of oyer and terminer and gaol delivery in any county besides Middlesex and London, or at a court of great sessions, or at any one of the superior courts of the counties palatine, before one of the justices of those courts respectively; if at a court wherein a recorder or other corporate officer is the judge or one of the judges, before such recorder or other corporate officer; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court, who are respectively authorised and required to examine such list, and to make such order touching the estreating or putting in process of any such recognisance as shall appear to them respectively to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognisance without the written order of the justice, recorder, corporate officer, chairman, or justices of the peace before whom respectively such list shall have been laid."

[1] *Mode of compelling attendance of witnesses—subpœna for prosecution.*] This process is issued by the clerk of the peace at sessions, or by the clerk of the assize at the assizes, or it may be issued from the crown office. And the last is the most effectual mode, for not only, as will be seen below, p. 95, are the proceedings upon it for contempt more speedy and effective, but it is itself more effectual, as it may be served anywhere in the United Kingdom.

In order to render the process to compel attendance of witnesses more effectual, it was provided by 45 G. 3, 92, 3, that the service of a subpœna (not from the crown office) on a witness in any part of the United Kingdom, for his appearance on a criminal prosecution in any other part, shall be as effectual as if it had been in that part where he is required to appear. It has been held on this statute, that by the word "part" in this section is signified England or Scotland or Ireland. *Brownell*, 1 *A. & E.* 598; 3 *L. J. M. C.* 118 (1834), p. 95. It does not seem, therefore, that any increased validity, except as between the three kingdoms, is thereby given to writs of subpœna issued from courts of limited jurisdiction, which at common law are only available within such jurisdiction.

Where there are writings or documents in the possession of a witness, which it is desired that he should produce on the trial, a clause of *duces tecum*, directing the witness to bring with him into court the documents in question, is added to the writ of subpœna. If the documents are in the possession of the party or his attorney, a notice to produce must be given. Where the documents are in the possession of the prosecutor, and the prisoner is desirous of having them produced upon the trial, the safest mode of proceeding appears to be to serve the prosecutor with a *subpœna duces tecum*, and not to rely upon a notice to produce, since it may be a question whether a prosecutor is so far a party to the proceeding as to be affected by a notice to produce. See p. 9, and foll.

The *subpœna duces tecum* is compulsory on the witness, and though it is a question for the decision of the presiding judge, whether the witness in court should produce the documents required, yet he ought to be prepared to produce them, if the judge be of that opinion. *Amey* v. *Long*, 9 *East*, 473 (1808); *Greenway*, 7 *Q. B.* 126 (1845).

A solicitor served with a *subpœna duces tecum* is bound to produce a

document in respect of which the prisoner is charged, although such document has been deposited with him by the prisoner on another occasion. *Brown*, 9 *Cox C. C.* 281 (1862); see *Cox* and *Railton*, p. 130.

A person subpœnaed merely to produce a document need not be sworn, the other side cannot insist on it; *Perry* v. *Gibson*, 1 *A. & E.* 48 (1834); and if sworn by mistake, is not liable to be cross-examined by the opposite party; *Rush* v. *Smyth*, 4 *Tyrw.* 675; 1 *Cr. M. & R.* 94 (1834). See further, p. 119.

It is said that one subpœna ought not to include more than four persons. *Doe* v. *Andrews*, *Cowp.* 845 (1778); *Tidd's Pr.* 805, p. 129.

A subpœna requiring the party to attend a trial on the commission day extends to the whole assizes, which, by fiction of law, are supposed to last but one day. *Scholes* v. *Hinton*, 10 *M. & W.* 15 (1842).

If the person whose attendance is required be a married woman, the service (perhaps) should be upon her personally. *Goodwin* v. *West*, *Cro. Car.* 522; 1 *Jones*, 430 (1638); 2 *Phill. Ev.* 428, 10*th ed.*

The witness must be personally served, by leaving with him a copy of the *subpœna*, or a *ticket* which contains the substance of the writ. 2 *Phill. Ev.* 427, 10*th ed.*; 3 *Russ. Cri.* 637; 1 *Stark. Ev.* 77, 2*nd ed.*; *Maddison* v. *Shore*, 5 *Mod.* 355 (1697). Where a copy only is served, the original must be shown to the witness whether he require it or not, otherwise he cannot be attached. *Wadsworth* v. *Marshall*, 3 *Tyrw.* 218; 1 *C. & M.* 87 (1832); cf. *Mullett* v. *Hunt*, p. 95. It must be served a reasonable time before the day of trial. Service upon a witness at two in the afternoon, in the City, requiring him to attend the sittings at Westminster in the course of the same day, has been held to be too short. *Hammond* v. *Stewart*, 1 *Str.* 510 (1722); see p. 11.

In a criminal case a person who is present in court, when called as a witness, is bound to be sworn and to give his evidence, although he has not been subpœnaed. An indictment for stopping up a way is a criminal case for this purpose. *Per* Littledale J., *Sadler*, 4 *C. & P.* 218 (1830). So a witness being sworn, and having in court a document in his possession. *Dwyer* v. *Collins*, pp. 9, 10.

Mode of compelling the attendance of witnesses—by subpœna for prisoner.] In cases of misdemeanor, the defendant was always entitled to a writ of subpœna, but it was otherwise in capital cases, in which the prisoner is not, at common law, entitled to call witnesses at all. In practice it had become common to allow witnesses for the prisoner to be heard in capital cases, about Sir E. Coke's time (see 3 *Inst.* 79); but they did not give their testimony on oath, and could not be compelled to give their attendance. By 1 Anne, st. 2, c. 9, all witnesses on behalf of a prisoner, for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury. Cf. 4 *Black. Comm.* 359–60. And since that statute the process of subpœna is allowed to prisoners in case of felony." 4 *Hawk. P. C.* Bk. 2, ch. 46, s. 172. A witness who refuses, after having been subpœnaed to attend, to give evidence for a prisoner, is liable to an attachment in the same manner as if subpœnaed for the prosecution. 1 *Stark. Ev.* 86, 3*rd ed.*; cf. p. 95.

Inspection of documents.] Where letters necessary for the defence had been seized under a search-warrant, Keating J. made an order in favour of the prisoner for an inspection of them (but not for copies). *Collucci*, 3 *F. & F.* 103 (1861).

Mode of compelling the attendance of witnesses—habeas corpus ad

testificandum.] Where a person required as a witness is in custody, or under the control of some third person, as a sailor on board of a ship of war, so as to prevent his attendance, the mode of compelling is to issue a *habeas corpus ad testificandum* to the person in authority. For this purpose application must be made to the court before which the prisoner is to be tried, or to a judge upon an affidavit stating that the party is a material witness and willing to attend. *Roddam, Cowp.* 672 (1777), where the writ was directed to the commanding officer; L. Mansfield said there must first be an affidavit that the men (who were sailors) were willing to attend on subpœna, they were not "to be brought up as prisoners against their consent"; 2 *Phill. Ev.* 429, 10*th ed.*; 1 *Stark. Ev.* 81, 3*rd ed.* The court will then, if they think fit, make a rule, or the judge will grant his *fiat* for a writ of *habeas corpus*; *Burbage*, 3 *Burr.* 1440 (1763), where it was refused for a man in prison; 2 *Phill. Ev. ib.*; which is then sued out, signed, and sealed. *Tidd's Prac.* 9*th ed.* 809. In *Freind*, 13 *St. Tr.* 3 (1696), Holt L.C.J. on the application of the prisoner, ordered his clerk to prepare "a warrant for *habeas corpus*" to the keeper of the Gatehouse to bring up a prisoner at once to give evidence.

Formerly, it was doubted whether persons in custody could be brought up as witnesses by writ of *habeas corpus*, to give evidence before any other courts than those at Westminster; but by 43 G. 3, 140, a judge may, at his discretion, award a writ of *habeas corpus ad testificandum*, for bringing any prisoner detained in any gaol in England before a court martial, or before commissioners of bankruptcy, commissioners for auditing the public accounts, or other commissioners, acting by virtue of any royal commission or warrant.

By 44 G. 3, 102, the judges have power to award writs of *habeas corpus* for bringing prisoners, detained in gaol, before any sitting at *nisi prius*, or before any court of record in the United Kingdom, to be there examined as witnesses, or before any grand, petit, or other jury, in any cause or matter, civil or criminal.

The application under this statute ought to be to a judge out of court. *Gordon*, 2 *M. & S.* 582 (1814).

The authority with whom the writ is left will be bound to bring up the body, on being paid his reasonable expenses. 2 *Phill. Ev.*; 1 *Stark. Ev.*, as above. If the witness be a prisoner of war, he cannot be brought up without an order from the Secretary of State, but he may be examined on interrogatories, *Furly* v. *Newnham*, 2 *Doug.* 419 (1780), where the order had been refused.

A witness may be brought up on *habeas corpus* from a lunatic asylum, on an affidavit that he is fit for examination, and not dangerous. *Fennel* v. *Tate*, 5 *Tyrw.* 218; 1 *Cr. M. & R.* 584 (1834).

Mode of compelling the attendance of a witness—by warrant from the Secretary of State or a judge.] It is enacted by 16–17 V. 30, 9, as amended by 61–2 V. 41, 15 (1) and Sched., that any judge of the Queen's Bench (and now, any judge of the High Court) may, if he think fit, "upon application by affidavit, issue a warrant or order under his hand, for bringing up any prisoner or person, confined in any gaol, prison, or place, under any sentence or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal . . . and the person required by any such warrant or order to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner, in all respects, as a prisoner required by any writ of *habeas corpus* awarded by

any of her Majesty's superior courts of law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."

Mode of compelling the attendance of witnesses—consequences of neglect to obey subpœna.] Where a person who has been duly served with a subpœna, and who is able to do so, neglects to appear in obedience to it, he is guilty of contempt of court (*T.* s. 1265) and punishable by attachment, and if taken under the attachment, he may be detained until he has given evidence upon the trial of the prisoner, and may then be set at liberty. *Shilcox* (1793), cited in *Ring*, 8 *T. R.* 585 (1800): attached witness kept in custody more than eight months after giving evidence. The person disobeying is subject to an attachment, although the cause was not called on. *Barrow* v. *Humphreys*, 3 *B. & Ald.* 598 (1820). And he is also liable to an action on the case if the party summoning him has to withdraw his case, or, *semble*, loses it, through his non-attendance. *Pearson* v. *Iles*, 2 *Doug.* 556 (1781); and *Mullett* v. *Hunt*, below. It is not necessary, in order to make a witness liable for disobeying a subpœna, that the jury should have been sworn. *Mullett* v. *Hunt*, 3 *Tyrw.* 875; 1 *Cr. & M.* 752 (1833), p. 93. Neither does it seems requisite that the party should have been called on his subpœna, particularly if he did not attend the court at all. *Dixon* v. *Lee*, 5 *Tyrw.* 180; 1 *Cr. M. & R.* 645 (1834), p. 96; *Stretch*, 3 *A. & E.* 503 (1835). But in order to ground a motion for an attachment, the affidavit must state that the party was a material witness. *Tinley* v. *Porter*, 2 *M. & W.* 822 (1837); and if it appear, by the notes of the judge at the trial or upon affidavit, that the testimony of the witness could not have been material, the rule for an attachment will not be granted. *Dicas* v. *Lawson*, 5 *Tyrw.* 235; 1 *Cr. M. & R.* 934 (1835).

If the subpœna issued out of the crown office, the Court of Queen's Bench will, upon application, grant the attachment. *Ring*, above. When the process is not issued out of the crown office, but under 45 G. 3, 92, 3, 4 (p. 92), punishment for default is regulated by that statute, and application must be made to the court out of which the process issued; disobedience to a subpœna issued by a court of quarter sessions is not a contempt of the Court of King's Bench. *Brownell*, p. 92. Quarter sessions have no power of proceeding against a person by attachment. 3 *Hawk. P. C.* Bk. 2, ch. 8, s. 33, citing *Bartlett*, 2 *Sess. Ca.* 291 (1735), where the King's Bench said "they would not determine how it would have been if they had committed . . . but the ordinary and proper method is by indictment" (for disobedience to an order). Cf. *Bac. Abridg. Courts, E.;* this seems to apply to default on a subpœna. But quarter sessions and inferior courts generally may fine an individual for a contempt [presumably, therefore, for not obeying a subpœna], in like manner as it is their constant practice to fine jurors who do not attend when summoned. See *Clement*, 4 *B. & Ald.* at 233; cf. 227 (1821). It has been held, that if a witness refuses to give evidence before a grand jury at quarter sessions, he may be fined, and committed until the fine be paid for "a great contempt" (*per* Holt C.J.). *Lord Preston*, 1 *Salk.* 278 (1691), where a peer of Scotland was committed.

Remuneration of witnesses.] At common law there was no mode provided for reimbursing witnesses for their expenses in criminal cases; but by 7 G. 4, 64, the expenses of witnesses in most cases of misdemeanor, and all cases of felony, are now allowed; as to the expenses of witnesses for the defence, see p. 59. See also 29–30 V. 52, as to expenses before magistrates, pp. 205–6. The various statutory provisions which empower courts of justice to grant costs to witnesses in criminal cases will be found under *Costs*, p. 204.

Witness bound to answer without tender of expenses.] As to subpœnas, under 45 G. 3, 92, p. 92, and as limited by *Brownell, ib.*, the witness is not punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpœna, for defraying the expenses of coming, attending, and returning. It has, indeed, been doubted whether in other criminal cases a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a subpœna, and the doubt is founded upon the provision of the above statute. 1 *Chitty, Cr. Law*, 613. "But the better opinion seems to be, that witnesses making default on criminal prosecutions are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpœna, although the court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey." 3 *Russ. Cri.* 641 (Bk. 5, ch. 5, s. 5); "the attendance of the witness being in the nature of a public duty" (in criminal cases), *Short* and *Mellor, Crown Office Practice* (1890), p. 42. "It is the common practice in criminal cases, for the court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid." 1 *Stark. Ev.* 83 (*a*), 2*nd ed.* And, accordingly, in 1820, Bayley J. ruled that an unwilling witness, who required to be paid before he gave evidence, had no right to demand such payment; Scarlett said, "It is not done in criminal cases." 3 *Russ. Cri. ib.* So on an indictment which had been removed into the Queen's Bench by *certiorari*, a witness for the defendant stated, before he was examined, that at the time he was served with the subpœna no money was paid him, and asked the judge to order the defendant to pay his expenses before he was examined. Park J. having conferred with Garrow B. said, we "are of opinion that I have no authority in a criminal case to order a defendant to pay a witness his expenses, though he has been subpœnaed by such defendant"; nor is the case "altered by the indictment having been removed by *certiorari*, and coming here as a civil cause." *Cooke*, 1 *C. & P.* 321 (1824). In *Cousens* (1843), 3 *Russ. Cri. ib.*, Wightman J. directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpœna duces tecum*, to go before the grand jury, although he objected on the ground that his expenses had not been paid. But the court might refuse to grant an attachment in the case of a poor witness, if his expenses were not paid; *Dixon* v. *Lee* (p. 95), where, in the circumstances, the court thought the conduct-money too little, though on receiving it, the witness made no complaint.

Protection of witnesses from arrest.] A witness attending to give evidence, whether subpœnaed or only having consented to attend, *Smith* v. *Stuart*, 3 *East*, 89 (1802), is protected from civil arrest, *eundo morando et redeundo*; and so are all persons having "relation to a suit which called for their attendance" (including bail and barristers on circuit), "provided they came *bonâ fide*." *Meekins* v. *Smith*, 1 *H. Bl.* 636 (1791). "A reasonable time is allowed to the witness for going and returning, and in making this allowance the courts are disposed to be liberal." 2 *Phil. Ev.* 428, 10*th ed.*, citing *Lightfoot* v. *Cameron*, 2 *W. Bl.* 1113 (1777), and *Strong* v. *Dickenson*, 1 *M. & W.* 488 (1836). A witness residing in London is not protected from arrest between the time of the service of the subpœna and the day appointed for the examination in London; but a witness coming to London to be examined, is protected during the whole time he remains in town, *bonâ fide*, for the purpose of giving his testimony. *Gibbs* v. *Phillipson*, 1 *Russ. & M.* 19 (1829). A witness subpœnaed in a criminal prosecution, tried in the King's Bench, who was committed for a contempt of court in striking the defendant, has the same privilege from arrest in returning home after his

imprisonment has expired, as he would have had in returning home from the court if he had not been so committed. *Wigley*, 7 *C. & P.* 4 (1835). If a witness is improperly arrested, the court out of which the subpœna issued, or the judge of the court in which the case has been or is to be tried, or a judge at chambers on *habeas corpus*, will order him to be discharged; cf. *ex parte Lyne*, 3 *Stark. N. P.* 132 (1822), witness not privileged from arrest by his bail. *T.* s. 1337. The protection does not extend to arrest on *criminal* process. *T.* s. 1333: *In re Douglas*, 3 *Q. B.* 825; 12 *L. J. Q. B.* 49 (1842).

Intimidation, &c., of witnesses in a court of justice.] Any interference or tampering with a witness or an intending witness is a contempt of the court. 1 *Hawk. P. C.* Bk. 1, ch. 21, s. 15; 4 *Bl. Comm.* 126. See *Perversion of Justice*, p. 697.

Intimidating other witnesses.] By 55-6 V. 64, 2. "Every person . . . who threatens or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure any person for having given evidence upon any inquiry [which includes a royal commission, a committee of either House of Parliament or any statutory authority, but not a court of justice, s. 1], or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable upon conviction thereof to a maximum penalty of 100*l.* or to a maximum imprisonment of three months," and the court may *in addition* award costs and compensation to the person aggrieved, s. 4. Cf. p. 198. The accused has a right to be tried by a jury, s. 3.

INCOMPETENCY OF WITNESSES.

It is for the court to decide upon the competency of witnesses, see *Hill* (p. 100), at 263. "Whether there be *any* evidence, is a question for the judge. Whether *sufficient* evidence is for the jury," *per* Buller J., *The Comp. of Carpenters* v. *Hayward*, *Dougl.* 375 (1780), where the judge had held a witness incompetent (for interest); *B. N. P.* 297; *T.* ss. 2, 23A.

Infant.] As far back as Hale (1 *P. C.* 634–5), who died in 1676, it was asserted that, in cases of rape, children of tender years ought to be heard unsworn, "for *in many cases* there may be reason to admit such witnesses to be heard, in cases especially of this nature, which yet the jury is not bound to believe." When this passage was cited in *Omychund* v. *Barker*, 1 *Atk.* 29 (1744), pp. 101, 102, two judges said it had been ruled that a child's evidence not on oath could not be received.

Of late years no particular age is required in practice to render the evidence of a child admissible. "The competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess." 1 *Phill. Ev.* 10*th ed.* 8. In *Brasier*, 1 *East, P. C.* 443; 1 *Leach*, 199 (1779), though the two reports do not quite agree, it seems that Blackstone, Nares, Eyre, and Buller JJ. were of opinion that the evidence of a child under seven years of age would have been admissible, if she had appeared on strict examination to be capable of understanding the nature and consequences of an oath or of distinguishing between good and evil. But others of the judges, particularly Gould and Willes JJ., held that the presumption of law, of want of discretion under seven, was conclusive. Subsequently all the judges agreed that a child of any age, if capable of distinguishing between good and evil, might be examined upon oath. It was held, therefore, that as the child was not produced, and her complaint to her mother had been admitted, the conviction was wrong, and so *Tucker* (1808) cited *Phill. Ev. ib.* 10. According to the rule now universally established, "the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also in part upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath or of the consequences of a falsehood." 1 *Phill. Ev.* 9, 10*th ed.* In a case of murder, where it appeared that a girl eight years old, up to the time of the deceased's death, was totally ignorant of religion, but subsequently she had received some instruction as to the nature and obligation of an oath with a view to her being examined, but at the trial showed that she had no real understanding on the subject of religion, or a future state, Patteson J. would not allow her to be examined, observing, "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial: and as it appears that previous to the happening of the circumstances, to which this witness comes to speak, she had had no

religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." *Williams*, 7 *C. & P.* 320 (1836). In an early edition of *T. Ev.* these remarks were severely criticised (and *Milton*, *Irish Circ. R.* 16 (1841), cited where religious instruction had been imparted since the commission of the offence, and the child was sworn), but in the last it is observed that (while the better opinion is that a trial ought not to be postponed in order that a child-witness may be instructed in the religious nature of an oath) "the matter is probably one entirely in the discretion of the presiding judge"; s. 1377 *n.* Accordingly, in Ireland it has been held that even on an indictment for murder, an infant might be examined, though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness. *Milton*, above. In *Nicholas*, 2 *C. & K.* 246 (1846), Pollock C.B. refused to put off the trial in order that a child of six years old might receive instruction, but said that he thought there were cases (*e.g.* of older children whose education had been *neglected*) in which it might be done, but not "where the infirmity arises from no neglect, but from the child being too young to have been taught."

Possibly a distinction was drawn between the case where the child was a material witness and that where he or she was not, for "in criminal cases where a person of tender years is a material witness, it is usual for the court to examine the witness as to his competency to take an oath before he goes before the grand jury. And if such a witness be found incompetent, for want of proper instruction, the court will, in its discretion, put off the trial, in order that the party may, in the mean time, receive such instruction as will qualify him to take an oath." 1 *Stark. Ev.* 93, *2nd ed.* (1833); and this was done by Rooke J. in the case of a rape, and approved of by all the judges. *Murphy* (1795), cited under *White*, 1 *Leach*, 430 *n.* (1786), p. 99. "An application to postpone the trial upon this ground ought properly to be made before the child is examined by the grand jury; at all events, before the trial has commenced," for where a judge stopped the case, when it appeared that the prosecutrix, "though an adult and of sufficient intellect, had no idea of a future state of rewards and punishments," and discharged the jury, it was held that an acquittal should have been directed, and a pardon was recommended. 1 *Phill. Ev.* 9, *10th ed.*, and *Wade*, 1 *Moo. C. C.* 86 (1825).

But now in the most essential cases (*i.e.* where the child is the sufferer) the matter is regulated by 48–9 V. 69, 4, p. 723, and 4 E. 7, 15, 15, p. 327, which provide safeguards, where evidence is unsworn, very much like those suggested by Hale (p. 98).

Degree of credit to be given to testimony of infants.] "Yet," says Blackstone (following Hale), "where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion." 4 *Com.* 214; nevertheless "it is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of a child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given." 1 *Phill. Ev.* 11, *10th ed.*, who also observes, "Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much

credit as that of grown persons; what is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive."

Deaf and dumb persons.] It was formerly held that a person deaf and dumb from birth was presumably in contemplation of law an idiot, and, therefore, incapable of guilt; but such presumption may be repelled by evidence of understanding, as in *Steel*, 1 *Lea. C. C.* 452 (1787—deafness). And now no such presumption exists, *per* Wood V.-C. in *Harrod* v. *Harrod*, 1 *Kay & J.* at p. 9 (1854). If it appear that such person has the use of his understanding, he is criminally answerable for his acts, 1 *Hale, P. C.* 34. He is also competent as a witness; thus, where a man deaf and dumb from birth, was produced as a witness, he was allowed to be examined through the medium of his sister, who was sworn "well and truly to interpret to" the witness "the questions and demands made by the court" to him, "and his answers made to them." The sister stated, that for a series of years she and her brother had been enabled to understand one another by means of certain arbitrary signs and motions, which time and necessity had invented between them. She believed that her brother had a perfect knowledge of the tenets of Christianity, and was certain that she could communicate to him notions of the moral and religious nature of an oath, and of the temporal dangers of perjury. *Bartlet*, 1 *Leach*, 408 (1786). So in Scotland, upon a trial for rape, the woman, who was deaf and dumb, but had been instructed by teachers, by means of signs, with regard to the nature of an oath, of a trial, and of the obligation of speaking the truth, was admitted to be examined (after her instructors had spoken to her capacity). *Martin*, 1832, 2 *Alison's Crim. Law of Scotl.* 437; and see *Whitehead*, p. 116.

Idiots and lunatics.] "*Non compos mentis* is of foure sorts:—1 *Ideota*, which from his nativitie, by a perpetuall infirmitie, is *non compos mentis*. 2 Hee that by sicknesse, griefe, or other accident, wholly loseth his memorie and understanding. 3 A lunatique that hath sometime his understanding, and sometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, so long as he hath not understanding. Lastly, hee that by his owne vitious act for a time depriveth himselfe of his memorie and understanding, as he that is drunken." *Co. Litt.* 247*a*. An idiot cannot be received as a witness. *Com. Dig. Testmoigne* (*A.* 1), citing *Co. Litt.* 6*b*. See p. 806.

A lunatic may be a witness, *in lucidis intervallis*. *Comyns. ib.* He must, of course, have been in possession of his intellect at the time of the event to which he testifies, as well as at the time of examination; and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination for the events he has witnessed. 2 *Alison*, as above. With regard to those persons who are afflicted with *monomania*, or an aberration of mind on one particular subject, not touching the matter in question, and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy the extent and influence of such a state of mind. But see *T.* s. 1375.

Where a monomaniac, confined in a lunatic asylum, was accepted as a witness by the judge who satisfied himself that he knew the nature, &c., of an oath, and gave a perfectly rational account of what he had seen, the conviction was unanimously upheld; the judge, assisted by medical testimony, determined upon his examination upon the *voir dire*, to hear him. It is for the jury to determine whether his testimony is affected

by his insanity and what weight is to be attached to it. *Hill*, 2 *Den. C. C. R.* 254 (1851), p. 98; so *A.-G.* v. *Hitchcock* (p. 89) at 95 *Ex.*

Oath or affirmation.] Despite the statutes, pp. 102, 103, and the exception of children (p. 98), it may still be worth while to refer to the immemorial law upon the subject. Thus, the Sovereign (2 *Roll. Abr.*, 686, *ed.* 1668; *Omichund* v. *Barker* (1744), *Willes* at 550, pp. 98, 102, and below; cf. *T.* s. 1381): a peer (*Shaftesbury* v. *Digby*, 3 *Keb.* 631, 1676); a judge (p. 108); a juror (p. 108); *Bennet* v. *Inhabs. of Hartford*, *Style*, 233 (1650); *Fitzjames* v. *Moys*, 1 *Sid.* 133 (1661); *Kitchen* v. *Manwaring*, *Andrews*, 321 (1726); *Rosser*, 7 *C. & P.* 648 (1836) must be sworn (or affirm), if they give evidence.

The sanction of an oath.] "The law requires that the witness should acknowledge the force of an oath in imposing a religious obligation upon him to speak the truth. It is therefore essential to the admissibility of a witness, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. . . . It is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury." 1 *Phill. Ev.* 15–16, 10*th ed.* (1852); *T.* s. 1382. Although it was formerly held that infidels (that is to say, persons professing some other than the Christian faith) could not be witnesses, on the ground that they were under none of the obligations of our religion, and therefore could not be under the influence of the oaths which our courts administer; *Gilb. Ev.* 142; yet a different rule has since prevailed; and it is now well settled, since the case of *Omichund* v. *Barker*, p. 98 (also above, and 1 *Wils.* 84), that those infidels who believe in a God, and that He will punish them in this world, or (as it seems) in the next, if they swear falsely, may be admitted as witnesses in this country.

"It is clear," says *Best*, s. 161, "that disbelief in the existence and moral government of God are not to be presumed." The succeeding paragraphs of this learned writer should be consulted by those who are interested in the history and philosophy of a very delicate question, which, however, is almost academic, since the Act of 1888, p. 103.

For reasons given *Best*, s. 166, it is still possible that dispute should arise as to the mode in which the state of the witness's belief is to be ascertained. The preponderance of authority is in favour of the witness being himself examined as to his religious opinion. *The Queen's case*, p. 2 (witness, after taking the oath, may be asked whether he thinks it binding); *Taylor*, 1 *Peake, N. P.* 14 (1790); *White*, p. 99; *Serva*, below. It is, however, the opinion of some writers that the witness ought not to be questioned at all, but that the fact should be proved by the oath of persons acquainted with him. Mr. Best strongly contends that evidence both of the person himself and others is admissible on the point.

The inquiry can never be carried further if the witness himself asserts his belief. Thus in *Serva*, 1 *Den. C. C.* 104; 2 *C. & K.* 53 (1845), p. 702, a negro, who was called as a witness, stated, before he was sworn, that he was a Christian, and had been baptised; Platt B. held that he might be sworn, and that no further question could be asked before he was so.

In *James*, 6 *Cox C. C.* 5 (1852), after the jury had delivered their verdict (guilty), it was discovered that one of the witnesses had not been sworn; the jury were then directed to reconsider their verdict, and to leave out of their consideration the evidence given by the unsworn witness, which they did with the same result, but, perhaps, the conviction should have been quashed.

Form of the oath.] The particular form or ceremony of administering an oath is quite distinct from the substance of the oath itself. *Best*, s. 58. The form of oaths under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of God; it being vain to compel a man to swear by a God in whom he does not believe and whom he therefore does not fear. *Puffend. De Jur. Nat. et Gent.* Bk. 4, ch. 2, s. 4. The rule of our law therefore is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such a manner as they may consider binding on their consciences. *Per* Alderson B. in *Miller* v. *Salomons*, 7 *Ex. R.* 534, 535 (1852); and *per* Pollock B. *ib.* 558. A Jew consequently is sworn upon the Pentateuch or the Old Testament, with his head covered. 2 *Hale, P. C.* 279; *Omichund* v. *Barker*, p. 101, and 1 *Atk.* 21. But a Jew who stated that he professed Christianity, though he had not been formally admitted into the Church, but had never been baptised, nor even formally renounced the Jewish faith, was allowed to be sworn on the New Testament. *Gilham*, 1 *Esp.* 285 (1795). A witness who stated that he believed both the Old and New Testament to be the word of God, yet as the latter prohibited, and the former countenanced swearing, he wished to be sworn on the former, was permitted to be so sworn. *Edmonds* v. *Rowe*, *Ry. & Moo. N. P. C.* 77 (1824). And where on a trial for high treason, one of the witnesses refused to be sworn in the usual manner, "but only put his hands to his buttons," and in reply to a question, whether he was sworn, finally stated that he was sworn and was under oath, it was held sufficient. *Love*, 5 *How. St. Tr.* 113 (1651). In Ireland it is the practice to swear Roman Catholic witnesses on a Testament with a crucifix or cross upon it. The following is given as the form of a Scotch Covenanter's oath: "I, A. B., do swear by God Himself, as I shall answer to Him at the great day of judgment, that the evidence I shall give to the court and jury, touching the matter in question, is the truth, the whole truth, and nothing but the truth, So help me God." *Mildrone*, 1 *Leach*, 412 *n.* (1786); *Walker*, *ib.* (1788). *Ibid.* A Mahomedan is sworn on the Koran. The form in *Morgan*, 1 *Leach*, 54 (1764), was as follows:— The witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo has been received, who touched with his hand the foot of a Brahmin. *Omichund* v. *Barker*, above. The following is given as the form of swearing a Chinese. On entering the box the witness immediately knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The crier of the court then, by direction of the interpreter, administered the oath in these words, which was translated by the interpreter into the Chinese language. "You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer." *Entrehman*, *C. & M.* 248 (1842).

The 1–2 V. 105, is "in all cases in which an oath may lawfully be and shall have been administered to any person either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

So where a person, who was of the Jewish persuasion at the time of trial, and an attendant at the synagogue, was sworn on the Gospels as a Christian (and gave a false name), the court refused a new trial on this ground; being of opinion that the oath as taken was binding on the witness, both as a religious and moral obligation; and Richardson J. added, that if the witness had sworn falsely, he would be subject to the penalties of perjury. *Sells* v. *Hoare*, 3 *B. & B.* 232; 7 *J. B. Moore*, 36 (1822); moreover, the objection was too late after verdict.

Affirmation in lieu of oath.] By 3–4 W. 4, 49, Quakers and Moravians are permitted to make an affirmation or declaration, instead of taking an oath, "in all places, and for all purposes whatsoever where an oath is or shall be required either by the common law or by any Act of Parliament"; and any such affirmation or declaration, if false, is punishable as perjury. Where a prosecutor, who had been a Quaker, but had seceded from the sect, and called himself an Evangelical Friend, stated that he could not affirm according to the form, and was allowed to give evidence under a general form of affirmation; the judges were unanimously of opinion that his evidence was improperly received. *Doran*, 2 *Lew. C. C.* 27; 2 *Moo. C. C.* 37 (1838).

This case led to the passing of 1–2 V. 77, which puts any person who shall have been a Quaker or a Moravian in exactly the same position in this regard as those sects; see last paragraph. The affirmation or declaration is: —"I, A. B., having been one of the people called Quakers [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm."

"For practical purposes" (*Stringer* on *Oaths*, *2nd ed.*, p. 116) these provisions are superseded by the Oaths Act, 1888, 51–2 V. 46; s. 1, is: "Every person upon objecting to being sworn, and stating as the ground of such objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath"; see p. 682.

S. 2: "Every such affirmation shall be as follows: 'I, A. B., do solemnly, sincerely, and truly declare and affirm,' and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness," *e.g.* in the commonest case, "—affirm that the evidence I shall give, &c., shall be the truth, &c., . . . nothing but the truth."

S. 3: "Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking such oath no religious belief, shall not for any purpose affect the validity of such oath."

S. 5: "If any person to whom an oath is administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question."

Where a witness desires to affirm, the judge (himself) must ascertain either that he has no religious belief or that the taking of an oath is contrary to his religious belief; if he has a religious belief he cannot be allowed to affirm; the objection to a witness on this latter ground was not too late after verdict. *Moore*, 17 *Cox C. C.* 458; 61 *L. J. M. C.* 80; 66 *L. T.* 125 (1892: C. C. R.), where a conviction was quashed.

Persons excommunicated or under sentence of death.] By the 53 G. 3, 127, 3, persons excommunicated incur no civil disabilities. It seems that a

person under sentence of death is incompetent to be a witness, and his capacity as a witness is not restored by 6–7 V. 85, 1, *per* Lush J. *Webb*, 11 *Cox C. C.* 133 (1867). But this is very doubtful. *T.* s. 1347 (*n.*). See p. 147.

Incompetency from interest.] The Criminal Evidence Act, 1898, p. 829, has almost entirely swept away the last relic of this disability, which had already been abolished in certain cases; see p. 107. The only survival is in the case of

Husband and wife.] By that statute (s. 1c) the *privilege* of spouses to be incompetent witnesses *against* one another as at common law (which was expressly preserved in criminal cases when incompetency from interest was almost entirely removed by 6–7 V. 85, 14–15 V. 99, and 16–17 V. 83), is maintained (except in so far as under s. 4 they are compellable witnesses against each other), while their incompetence to give evidence *in favour of* the prisoner is also abolished; see also s. 1*d*.

Thus the effect of this statute is that a spouse of the prisoner may *in all cases* be called on his or her behalf, but the cases in which such spouse may be called against the prisoner are left unaffected. See pp. 326, 609. As to the nature of those cases, see note to schedule, p. 831.

The rule, as it now is, is in general, absolute, and cannot be waived. But any conversation between husband and wife may be proved by third persons who are present at or overhear it. *Smithies*, p. 49; *Simons*, p. 36; *Bartlett*, p. 48. And it has been held that any statement made, or list given, by a wife to a third person in the presence of the prisoner may in like manner be proved. *Mallory*, 13 *Q. B. D.* 33; 53 *L. J. M. C.* 134 (1884), *C. C. R.*

Where the relation of husband and wife has once subsisted (and the one has, therefore, been an inadmissible witness against the other), they remain so even after the relation has ceased, with respect to matters which occurred during the continuance of the relation. Thus, where a woman divorced by Act of Parliament, and married again, was called to prove a contract by her former husband, she was rejected by Lord Alvanley. "If she might be a witness," he observed, "in a civil proceeding, she might equally be so in a criminal proceeding; and it shall never be endured that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever by the misconduct of one party . . . the relation has been dissolved." *Monroe* v. *Twistleton*, 2 *Peake N. P. C.* 219 (1802). Upon the authority of this case, Best C.J. rejected the testimony of a widow called to prove a conversation between herself and her late husband. *Doker* v. *Hasker*, *Ry. & M.*, *N. P. C.* 198 (1824). In *Beveridge* v. *Minter*, 1 *C. & P.* 364 (1824), Abbott C.J. received the evidence (apparently because deceased's widow was "appearing against her own interest"); but in *O'Connor* v. *Marjoribanks*, 4 *M. & G.* 435 (1842), the Court of Common Pleas held, that it was the sounder and better rule to exclude the testimony of each respecting the other in *all* cases, according to the law laid down by Lord Alvanley in *Monroe* v. *Twistleton*. As to the Married Women's Property Act, see p. 107.

Incompetency only extends to lawful husband and wife.] It is only where there has been a valid marriage that the parties are excluded from giving evidence against each other. Therefore, on an indictment for bigamy, *after proof of the first marriage*, the second "wife" is a competent witness against the husband, for the marriage is void. *B. N. P.* 287; *Bac. Ab. Ev. A.* 1; 1 *East, P. C.* 469. See p. 107. So where a woman had married the plaintiff,

and lived with him as his wife during the time of the transactions to which she was called to speak, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead: Patteson J. held that there was no objection to her giving evidence for the defendant. *Wells* v. *Fisher*, 1 *Moo. & R.* 99; 5 *C. & P.* 12 (1831). Of course, a woman who cohabits with a man as his wife under his name, but is not so in fact, is a competent witness for or against him. *Batthews* v. *Galindo*, 4 *Bing.* 610 (1828). See also *Young*, 5 *Cox C. C.* 296 (1851), prisoner's deceased wife's sister, whom he had "married," admitted in evidence against him; *Blackburn*, 6 *Cox C. C.* 338 (1853): question whether witness deposing that she is wife of the prisoner can be cross-examined on the *voir dire*, and if so, whether the issue is for judge or jury.

Where other persons are indicted with husband or wife.] Where several persons are indicted together, an attempt has sometimes been made to call the wife of one prisoner as evidence for or against another. In very few cases has this been allowed to be done. In *Smith*, 1 *Moo. C. C.* 289 (1826), four prisoners were indicted for a burglary. One of the prisoners, Draper, set up an *alibi*, and called his daughter (a co-prisoner's wife) in support of it, but Littledale J. refused to let her be examined, saying that the evidence of the prosecution would be thereby weakened altogether, and that so the witness's husband would be benefited. The question was reserved, and all the judges, except Graham B. and Littledale J. himself, thought the evidence rightly rejected. This was followed in *Hood*, 1 *Moo. C. C.* 281 (1830). So where upon an indictment against Webb and three other prisoners for sheep-stealing, the counsel for the prosecution proposed to call the wife of Webb to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners that the wife of one prisoner was incompetent to give evidence for or against the other prisoners, Bolland B. held that the witness was incompetent. *Webb* (1830), 3 *Russ. Cri.* 663 (B. 5, c. 5, s. 7). But in *Sills*, 1 *C. & K.* 494 (1844), where A. and B. were indicted for burglary, and a part of the stolen property was found in the house of each of the prisoners, Tindal C.J. allowed the wife of A. to be called on behalf of B. to prove that she took to B.'s house the property which was found there; it seems very difficult to reconcile this decision with that of *Smith*, which was not referred to. In *Thompson*, *L. R.* 1 *C. C. R.* 377; 41 *L. J. M. C.* 112 (1872), three prisoners were on their trial, two for larceny and one for receiving; and it was held that the wife of the one could not be called to give evidence for the two charged with larceny, all three being "indicted in one indictment . . . and tried together," "although there were counts charging different offences." By far the greater preponderance of authority was, therefore, in favour of the proposition, that in no such case, where the husband was on his trial, could the wife be called as a witness, and *vice versâ*. See also p. 109. As to prisoners separately indicted, see *Williams*, p. 127.

Where husband or wife is not indicted, but implicated.] Where the guilt of the husband or wife is not the immediate subject of inquiry, though he or she may be criminated in the course of it, neither is incompetent, and all that he or she can do is to refuse to answer questions incriminating the other, when, probably, the court will protect him or her, *per* Bayley J., *Inhabs. of All Saints, Worcester*, 6 *M. & S.* 200 (1817), overruling *Inhabs. of Cliviger*, 2 *T. R.* 263 (1788). As to what protection the husband or wife is entitled to, see p. 127. *T.* s. 1367.

Cases of personal violence.] It is quite clear that a wife is a competent witness against her husband in respect of any charge which affects her liberty or person. *Per* Hullock B., *Wakefield*, 2 *Lewin, C. C.* 1, 279 (1827), p. 352. See 3 *Russ. Cri.* 666. Thus in *L. Audley* or *Castlehaven*, who was tried as a principal in the second degree, for a rape upon his own wife, the judges resolved that though, in a civil case, a wife was not a competent witness, yet that in a criminal case of this nature, being the person grieved, upon whom the crime is committed, she is to be admitted. 3 *How. St. Tr.* 402 (1631), p. 727; 1 *Hale, P. C.* 301, 629. So on an indictment against the husband for an assault upon his wife. *Azire*, 1 *Str.* 633 (1725); *B. N. P.* 287. So a wife is always permitted to swear the peace against her husband, and her affidavit has been permitted to be read, on an application to the Court of King's Bench, for an information against the husband, for an attempt to take her away by force, after articles of separation. *Lady Lawley's case*, *B. N. P.* 287 (about 1731 ?). Upon an indictment under the repealed statute, 3 H. 7, 2, for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*. *Fulwood, Cro. Car.* 488 (1638); *Brown*, 1 *Vent.* 243 (1674), p. 228; *Haagen Swendsen*, 14 *How. St. Tr.* 559, 575 (1702). And she was consequently a witness *for* him. *Perry, coram* Gibbs C.J. (1794), 4 *Hawk. P. C.* Bk. 2, c. 46, s. 79, cited *Serjeant, Ry. & Moo.* 353 (1826). But a doubt has been entertained, whether, if the woman afterwards assent to the marriage, she is capable of being a witness. In *Brown* above, it is said by Hale, that most of the judges were of opinion that, had she lived with him any considerable time, and assented to the marriage, by a free cohabitation, she should not have been admitted as a witness. 1 *P. C.* 302. But Blackstone J. seems to concur in the contrary opinion. 4 *Com.* 209. And the arguments of Mr. East, on the same side, appear to carry great weight with them. 1 *P. C.* 454. In *Wakefield*, above, where the defendants were charged, in one count, with a conspiracy to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and in another count, with conspiring to take her away by force, she being an heiress, and to marry her to one of the defendants; Hullock B. was of opinion, that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of *necessity*, although there was no evidence to support that part of the indictment which charged force (*Lew.* 288); and also on the ground that the latter defendant, by his own criminal act, could not exclude such evidence against himself.

Upon an indictment under Lord Ellenborough's Act (43 G. 3, 58, repealed), against *Whitehouse* for shooting at his wife, the latter was admitted as a witness by Garrow B., after consulting Holroyd J., upon the ground of the *necessity* of the case. Holroyd J. referred to the case of *Jagger*, 1 *East, P. C.* 455 (1796), where the husband attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband, and it was held by twelve judges that the evidence was rightly admitted. Holroyd J., however, said that he thought the wife could only be admitted to prove facts which could not be proved by any other witness. 3 *Russ. Cri.* 666. Upon the same principle that the evidence of the wife, if living, would be received to prove a case of personal violence, her dying declarations are admissible in case of murder by her husband. *Woodcock*, p. 29; *John*, p. 30. And in similar cases of personal violence, the examinations of the husband or wife (murdered, for example) taken before a magistrate pursuant to the statute (p. 59), would, as it seems, be admissible against the other spouse

where the witness, if living, would have been admissible. Upon the hearing of an information for neglecting to maintain a wife whereby she becomes chargeable to the parish, the wife is not a competent witness against her husband, for such neglect is not a personal injury to the wife, but an offence against the parish; nor is there any necessity for calling the wife, as such neglect might be proved by other persons. *Reeve* v. *Wood*, 34 *L. J. M. C.* 15 (1864).

In cases of bigamy.] See p. 104. It has been contended by two writers of authority (*Alison's Pr. Cr. Law*, 463; *Best, Ev.* s. 477, Bk. 2, Pt. 1) that the evidence should be admitted in these cases on the ground of the personal injury, and, therefore, at any stage of the trial. But that opinion has not yet received the sanction of authority.

Exceptions by statute (*other than the Criminal Evidence Act*, p. 829) *to incompetency of* (1) *defendant*, (2) *his or her spouse.*] Under s. 11 (p. 563) of the Conspiracy and Protection of Property Act, 1875 (38–9 V. 86), upon the hearing and determining of any indictment or information under ss. 4, 5, 6 (see p. 360), the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as *competent* witnesses. Under 40–1 V. 14, on the trial of any indictment or other proceeding (because it is in substance civil, p. 501), for the non-repair of any public highway or bridge, or for any nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses, and *compellable* to give evidence. See p. 831.

47–8 V. 14, 1, p. 557, makes it quite clear that in criminal proceedings authorised by 45–6 V. 75, 12 & 16 (pp. 556, 831), spouses are not only competent but *compellable* witnesses against each other.

By 48–9 V. 69, 20, every person charged under that Act, or under s. 48 and ss. 51–55, both inclusive, of 24–5 V. 100, and the husband and wife of the person so charged, shall be competent but *not compellable* witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury. This exception, at any rate, has been removed by s. 4 (1) of the Criminal Evidence Act, p. 830. See p. 227 and *Table of Statutes.* The offences here included relate chiefly to the defilement of women and girls, rape, indecent assault, abduction of heiresses, abduction by force with intent to marry, abduction of girls under sixteen—which see under these respective headings.

A prisoner, charged both with indecent and common assault, gave evidence under s. 20. He was convicted of a common assault, and the court held that he was properly convicted, although his evidence would not have been admissible in a charge of common assault simply. *Owen*, 20 *Q. B. D.* 829; 57 *L. J. M. C.* 46 (1888).

In prosecutions for offences against the Merchandise Marks Act, 1887, 50–1 V. 28, 10, the defendant and his wife, or her husband, are competent witnesses.

In any proceeding against any person under s. 4 (making or possessing explosives under suspicious circumstances) of the Explosive Substances Act, 1883, 46–7 V. 3, such person and his wife, or husband, may by s. 4 (2), if *such person* thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case. So under the Corrupt Practices Prevention Act, 1883, by s. 53 (2), p. 284. Similarly under the law of Libel Amendment Act, 51–2 V. 64, p. 579, and under the Prevention of Cruelty to Children Act, 4 E. 7, 15, 12, p. 326. And under the Betting and Loans (Infants) Act, 1892 (55–6 V. 4), see p. 492. See also the Schedule to the Criminal Evidence Act, 1898, p. 831, and p. 104.

Other persons engaged in the case.] The only other case of incompetency s that of a grand juror, who has sometimes been rejected on account of the oath of secrecy (or, rather, perhaps, on general grounds of public policy) which he takes before the inquiry. But even as to him the case has been considered doubtful. 1 *Phill. Ev.* 140, 10*th ed.*, citing *Watson*, p. 1 (*St. Tr.* 107). Cf. p. 170. *T.* ss. 942-3. Indeed, L. Kenyon allowed, in malicious prosecution, a grand juryman to be called to prove who was the prosecutor of an indictment, being of opinion that it was a fact the disclosure of which did not infringe upon his oath. *Sykes* v. *Dunbar* (1800), 2 *Selw. N. P.*, 13*th ed.*, 1015. This was followed in *Freeman* v. *Arkell*, 1 *C. & P.* 137 (1823), p. 8. But the King's Bench refused to receive an affidavit from a grand juryman, as to the number of grand jurors who concurred in finding the bill. *Marsh*, 6 *A. & E.* 236 (1837). So, where a grand jury returned an indictment containing ten counts, indorsed "a true bill on both counts," and the prisoner pleaded to the whole ten counts; Patteson J. (the grand jurors having been discharged) would not allow one of them to be called as a witness to explain their finding. *Cooke*, 8 *C. & P.* 582 (1838). It is no objection against a person's giving evidence, either for or against a prisoner, that he is one of the judges appointed to try him. 4 *Hawk. P. C.* Bk. 2, ch. 46, s. 83; *Bac. Ab. Evid.* (*A.* 2). But see *Gazard*, p. 130. In *Hacker* (1660) two of the commissioners for the trial of the regicides came off the bench, and were sworn, and gave evidence, and did not go up to the bench again during the trial. *Kel.* 12; *Sid.* 153. See *T.* s. 1379; and p. 101, generally: as to counsel, see *T.* s. 938 and s. 1378 *n.*

A juror may give evidence of any fact material to be communicated in the course of a trial, but of course he must be sworn. See *Rosser*, p. 101, 3 *Bl. Com.* 375. But, generally, it is most undesirable that any one appearing in one capacity at a trial should appear in any other. Cf. *Newton* v. *Chaplin*, p. 129, at 363, 366, as to counsel.

Accomplice—always admissible.] Notwithstanding the common law rule which formerly prevailed that witnesses who were interested in the inquiry were not admissible, an exception was always made in the case of an accomplice who was willing to give evidence; and this exception has been stated to be founded on necessity, since, if accomplices were not admitted, it would frequently be impossible to find evidence to convict the greatest offenders. 4 *Hawk. P. C.* Bk. 2, ch. 46, ss. 94 and foll. It is not a matter of course to admit an accomplice to give evidence on the trial, even though his testimony has been received by the committing magistrates; but an application to the court for the purpose must be made. 1 *Phill. Ev.* 91, 10*th ed.* The court usually considers, not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus, where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers, against whom the evidence of the accomplice was required; Gurney B. refused to permit one of the principals to become a witness. *Mellor* (1833). So in *Saunders* (1842), "on a motion to admit an accomplice, Patteson J. said, 'I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do.' And in *Salt* (1843) . . . , where there was no corroboration of an accomplice, Wightman J. refused to allow him to become a witness." 3 *Russ. Cri.* 644 *n.* And again in *Sparks*, 1 *F. & F.* 388 (1858), where the counsel

for the prosecution applied for leave to call an accomplice who had pleaded guilty, Hill J. refused to permit it until the other evidence had been given in order to see whether it was sufficient to corroborate that of the accomplice; see p. 110.

Accomplice—practice in calling.] It makes no difference whether the accomplice has been convicted or not, or whether he be joined in the same indictment with the prisoner to be tried or not; provided he be not put upon his trial at the same time. *Hawk. P. C.*, above. Where A., B., C., and D. were indicted together, after plea, and before they were given in charge to the jury, Williams J. allowed D. to be removed from the dock, and examined as a witness against his associates. *Gerber, T. & M.* 647 (1852). See also *Winsor* v. *R., L. R.* 1 *Q. B.* 390 (1852); see also *ib.*, 311, p. 189.

The practice, where the testimony of an accomplice is required to prove the case before the grand jury, and he is in custody, is for the counsel for the prosecution to move that he be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that the testimony is essential. 3 *Russ. Cri.* 643, after 2 *Stark. Ev.* 12, *3rd ed.* Where the accomplice has been joined in the indictment, and, before the case comes on, it appears that his evidence will be required, the usual practice is, before opening the case, to apply to have the accomplice acquitted. *Rowland, Ry. & Moo.* 401 (1826). See also a remark of Cockburn C.J. in *Winsor* v. *R.*, above, approving of this course (or, of that of first convicting and sentencing, if practicable), where the prosecution call the witness, although, as pointed out by Lord Coleridge C.J. in *Bradlaugh*, below, he did not lay it down as a proposition of law that the accomplice could not be called without being first acquitted; cf. Cockburn C.J. on his own remark in *Payne*, below, at 354. Where the case has proceeded against all the prisoners, but no evidence appears against one of them, the court will, in its discretion, upon the application of the prosecutor, order that one to be acquitted for the purpose of giving evidence against the rest. *Fraser*, 1 *M'Nally; Rules of Evidence*, 56 (1797). Where defendants were *jointly* indicted and jointly tried, they could not be called for each other (nor apparently against); but this case is, since 1898, of no importance. *Payne, L. R.* 1 *C. C. R.* 349; 41 *L. J. M. C.* 65 (1872). As to wife of any one prisoner, see *Thompson*, p. 105.

Accomplice—when competent for prisoner.] See last par. It is quite clear that accomplices are competent witnesses for the prisoner, in conjunction with whom they themselves committed the crime for which they are all *separately* indicted. *Bilmore*, 1 *Hale, P. C.* 305 (1644). If he is charged in the same indictment, but not given in charge to the jury, and his trial is postponed, he may be called without being acquitted, either for the crown or the defence; but, as stated above, if called for the crown, the better course is to take an acquittal; and if called for the defence, there was no power to compel an acquittal to be taken. *Bradlaugh*, 15 *Cox C. C.* 217 (1883), pp. 161, 565; *Payne*, above.

Accomplice—promise of pardon.] Although L. Hale thought that if a man have a promise of pardon if he gives evidence against one of his own confederates, this disables his testimony; 2 *P. C.* 280; yet "the contrary opinion hath prevailed, see *Tong's case, Kel.* 17 (1662) . . . but most certainly it is a great objection to the credibility if not to the competency of the witness"; see also 1 *P. C.* 304. In *Reilly*, p. 695, a person convicted of perjury was pardoned and admitted as a witness against his suborner; the pardon restored his competency. This the judges held to be right, as a pardon "not only respites the convict from punishment, but entirely absolves him from the crime." See p. 125.

Accomplice—corroboration of.] The state of the law as to the corroboration of accomplices is somewhat peculiar. It has been repeatedly laid down that a conviction on the testimony of an accomplice uncorroborated is legal. The point was considered by the twelve judges, and so decided in *Attwood*, 1 *Lea.* 464 (1788); and again in *Durham*, *ib.* 478 (1787). And that the rule is so has also been acknowledged by Lord Hale, 1 *P. C.* 304, 305; by L. Ellenborough, *Jones*, 2 *Camph.* 131 (1809); by L. Denman, *Hastings*, 7 *C. & P.* 152 (1835); by Alderson B., *Wilks*, *ib.* 273 (1836), below; by Gurney J., *Jarvis*, 2 *Moo. & R.* 40 (1837), p. 156; and lastly, by the Court for C. C. R., *Stubbs*, 25 *L. J. M. C.* 16 (1855), below. See also *Boyes*, 1 *B. & S.* 311 (1861), and *In re Meunier*, 1894, 2 *Q. B.* 415; 63 *L. J. M. C.* 198.

But while the law is thus fully established, the practice of judges is, as some of these cases show, almost invariably to advise juries not to convict upon the evidence of an accomplice who is uncorroborated, and sometimes judges, where the testimony of the accomplice is the only evidence, take upon themselves to direct an acquittal of the prisoner. Of course, it is always proper for a judge in the exercise of his discretion to *advise* a jury to acquit the prisoner, but it is submitted that it is not usually his province to *direct* an acquittal unless there be *no* legal evidence against the prisoner. Cave J. in *In re Meunier*, said, "The evidence must be laid before the jury in each case. . . . I know of no power to withdraw the case from the jury for want of corroborative evidence, or to set aside a verdict of guilty on that ground." Thus the law remains in that anomalous state in which a principle is barely acknowledged, but is constantly criticised and frequently violated.

As to accomplices in a prize-fight, see p. 595.

Accomplice—nature of corroboration.] Another point which arises with respect to the corroboration of accomplices, and upon which the authorities are by no means so well agreed, is as to what is the nature or amount of the corroboration deemed desirable. See *Swallow*, &c., 31 *St. Tr.* at 980 (1813), and *Gallagher*, 15 *Cox C. C.* at 318 (1883); *Best*, s. 171.

It must be recollected that an accomplice is in most cases present at the committal of the offence; and even if not so, he may be presumed to be on such terms with the accused as would render his knowing all the circumstances attending the crime extremely probable. The real danger is that the accomplice should relate the circumstances truly, and at the same time attribute a share in the transaction to an innocent person.

It is almost the universal opinion that the testimony of the accomplice should be corroborated as to the *person* of the prisoner against whom he speaks. This was so held by Patteson J. in *Addis*, 6 *C. & P.* 388 (1834), p. 487, and again, in *Kelsey*, 2 *Lew.* 45 (1838); by Williams J. in *Webb*, 6 *C. & P.* 595 (1834); by Alderson B. in *Wilks*, above; and by Lord Abinger C.B. in *Farler*, 8 *C. & P.* 106 (1837).

And in *Stubbs*, above, Parke B. said, "My practice always has been to tell the jury not to convict the prisoner, unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner"; and Cresswell J. added, "You may take it for granted that the accomplice was at the committal of the offence, and may be corroborated as to the facts; but that has no tendency to show that the parties accused were there."

What appears to be required is, that there should be some fact deposed to independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. Thus upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, and that the brother gave

one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid. On the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen, and the skins were found in the place named by the accomplice. Patteson J. held that this was sufficient: the finding of the mutton in the possession of the prisoner in itself being a confirmation of the testimony of the accomplice for the jury to consider. If the confirmation had merely gone to matters only affecting the accomplice—*e.g.* the finding of the skins—for he might have put them there himself—that would not have been enough. But the prisoner was acquitted. *Birkett*, 8 *C. & P.* 732 (1839). It is not necessary that the accomplice should be corroborated in every particular (for then, his testimony would be superfluous); but there must be a sufficient amount of confirmation to satisfy the jury of the truth of his story. *Gallagher*, and *Swallow*, p. 110.

The point about which the opinions of judges appear to have fluctuated is as to whether, where several are indicted, and the evidence of the accomplice is confirmed as to some only and not as to others, the jury ought to be advised to acquit those against whom there is no corroboration. On the one hand it is strongly urged by Mr. Starkie, on *Dawber*, 3 *Stark. N. P. C.* 34 *n.* (1821), which was such a case, where all were convicted, that a witness, if believed at all, must be believed *in toto*. There, Bayley J. so laid down the law. But it may be answered, that the principle of requiring or desiring corroboration is founded on the supposition that there are degrees of credibility, and that an accomplice, though not absolutely incredible, is only credible when confirmed; and that he will only speak the truth in part is just as probable as that he will not speak the truth at all. And this is the view that has been taken in the majority of the cases; thus in *Wells*, *M. & M.* 326 (1829), where an indictment was preferred against one principal and two accessories, and the case was proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal; Littledale J. advised the jury that the case ought not to be considered as proved against the principal, and that all the prisoners ought, therefore, to be acquitted. So in *Moore*, 7 *C. & P.* 270 (1836), on an indictment against A. as principal and B. as receiver, where the evidence of an accomplice was corroborated as against A., but not as against B., Alderson B. thought that it was not sufficient; and in *Stubbs*, p. 110, Jervis C.J. said, "There is another point to be noticed; when an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the judge to advise the jury that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed: for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the transaction."

One accomplice corroborating another.] In a case where two accomplices spoke distinctly to the prisoner's presence, Littledale J. told the jury, that, if their statements were the only evidence, he should not advise them to convict, adding, "It is not usual to convict on the evidence of one accomplice without confirmation, and in my opinion it makes no difference that there are more than one." *Noakes*, 5 *C. & P.* 326 (1832). *Sed quære.* In one case it was held by Park J. that a confirmation by the wife of an accomplice was insufficient, as the wife and the accomplice must be considered as one for this purpose. *Neale*, 7 *C. & P.* 168 (1835). See also *Jellyman*, 8 *C. & P.* 604 (1838), p. 778. As to which also *quære.*

Accomplice—situation of an accomplice when called as a witness.] The

practice now adopted is for the magistrate or for the court to direct that he shall be examined upon an understanding, that if he gives his evidence in an unexceptionable manner he shall be recommended for a pardon, or, as all the judges put it, he "ought not to be prosecuted for his own guilt so disclosed by him, nor perhaps for any other offence of the same kind, which he may accidentally, and without any bad design, have omitted in his confession; but he cannot by law plead this in bar of any indictment, . . . nor avail himself of it upon his trial, for it is merely an equitable claim to the mercy of the crown, from the magistrates' express or implied promise of an indemnity upon certain conditions that have been performed. It can only come before the court by way of application to put off the trial, in order to give the prisoner time to apply elsewhere." *Rudd*, *Cowp.* 331; 1 *Leach*, 115 (1775). So where two prisoners, under sentence for murder, on being brought before the K. B. by *habeas corpus*, were asked what they had to say why execution should not be awarded against them, and one of them pleaded, *ore tenus*, that the king, by proclamation in the Gazette, had promised pardon to any person, except the actual murderer, who should give information whereby such murderer should be apprehended and convicted; and that he, not being the actual murderer, had given such information, and thereby entitled himself to the pardon; such plea, on demurrer *ore tenus*, by the attorney-general, was held not sufficient. *Garside*, 2 *A. & E.* 266 (1834). After giving his evidence, but not in such a way as to entitle him to favour, an accomplice may still be indicted for the same offence, *below;* and though he may have conducted himself properly, he is sometimes proceeded against for *other* offences. Thus, where an accomplice was admitted to give evidence against a prisoner for receiving stolen goods, and the latter was convicted, and the witness was afterwards prosecuted in another county for horse-stealing, and convicted; a doubt arising whether this case came within the equitable claim to mercy, it was referred to the judges, who were unanimously of opinion that the pardon was not to extend to offences for which the prisoner might be liable to prosecution out of the county, and the prisoner underwent his sentence. *Duce* (undated), 1 *Burn's Justice*, 211, 24*th ed.* by Chetwynd (1825). So where an accomplice who had been admitted as a witness against his companions, on a charge of highway robbery, and had conducted himself properly, was afterwards tried himself for burglary, Garrow B. submitted the point to the judges, whether he ought to have been tried after the promise of pardon; but the judges were all of opinion, that though examined as a witness for the crown, on the application of the counsel for the prosecution, there was no legal objection to his being tried for any offence with which he was charged, and that it rested entirely in the discretion of the judge whether to recommend a prisoner in such a case to mercy. *Lee*, *Russ. & Ry.* 361 (1818); *Brunton* (1821), *ib.* 454. With respect to other offences, therefore, the witness is not bound to answer on his cross-examination. *West*, 1 *Phill. Ev.* 91 *n.*, 10*th ed.* (1821). Where a receiver discovered the principals in a felony under a promise of favour, and also disclosed another felony of the same kind under an impression that by the course he had taken he had protected himself from the consequences; Coleridge J. successfully recommended the counsel for the prosecutor not to proceed with the indictment for such other felony, adding, however, that if it was persisted in he was bound to try the case. *Garside*, 2 *Lew. C. C.* 38 (1838).

A prisoner who, after a false representation made to him by a constable in gaol, that his confederates had been taken into custody, made a confession, and was admitted as a witness against his associates, but on the trial denied all knowledge of the subject, was afterwards tried and convicted upon his own confession; and the conviction was upheld by all the judges: p. 44. *Burley*, 2

Stark. Ev. 13, *3rd ed.* (1818). So where an accomplice in burglary, who had been allowed to go before the grand jury as a witness for the crown, upon the trial pretended to be ignorant of the facts on which he had before given evidence, and two out of three prisoners were in consequence acquitted, Coleridge J. ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. *Moore*, 2 *Lew. C. C.* 37 (1838). So where an accomplice, after making a full disclosure before the committing magistrate, refused when before the grand jury to give any evidence at all, Wightman J. ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *Holtham* (1843), 3 *Russ. Cri.* 643 (*n.*); cf. p. 42. So where an accomplice who was called as a witness against several prisoners, gave evidence which showed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty, Parke B. thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. *Stokes*, 1837, *ib.* The prisoner made a statement implicating himself and others in a Fenian conspiracy, to a constable, voluntarily, and then repeated it to a magistrate upon oath. He then made a further statement on oath, as a witness, adding, "I came here to save myself." No inducement was held out to him and he was not cautioned, the magistrate regarding him as an approver. Subsequently, though bound over, he refused to prosecute. Both the statements made by him on oath were received in evidence against him on his trial for treason-felony. But the conviction was quashed by a majority, some judges thinking that both informations ought to have been rejected, some the second; two thought they were properly received. Cf. p. 45. *Gillis*, 11 *Cox C. C.* 69 (1866: C. Crim. Ap. Ireland).

EXAMINATION OF WITNESSES.

Ordering witnesses out of court.] A prisoner or defendant, if a witness or not, cannot be ordered out of court while he behaves himself becomingly; p. 166. In general the court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the court. And the *right* of either party to require the unexamined witness to retire, may be exercised at any period of the case. *Per* Alderson B., *Southey* v. *Nash*, 7 *C. & P.* 632; 48 *R. R.* 843 (1837); but this is not borne out by *Selfe* v. *Isaacson*, 1 *F. & F.* 194 (1858), where it was held the court had a discretion and the plaintiff a right to remain in court. And even if the witness is under examination "it is almost a right for the opposite party to have" him "out of court while a discussion is going on as to his evidence," *per* Coleridge J. (who acted on this principle), *Murphy*, p. 1, p. 354. It has been said that a prisoner cannot claim this as a matter of right. *Cook*, *Vaughan*, 13 *St. Tr.* 348, 494 (1696) p. 181; *Goodere*, 17 *St. Tr.* 1015 (1741). But in practice the case of a prisoner forms no exception to the general rule. The rule has been held not to extend to the attorney in the case, who may remain and still be examined as a witness, his assistance being in most cases necessary to the proper conduct of the case. *Pomeroy* v. *Baddeley*, *Ry. & Moo.* 430 (1826). But it extends to the prosecutor, if it be proposed to examine him as a witness. *Newman*, 3 *C. & K.* 260; 1 *El. & Bl.* 268; 22 *L. J. Q. B.* 156 (1852), *per* Lord Campbell C.J. who said, "as prosecutor he has a right to be in court": *i.e.* if only prosecutor. So, as it seems, a physician, or other professional person, who is called to give an opinion as a matter of skill upon the circumstances of the case, may be allowed to remain.

If a witness remains in court after an order made for the witnesses on both sides to withdraw, the rejection of his evidence is entirely in the discretion of the judge (but in the Exchequer it was peremptorily excluded; and so it was by Park J. in *Wylde*, p. 684); *per* Coleridge J., *Thomas* v. *David*, 7 *C. & P.* 350 (1836); *Parker* v. *M'William*, 6 *Bingh.* 683 (1830); *Colley*, *Moo. & Malk.* 329 (1829). But in *Chandler* v. *Horne*, 2 *Moo. & Rob.* 423 (1842), Erskine J. stated that it was now settled by all the judges that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence (and he may commit him for contempt); and see *Cobbett* v. *Hudson*, 1 *E. & B.* 11; 29 *L. J. Q. B.* 11 (1852); *T.* s. 1401.

Calling all witnesses whose names are on the indictment, &c.] Although a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment; *Simmonds*, 1 *C. & P.* 84 (1823); *Whitbread*, *ib.* 84 *n.* (1823); yet it is usual to do so in order to afford the prisoner's counsel an opportunity to cross-examine them; *Simmonds*; where as the prosecutor did not call one the judge did. *Taylor*, *ib. n.* (1823); *Bodle*, 6 *C. & P.* 186 (1833). The prosecutor is not bound to call witnesses merely because their names are on the back of the indictment, but the prosecutor ought to have all such witnesses in court, so that they may

be called for the defence, if they are wanted for that purpose. If, however, they are called for the defendant, he makes them his own witnesses. *Woodhead*, 2 *C. & K.* 520 (1847); *per* Alderson B. And see *Cassidy*, 1 *F. & F.* 79 (1858); from which it appears that Parke B., Cresswell J., and Lord Campbell C.J. agree in this ruling.

The court has no *power* to oblige a prosecutor to give to a defendant the additions and places of residence of witnesses named on the back of an indictment. *Gordon*, 2 *Dowl. Pr. R. Q. B.* 417; 12 *L. J. M. C.* 84 (1842), where there was strong reason for doing it.

Homicide.] On a trial for murder, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined on the part of the prosecution, Patteson J. directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the other side. The learned judge observed, "Every witness who was present at a transaction of this sort ought to be called; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusions as to the real truth of the matter." In the same case the judge called, and himself examined, one of the surgeons present at the *post-mortem* examination "for the furtherance of justice" as he was "a material witness, who is not called on the part of the prosecution"; his name was not on the back of the indictment. *Holden*, 8 *C. & P.* 609 (1838). See also *Stroner* (rape), 1 *C. & K.* 650 (1845), where Pollock C.B. insisted on two material witnesses not bound over and not named on the back of the indictment, *present for the prisoner*, being called for the prosecution, adding, "I shall allow the counsel for the prosecution every latitude in examining them"; p. 117. And it seems that the same course should be pursued even when the person is a near relative of the prisoner, as a brother, *Chapman*, 8 *C. & P.* 558 (1838), where, as the brother was a witness at the inquest, "and that not at the instance of the prisoner," L. Abinger C.B. thought the prosecution ought to call him, and if he showed any unfair bias might cross-examine him, p. 117; or a daughter, *Orchard* (1838), *ib.* (*n.*).

A judge has power to call and examine a witness who has not been called by either of the parties (*Holden*, above), and if he does so (unlike the case of his recalling a witness, below), neither party can cross-examine without the judge's leave. Such leave ought, however, to be granted if the evidence given is adverse to either party, but the cross-examination should be confined to the answers given, and a general cross-examination should not be permitted. *Coulson* v. *Disborough* (1894), 1 *Q. B.* 316; 70 *L. T.* 617; 10 *T. L. R.* 429; 58 *J. P.* 784; 42 *W. R.* 449; 9 *R.* 390.

The court recalling witnesses.] The judge may recall witnesses that have already been examined. Where, after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) recalled and examined a witness for the prosecution, it was held, that the prisoner's counsel had a right to cross-examine again. *Per* Taunton J., *Watson*, 6 *C. & P.* 653 (1834).

Although the prosecutor's counsel has closed his case, and the counsel for the prisoner has taken an objection that there was not enough evidence in law, the judge may, it seems, make any further inquiries of the witnesses he thinks fit, in order to answer the objection. *Remnant*, *R. & R.* 136 (1807).

Evidence by consent only in misdemeanor.] Where there were two prosecutions against the prisoner for felony, and his counsel offered to admit

the evidence taken on the first trial, as given in the second; Patteson J. doubted whether that could be done, even by consent, in a case of felony, but the learned judge directed the witnesses to be resworn, and read their evidence over to them from his notes. *Foster*, 7 *C. & P.* 495 (1836). In cases of misdemeanor, evidence may be taken by consent. *Per* Patteson J. *Ib.* Where, however, on an indictment for perjury, it appeared that the attorneys on both sides had agreed that the formal proofs should be dispensed with, and that part of the prosecutor's case admitted, L. Abinger C.B. said, "In a criminal case tried in the crown side of the assizes, I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel." The defendant's counsel declining to make any admission, and the formal proof not being complete, the defendant was acquitted. *Thornhill*, 8 *C. & P.* 575 (1838), p. 1.

At what time the objection to the competency of a witness must be taken.] It was formerly considered necessary to take the objection to the competency of a witness on the *voir dire*: *Lord Lovat*, 18 *St. Tr.* 596, 607 (1746); 1 *Phill. Ev.* 85, 10*th ed.* (1852); "but this strict and ancient practice has been much modified; as appears by authorities which can be traced back in our Law Reports beyond the last century." *Ib.* The examination of a witness, to discover whether he was interested or not, was frequently to the same effect as his examination in chief, so that it saved time, and was more convenient, to let him be sworn in the first instance. In *Stone* v. *Blackburne*, 1 *Esp.* 37 (1793), it was said by L. Kenyon, that objections to the competency of witnesses never come too late, but may be made in any stage of the case. See also *Jacobs* v. *Layborn*, 11 *M. & W.* at 685 (1843). But the most convenient time to object to the competency of a witness is before he is sworn, *Yardley* v. *Arnold*, 10 *M. & W.* at 145 (1842), when the witness is questioned by the court upon the points suggested by the objecting party, and extrinsic evidence upon the point may also be received; *Bartlett* v. *Smith*, 11 *M. & W.* 486 (1843), p. 30; cf. *A.-G.* v. *Hitchcock*, p. 99; *Cleave* v. *Jones*, 7 *Ex.* 428; 21 *L. J. Ex.* 105 (1852).

Where a witness who was deaf and dumb had been examined on the *voir dire*, and an interpreter was sworn to interpret by signs which he said he could do—but after the evidence had been proceeded with for some time he found that the witness and he could not understand one another, the judge at the trial refused to leave the evidence of the witness to the jury, but left the case to the jury upon other evidence adduced. And it was held that he had acted rightly. *Whitehead*, *L. R.* 1 *C. C. R.* 33; 35 *L. J. M. C.* 186 (1866), p. 100.

Examination in chief—leading questions—adverse witness.] After the witness has been duly sworn, he is examined in chief by the side calling him. Being supposed to be in the interest of that side, it is a rule, that upon such examination leading questions "*i.e.* questions which directly or indirectly suggest to the witness the answer he is to give" *Best*, s. 641 (which see), shall not be put to him. Questions to which the answer "yes," or "no," would not be conclusive upon the matter in issue, are not in general objectionable; but if such answer would be conclusive, "on any part of the issue," the question would be objectionable. *Best*, *ib.* It is necessary, to a certain extent, to lead the mind of the witness to the subject of the inquiry. *Per* L. Ellenborough, *Nicholls* v. *Dowding*, 1 *Stark.* 81 (1815). Thus, where the question is, whether A. and B. were partners, a witness may be asked whether A. has interfered in the business of B. *Ib.* So where a witness being called to prove a partnership could not recollect the names of the members of the firm, so as to repeat them without suggestion: L. Ellenborough,

alluding to a case tried before L. Mansfield, in which the witness had been allowed to read a written list of names, ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. *Acerro* v. *Petroni*, 1 *Stark.* 100 (1815). So, for the purpose of identification, a particular prisoner may be pointed out to a witness who has given a description, who may be asked whether he is the man he meant. *De Berenger*, pp. 351, 360, cited in *Watson*, p. 1 (*Stark.* 129 *n.*), where counsel was allowed to ask this "in the most direct terms"; but see *Best*, s. 643. So where a question arose as to the contents of a written instrument which had been lost, and in order to contradict a witness who had been examined as to the contents, another witness was called; L. Ellenborough ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked "if it contained a particular passage recited to him, which had been sworn to on the other side, otherwise it would be impossible ever to come to a direct contradiction." *Courteen* v. *Touse*, 1 *Camph.* 42 (1807).

Upon the same principle, viz. the difficulty or impossibility of attaining the object for which the witness is called, unless leading questions are permitted to be put to him, they have been allowed where they are necessary to establish a contradiction. Thus, where counsel, on cross-examination, having asked a witness as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and the witness denied having used them, "called a person to prove that he had, and read to him the particular words from his brief, Abbot C. J. held that he was entitled to do so." *Edmonds* v. *Walter*, 3 *Stark.* 7 (1820), but this *form* of question has been criticised; *Best*, s. 642.

Where a witness, examined in chief, by his conduct in the box shows himself decidedly adverse to the side calling him, it is in the discretion of the judge to allow him to be cross-examined, pp. 89, 115: *Bastin* v. *Carew*, *Ry. & Moo. N. P. C.* 127 (1824: plaintiff calling defendant—"a situation which of necessity makes him adverse"); *Clarke* v. *Saffery*, *ib.* 126 (1824); *Murphy*, at 306, p. 1; *per* L. Abinger C.B., *Chapman*, p. 115. Somewhat similar to this is the question whether, where a witness, called for one side, is afterwards recalled by the other, the latter party may cross-examine him; it was held, by L. Kenyon, that he may; for having been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case. *Dickinson* v. *Shee*, 4 *Esp.* 67 (1801).

Contradicting your own witness.] See p. 87.

Cross-examination.] Leading questions are admittted on cross-examination, in which much larger powers are given to counsel than in the original examination. The form of a cross-examination, however, depends, in some degree, like that of an examination in chief, upon the bias and disposition evinced by the witness under interrogation. If he should display a zeal against the side cross-examining him, great latitude with regard to leading questions may with propriety be admitted. But if, on the other hand, he betrays a desire to serve the side which cross-examines him, although the court will not in general interfere to prevent the counsel from putting leading questions, yet it has been rightly observed, that evidence obtained in this manner is very unsatisfactory and open to much remark. The rule was thus laid down by Buller J.: "You may lead a witness upon a cross-examination, to bring him directly to the point as to the answer; but not to go the length . . . of putting the very words into the witness's mouth which he was to echo back again." *Hardy*, 24 *How. St. Tr.* 755 (1794).

In a later case, where an objection was made to leading a willing witness, Alderson B. said, "I apprehend you may put a leading question to an unwilling witness, on the examination in chief, at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not." *Parkin* v. *Moon*, 7 *C. & P.* 405 (1836).

When two prisoners were tried on the same indictment, and separately defended, a witness called by one of them ought to have been cross-examined on behalf of the other, as he gave testimony tending to criminate the latter, and, as the court did not allow this, nor his counsel to reply on that evidence, but offered to put questions for the prisoner, his conviction was quashed; whether the right existed, if that evidence had not criminated a prisoner, was left open. *Burdett*, *Dears. & P. C. C. R.* 431; 24 *L. J. M. C.* 63 (1855), p. 187: cf. *Hudwen*, p. 88. As to the cross-examination of a prisoner-witness (1) by the crown, (2) by a co-prisoner, see p. 88.

Cross-examination of witnesses as to previous statements in writing.] It was settled in *The Queen's case*, at 292, p. 2, that, when upon cross-examination a witness is asked, whether or not he has made any previous statement of a particular nature, the other side may intervene, and ask, whether the representation referred to was in writing or verbal. If it appears to be in writing, then the "inquiry is stopped, because the writing must be itself produced."

Now, by 28-9 V. 18, 4: "If a witness upon cross-examination, as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Ib. s. 5: "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit." See p. 57. When the attention of the witness has been called to the writing, and it is desired to contradict him, the writing must be put in evidence. *Riley*, 4 *F. & F.* 964 (1866); *Wright*, *ib.* 967 (1866)—depositions in both cases. In *Hughes*, 1868 (*previous editions of this work*), Byles J. said the proviso as to the judge doing as he thinks fit, applied equally before any answer had been given by the witness or after,—in fact to the whole of the trial; and the use he always made of a deposition was to have it read before any attempt was made to contradict a witness by it.

If counsel on cross-examination puts a paper into the witness's hand, and questions him upon it, "and anything comes of the questions" (but not otherwise), the counsel on the other side has a right to see the paper, and reexamine upon it. *Duncombe*, 8 *C. & P.* 369 (1838).

Since the passing of the statute, *Edwards*, 8 *C. & P.* 26 (1837); *Ford*, 2 *Den. C. C.* 245 (1851); *Quin*, 3 *F. & F.* 818 (1863), and *Hughes*, above, have merely an historical interest.

In *Christopher*, &c., 1 *Den. C. C.* 536 (1850), the magistrate's clerk had put, while copying the depositions *out of court*, magistrate and prisoners

being absent, some suggestions to the witnesses, the answers to which were inserted by him therein. Afterwards the witnesses appeared again before the magistrates, and, in the presence of the prisoners, were re-sworn; the depositions were read over, an opportunity was given to the prisoners to cross-examine the witnesses, and the depositions were then signed. On the trial the prisoners' counsel, without putting in the depositions, proposed to cross-examine a witness upon something, a material point, in the *additions*, which the judge at the trial refused to permit; but the Court of C. C. R. held that the question was proper, inasmuch as the magistrate's clerk, a person in no authority, "could not, by any act of his, attach to the writing a character which would exclude parol evidence of what was so written," and the conviction was quashed. See p. 63.

On what subjects a witness may be cross-examined.] A witness may be questioned on cross-examination, not only on the subject of inquiry, but upon any other subject, however remote, for the purpose of testing his credibility, his memory, his means of knowledge, or his accuracy. Cf. p. 88. Whether or not the question put will have that effect will depend on the circumstances of the case, and frequently also upon information which is in possession of the cross-examining counsel only; judges, therefore, are in the habit of granting considerable licence to counsel in this matter, from the implicit confidence which is placed in them that they will not turn the power, which is put in their hands for the purposes of justice, into an instrument of oppression. The moment it appears that a question is being put which does not either bear upon the issue, or enable the jury to judge of the *value* of the witness's testimony, it is the duty of the court to interfere, as well to protect the witness from what then becomes an injustice or an insult, as to prevent the time of the court from being wasted. Cf. *T.* s. 1434; *Best*, s. 130; cf. p. 87.

As to when a witness may refuse to answer questions put to him, see pp. 124 and foll.

Cross-examination of witnesses producing documents only.] Where a witness is called merely to produce a document which can be proved by another, and he is not sworn, he is not subject to cross-examination. *Simpson* v. *Smith*, 1822, *cor.* Holroyd J.; 2 *Phill. Ev.* 467, 10*th ed.* (magistrate producing information); *Davis* v. *Dale*, *M.* & *M.* 514 (1830). Thus where, on an indictment for perjury, a sheriff's officer had been subpœnaed to produce a warrant of the sheriff, after argument, he was ordered to do so without having been sworn. *Murlis*, *M.* & *M.* 515 (1830). But where the person producing a document is sworn, the other side is entitled to cross-examine him, although he is not examined in chief. *Brooke*, 2 *Stark.* 472 (1819). See *Rush* v. *Smyth*, p. 93. So, where a witness has been asked only an immaterial question, and his evidence is stopped by the judge, there is no right to cross-examine him. *Creevy* v. *Carr*, 7 *C.* & *P.* 64 (1835). Where a witness is sworn, and gives some evidence, if it be merely to prove an instrument, he is to be considered a witness for all purposes. *Morgan* v. *Bridges*, 2 *Stark. N. P.* 314 (1818).

Re-examination.] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must of course be confined to the subject-matter of the cross-examination. *T.* s. 1474. "The re-examination of a witness is not to extend to any new matter, unconnected with the cross-examination, and which might have been inquired into on the examination in chief. If new matter is wanted, the usual course is to ask the judge to make the inquiry; in such cases he will exercise his discretion, and determine how the inquiry, if necessary, may be most

conveniently made, whether by himself or by the counsel." 2 *Phill. Ev.* 473, 10*th ed.*

The rule with regard to re-examinations is thus laid down by Abbott C.J. in *The Queen's case*, p. 2, at 297: "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but, I think, he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. . . . I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit relative to the subject-matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion." Cf. p. 48. In *Prince* v. *Samo*, 7 *A. & E.* 627; 7 *L.J. Q.B.* 123 (1838), the Court of Queen's Bench noting the distinction here made between a party to the suit and a third person, "overruled" (*T.* s. 1474 *n.*) the doctrine laid down in the above case, and held, that when a statement made by a *party to a suit* in giving evidence on a former trial, has been got out in cross-examination, only so much of the remainder of the evidence is allowed to be given on re-examination as tends to qualify or explain the statement made on cross-examination. See *Sturge* v. *Buchanan*, 10 *A. & E.* 605; 12 *P. & D.* 573 (1839). In cross-examination the prosecutor admitted having spoken ill of his father: in re-examination it was proposed to ask him how his father had behaved before he spoke thus. On objection, Parke B. said the question might be put, for the father's conduct had been made evidence by the cross-examination to discredit the witness, and the latter was entitled to show that his language was justified. *St. George*, p. 251.

Where one of the plaintiff's witnesses voluntarily stated on cross-examination facts not strictly evidence, but which might prejudice the plaintiff, it was held that unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. *Blewett* v. *Tregonning*, 3 *A. & E.* 583 (1835).

Memorandum to refresh witness's memory.] See pp. 54, 55. He may refer to any entry or memorandum he has made shortly after the occurrence of the fact to which it relates, although the entry or memorandum would not of itself be evidence, *Kensington* v. *Inglis*, 8 *East*, 288–9 (1807); as, to an unstamped receipt, *Maugham* v. *Hubbard*, 8 *B. & C.* 14 (1828), or to entries made by another in his presence and read out to him, *Langton*, 2 *Q. B. D.* 296; 46 *L. J. M. C.* 136; 13 *Cox C. C.* 345 (1876); C. C. R., p. 562. But a witness cannot refresh his memory by even *his own* extracts from a book, if he has no other recollection, *Doe* v. *Perkins*, 3 *T. R.* 749 (1790); or from a copy of extracts from a written book: for the rule requiring the best evidence makes it necessary to produce the original, though used only to refresh the memory. *Burton* v. *Plummer*, 2 *A. & E.* 343, 344 (1834); cf. *Alcock* v. *The Royal Exchange Ins. Co.*, 13 *Q. B.* 292 (1849).

Where a witness on looking at a written paper has his memory so refreshed that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. *Langton*, above. Thus where it has been material "to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them." *T.* s. 1410, and cases there cited. A solicitor was allowed to look at his own account of interviews with prisoner, dictated by him to a stenographer, then copied in longhand and read over by him soon afterwards, though the shorthand writer could have been called. *Dexter*, 19 *Cox C. C.* 360 (1899) p. 161.

Where the witness cannot speak without referring to a book, the book must be produced in court. *Per* Coleridge J., *Howard* v. *Canfield*, 5 *Dowl. P. C.* 417 (1836). If produced by or to a witness, the counsel for the other side has a right to see it, and cross-examine from it; *Hardy*, at 824, p. 117; or he may look at it and ask when it was written, without being bound to put it in evidence. *Ramsden*, 2 *C. & P.* 603 (1827). If he cross-examines to other entries than those referred to by the witness, he makes them part of his own evidence. *Per* Gurney B., *Gregory* v. *Tavernor*, 6 *C. & P.* 281 (1833), p. 663; the jury may see the entries.

A photograph, said to be that of the "real" husband, was, upon a trial for bigamy, allowed to be shown to two persons who had known him, on the ground that it was "a visible representation of the image or impression made on the minds of the witnesses by the sight of the person" represented, so that it was "only another species of the evidence which persons give of identity, when they speak merely from memory." *Tolson*, 4 *F. & F.* 104 (1864).

Examination as to belief.] Belief is as much a fact as any other. *T.* s. 1415. It is the constant practice to receive a witness's belief of the identity of a person, or of the fact of a certain writing being that of a particular individual, though the witness will not swear positively to these facts. See *Miller*, 3 *Wils.* 427 (1773). For false evidence so given, a witness may be indicted for perjury. *Pedley*, 1 *Leach*, 325 (1784); *Schlesinger*, 10 *Q. B.* 670; 17 *L. J. M. C.* 79 (1847). See p. 683.

Examination as to opinion.] Although, in general, a witness cannot be asked what his opinion upon a particular question is, since he is called for the purpose of speaking as to *facts* (other than his opinion) only; yet where matter of skill and judgment is involved, a person competent to give an opinion may be asked what that opinion is. Thus an engineer may be called to say what, in his opinion, was the cause of a harbour being blocked up. *Folkes* v. *Chad*, 3 *Dougl.* 157; 4 *T. R.* 498 (1782). In a variety of other cases, also, such evidence has been admitted. "Many nice questions," observes L. Mansfield, "may arise as to forgery, and as to the impressions of seals, whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken." *Ib.* So it seems is the opinion of any person in the habit of receiving letters, of the genuineness of a post-mark. See *Abbey* v. *Lill*, 5 *Bingh.* 299 (1829). So antiquaries as to the date of ancient hand-writing. *Tracy Peerage*, 10 *Cl. & Fin.* at 191 (1843), where L. Campbell expresses the opinion "that hardly any weight is to be given to the evidence of what are called scientific witnesses." So the opinion of a shipbuilder, who has not seen the ship, on a question of seaworthiness. *Thornton* v. *Roy. Exch. Ass. Co.*, *Peake, N. P. C.* 25 (1791); *Beckwith* v. *Sydebotham*, 1 *Camp.* 117 (1807); the opinion of brokers on a policy; *Chapman* v. *Walton*, 10

Bingh. 57 (1833). However, the Court of Queen's Bench in *Campbell* v. *Rickards*, 5 *B. & Ad.* 840 (1833), held (overruling several previous decisions), that the materiality of a fact, concealed at the time of insuring, was a question for the jury alone. "Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties acted in one way rather than another."

It is the constant practice to examine medical men as to their judgment with regard to the cause of a person's death, who has suffered violence; and where, on a trial for murder, the defence was insanity, the judges, to whom the point was referred, were all of opinion that in such a case a witness of medical skill might be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. Several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz. whether, from the other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. *Wright*, *Russ. & Ry.* 456 (1821). On an indictment for cutting and maiming, Park J. on the authority of the above case, allowed a medical man, who had heard the trial, to be asked whether the facts and appearances proved showed symptoms of insanity. *Searle*, 1 *Moo. & R.* 75 (1831). And it seems that in *McNaughten* (10 *Cl. & F.* 200, 1843), p. 810, such questions were allowed to be asked. 3 *Russ. Cri.* 611 (*n.*). So, also, skilled witnesses may refresh their memory by referring to professional treatises, although such treatises are not admissible in evidence: *Sussex Peerage*, below; *T.* s. 1423; and at all events a medical witness may be asked whether he has not in the course of his reading become acquainted with such and such results of scientific experience, and he may state that his judgment is founded in part on what he has read, though the books themselves could not be read. *Collier* v. *Simpson*, 5 *C. & P.* 74 (1831). Foreign law-books were formerly read to prove the foreign law; *e.g.* in *Picton*, p. 277, but see below.

Where on an indictment for uttering a forged will, which together with pieces of paper "used for the purpose of setting it up," *i.e.* supporting it, it was suggested, had been written over pencil marks which had been rubbed out, Parke B. (after consulting Tindal C.J.) held, that the evidence of an engraver who had examined the papers with a mirror, and traced the pencil marks, was admissible on the part of the prosecution, but that the weight of the evidence would depend upon the way in which it would be confirmed. *Williams*, 8 *C. & P.* 434 (1838).

In proving the laws (written or unwritten) of foreign countries also, the opinions of competent witnesses are admissible. The law of a foreign state must be proved by the *parol* evidence of witnesses possessing professional skill; *De Bode's case*, 8 *Q. B.*, at 246 (1844), overruling *Clegg* v. *Levy*, 3 *Camp.* 166 (1812), which permits mere authenticated copies of foreign laws to be read; *Sussex Peerage*, 11 *Cl. & Fin.* at 114–7; 8 *Jur.* 793; 65 *R. R.* 11 (1844); *Nelson* v. *L. Bridport*, 8 *Beav.* 527 (1845); *T.* s. 1423. As to books and other legal works, see above. Thus on a trial for abduction, a Scotch barrister was examined as to whether the marriage, as proved by a witness would be a valid marriage according to the law of Scotland. *Wakefield*, at 287, p. 106. See also *Lindo* v. *Belisario*, 1 *Hag. Cons.* 216 (1795); *Dalrymple* v. *Dalrymple*, 2 *Hagg. Cons.* at 59 (1811); *Middleton* v. *Janverin*, *ib.* 437 (1802); cf. *Lucon* v. *Higgins*, p. 277; *Povey*, 22 *L. J. M. C.* 19; *D. & B. C. C.* 32 (1852), p. 277; *Cocks* v. *Purday*, 2 *C. & K.* 269 (1846).

"Foreign unwritten laws, customs, and usages, may be proved, and, indeed, must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses instructed in the laws, customs, and usages, under oath." *Story*, on the Conflict of Laws, s. 642, *8th ed.* (Boston, 1883), referring here to English law; so *T.*, above, to the same effect, who by "customs" or "usages" must mean legal ones, for "a foreign *custom* or *usage* is . . . a matter of fact (just as . . . in this country), and therefore can be proved by any witness who is acquainted with the fact." *T.* s. 1425, citing cases. See p. 143; and as to marriage, p. 277.

As to proving the laws or customs of savage states, see *In re Bethell*, 38 *Ch. D.* 220 (1888).

Rebutting evidence.] "After the close of the case for the defendant, the general rule is that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence and not tending to controvert or disprove it . . . but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted." 2 *Phill. Ev.* 475. That discretion is, in practice, the only rule (provided, always, that such evidence is not merely confirmatory of the original case, for then it should have been tendered at first). Evidence in reply is usually allowed where prisoner gives evidence of matter which could not be foreseen by the prosecution, *e.g.* a lawful explanation (*Stimpson*, 2 *C. & P.* 415 in 1826), that the goods were bought; or an *alibi* (*Hilditch*, 5 *C. & P.* 299 in 1832); good character (*Rowton*, p. 86), or some collateral fact impeaching the credit of a witness on the other side (*Whelan*, p. 89). In *Frost*, p. 178 (*St. Tr.* at 386) Tindal C.J. said: "If any matter arises *ex improviso*, which no human ingenuity can foresee on the part of . . . a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown." Theoretically, no doubt, the prisoner might reply on the rebutting evidence, but the procedure is controlled by the judge. Cf. p. 86 (remarks by Cockburn C.J.), p. 89, and p. 186 (*per* Cave J.), and *Beighton*, p. 724. For instances see pp. 28, 115, 579.

PRIVILEGE OF WITNESSES.

Nature of privilege.] We have already considered (pp. 88 and foll., 119) what questions may be put to a witness; every such question the witness is bound to answer, unless he can show that he is privileged from so doing, from some peculiarity in his situation.

The difference between privilege and incompetency (cf. p. 104) is that an incompetent witness ought not to be examined, and if he is examined inadvertently, his testimony is not legal evidence, *i.e.* the verdict may be set aside; but a privileged witness *may* always be examined, and his testimony is perfectly legal if the privilege be not insisted on.

If a witness be compelled to answer in cases where he claims and ought to have been allowed his privilege, that is not a ground for reversing a conviction upon complaint of the defendant, as the only person injured is the witness. *Kinglake*, 11 *Cox C. C.* 499 (1870), p. 134.

The privilege of a witness arises in three ways: (i.) on the ground that to answer the question would expose him to consequences so injurious that he ought to be allowed to decline doing so; (ii.) that to answer the question would be a breach of confidence, which he ought not to be forced to commit; (iii.) that to compel the witness to answer the question would be against public policy.

In view of civil consequences.] It has generally been considered that a witness is privileged from answering any question, the answer to which might directly subject him to forfeiture of estate. Forfeiture, pp. 516, 611, is now abolished except as consequent on outlawry by 33–4 V. 23, 1. The old rule is recognised and the existing rule is stated by 46 G. 3, 37, by which, after reciting that "doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to any penalty or forfeiture, but the answering of which might establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit at the instance of his Majesty or of some other person or persons," it was *declared* and enacted, "that a witness cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty or of any other person or persons." *Best*, s. 131.

In a previous edition of this work a doubt was expressed whether the exception of "penalty" extends to penalties to be recovered by a common informer, or otherwise in a civil manner, but no other authority seems to share the doubt. *T.* s. 1453.

In view of ecclesiastical consequences.] Questions subjecting a witness to ecclesiastical penalties have been generally considered as coming within those which he is entitled to decline answering, as under 2–3 E. 6, 13, 2 (now

repealed), for not setting out tithes, *Jackson* v. *Benson*, 1 *Y. & J.* 32 (1826); on a charge of incest, *Brownsword* v. *Edwards*, 2 *Ves. Sen.* 245 (1750); or illicit cohabitation, *Chetwynd* v. *Lindon*, *Ib.* 403 (1752).

But there cannot be a doubt that a judge, in deciding whether or not a witness is entitled to the privilege, would consider whether the danger suggested by the witness was "real and appreciable," *Boyes*, p. 110, and below, where, despite his pardon, a witness pleaded fear of impeachment for bribery in a Parliamentary election; and the mere chance of an obsolete jurisdiction like the ecclesiastical, or that of impeachment, being set in motion would very likely not be considered as entitling the witness to his privilege.

In view of criminal consequences.] See p. 45. That the witness will be subjected to a criminal charge, however punishable, is clearly a sufficient ground for claiming the protection. Thus, a person could not be compelled to confess himself the father of a bastard child, as he was thereby subjected to the punishment inflicted by 18 Eliz. 3, 2 (repealed). *St. Mary, Nottingham*, 13 *East*, 58 *n.* (before 1810). So a witness could not be compelled to answer a question which even had a tendency to convict him of usury. *Cates* v. *Hardacre*, 3 *Taunt.* 424 (1811). And if a witness was improperly compelled, *after objection taken by him*, to answer questions tending to criminate him, it would appear that such answers would not be admissible in evidence against him should he be subsequently tried on a criminal charge,—the only exception to depositions being admissible evidence against the deponent. *Coote*, p. 52. But if the time limited for the recovery of the penalty have expired, the witness may be compelled to answer. *Roberts* v. *Allatt, M. & M.* 192 (1828).

Whether or not a witness who has been pardoned is bound to answer questions which tend to show him guilty of the offence for which the pardon has been granted, is perhaps doubtful. The question appears to have been decided in the negative by North C.J. in *Reading*, 7 *How. St. Tr.* 296 (1679); but that case has been much doubted. See last case above; and in *Boyes*, p. 110, it was held by the Queen's Bench that a pardon took away the privilege of the witness in such a case.

As to the effect of a pardon see *Hay* v. *Justices of the Tower*, 24 *Q. B. D.* 551 (1890), p. 569; pardoned convict is in the legal position of unconvicted person. See p. 109.

By the Corrupt Practices Prevention Act, 1883, 46-7 V. 51, 59, persons called as witnesses before any election court, or before election commissioners, are not excused from answering as to election offences; but if they answer every question truly, they are to receive a certificate, which will be a bar to all proceedings against such persons for any offences under the Corrupt Practices Prevention Acts, and no answer shall, except in the case of any criminal proceeding for perjury in respect of their then evidence, be admissible in evidence in any proceeding, civil or criminal. By the interpretation clause, s. 64, the word "indictment" includes "information." This interpretation was inserted to meet the case of *Slator*, 8 *Q. B. D.* 267; 51 *L. J. Q. B.* 246 (1881), ex-officio information for perjury, and the words "any criminal proceeding" seem to get rid of the objection raised in *Buttle*, *L. R.* 1 *C. C. R.* 248; 39 *L. J. M. C.* 115 (1870), where it was held that answers given before a commission could not be used on a trial for perjury committed at the trial of an election petition.

Similar provisions are applied to witnesses as to any offence against the Explosive Substances Act, 1883, 46-7 V. 3, 6.

As to compelling witnesses to answer in cases of bankruptcy, and fraudulent agents, bankers, &c., see p. 45.

When the proprietor of certain pills (unpatented), cross-examined as to

their composition, claimed the protection of the court, on the ground of its being a trade secret the disclosure of which would be a great loss to him, L. Lyndhurst ordered him to answer, but suggested to counsel "the propriety of not going further into this subject than the ends of justice required." *Webb*, p. 600.

The judge to decide on the right to decline answering.] The judge is to decide whether or not the witness is entitled to the privilege, subject to the correction of a superior court. What queries he ought to make in order to satisfy himself upon this point has been the subject of considerable difference of opinion. In *Fisher* v. *Ronalds*, 12 *C. B.* 762 (1852), it was unnecessary to decide the point, but Maule J. said, "It is the witness who is to exercise his discretion, not the judge. The witness might be asked, 'Were you in London on such a day?' and though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission would complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him." It was equally unnecessary to decide the point in *Osborne* v. *The London Dock Company*, 10 *Ex. R.* 701 (1855), but the question was a good deal discussed, the opinion of Parke B. clearly inclining to the view that the witness ought to satisfy the court that the effect of the question will be to endanger him. The learned baron stated that this was the opinion of the majority of the judges who considered the case of *Garbett*, 1 *Den. C. C.* 236 (1847), p. 134, though they expressly refrained from deciding the point; and he also cited the opinion of L. Truro, who, in the case of *Short* v. *Mercier*, 3 *Mac. & G.* 217 (1851), said, "A defendant, in order to entitle himself to protection, is not bound to show to what extent the discovery sought may affect him, for to do that he might oftentimes of necessity deprive himself of the benefit he is seeking; but it will satisfy the rule if he states circumstances consistent on the face of them with the existence of the peril alleged, and which also render it extremely probable." In *Sidebottom* v. *Atkyns*, 3 *Jur. N. S.* 631 (1857), Stuart V.-C. holding strongly that the view of Maule J. (and of Jervis C.J. stated to be the same) went much too far, compelled a witness to answer questions although he swore that he should thereby subject himself to a criminal prosecution. But in *Adams* v. *Lloyd*, 3 *Hurl. & Nor.* 351 (1858), Pollock C.B. distinctly approves of Maule J.'s statement (above), and does not accept the doubts, adding, "The only exception I know of is this—where the judge is perfectly certain that the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege, then the judge is right in insisting on his answering the question." See *Boyes*, p. 125, the rule in which case may be taken to be well established; it was adopted by the Court of Appeal in *Ex parte Reynolds*, 20 *Ch. D.* 294; 51 *L. J. Ch.* 756 (1882): when it once appears that the witness is really in danger, "great latitude" must be allowed him to judge for himself. Cf. *Charlesworth*, p. 188, and (arising therefrom) *Ex parte Fernandez*, 30 *L. J. C. P.* 321 (1861).

The result is that the bare oath of the witness, that he is endangered by being compelled to answer, is not to be considered as necessarily sufficient.

Questions tending to degrade a witness's character.] It is submitted that there cannot, by any possibility, be any doubt as to the rule upon the subject.

Every question must be answered by a witness, whether it tend to degrade him or not, *if it be material to the issue*, unless it tend to render him liable to penalties and punishment (p. 124). As the credibility of a witness is always in issue, he must, perhaps, therefore, answer questions which are in no other way material than as affecting his credibility. *T.* s. 1460. On the other hand, every question which is not material to the issue is improper; and it is not only improper, but unbecoming, to put questions to a witness, the very putting of which tends to degrade him, and which, not being material, he cannot be compelled to answer. And as every witness is entitled to the protection of the court in which he appears, any attempt to degrade him unnecessarily will immediately be repressed, without waiting for the witness to object to the question. See p. 730.

As to questions on previous convictions, see pp. 87, 137.

Privilege of husband and wife.] A doubt has arisen whether the principle of law which considers husband and wife as one person, extends to protect persons who stand in that relation to each other from answering questions which tend to criminate either, even although they are neither of them put upon trial, or in a situation in which the evidence can be used against them. See *Cliviger*, p. 105 (overruled). All the subsequent cases, with one exception, treat the husband or wife as a competent witness under such circumstances. *All Saints, Worcester*, p. 105; *Inhabs. of Bathwick*, 2 *B. & Ad.* 639 (1831); *Williams*, 8 *C. & P.* 284 (1838); where the wife of a man already convicted of stealing was admitted against another prisoner *separately* indicted for the *same* larceny. The case the other way is that of *Gleed* (1832), 3 *Russ. Cri.* 664, *6th ed.*, in which, on a charge of stealing wheat, Taunton J., after consulting Littledale J., refused to allow a wife to be called in order that she might be asked whether her husband, who had absconded, was not present when the wheat was stolen, and delivered it to the prisoner; but that case would hardly prevail against the decisions above referred to. In *Thurtell, Annual Register*, 1 (1824), Mrs. Probert, whose husband had previously been acquitted, was the principal witness; *per* Alderson B. in *Williams*, above. See p. 104, for competency of spouses against each other.

But the tendency of the courts is to spare such witnesses as much as possible. See *All Saints, Worcester*, p. 105, *per* Bayley J. and *Cartwright* v. *Green*, 8 *Ves.* 405 (1802), wife not compelled in equity to make discovery of a felony against her husband. By 16–7 V. 83, 3, "No husband shall be compellable to disclose any communication made to him by his wife during the marriage," and *vice versâ*. So s. 1 (*d*) of 1898 Act, p. 829. See *O'Connor* v. *Marjoribanks*, p. 104.

That, if the husband or wife have been already convicted, acquitted, or pardoned, there will be no ground for claiming the privilege seems to follow from *Williams*, above.

Confidential adviser privileged—Documents.] The matters with respect to which the privilege of secrecy exists on the ground of confidence are those which have come to the knowledge of the witness *as professional legal adviser*. *Wilson* v. *Rastall*, 4 *T. R.* 758 (1792); *Duchess of Kingston's case*, 20 *St. Tr.* at 573; 1 *Leach*, 146 (1776), pp. 165, 279. Other professional persons, whether physicians, surgeons, or clergymen, have no such privilege. *Ib.* Thus where the prisoner, being a Roman Catholic, made a confession before a Protestant clergyman, the confession was permitted to be given in evidence at the trial, and he was executed. *Sparke*, cited *Peake, N. P. C.* 78 (about 1791), where L. Kenyon observed that he should have paused before he admitted the evidence; but there appears to be no ground for this doubt:

in *Du Barré* v. *Livette*, *ib.* (1791), he refused to hear in a civil action the interpreter between defendant, a thief, and his attorney repeat conversations between them as to the former's criminal trial, but admitted his own first-hand conversations in the absence of the attorney. In *Gilham*, p. 39, it was admitted by the counsel for the prisoner, that a clergyman is bound to disclose what has been revealed to him as matter of religious confession; and the prisoner in that case was executed.

So the agent of the solicitor stands in the same situation as the solicitor himself, and the conversations of an attorney cannot be admitted against his client. *Parkins* v. *Hawkshaw*, 2 *Stark. N. P. C.* 239 (1817); *Goodall* v. *Little*, 20 *L. J. Ch.* 132 (1851), letters passing between solicitors privileged, but not those passing between co-defendants to be put before solicitors. So a clerk to the solicitor. *Taylor* v. *Foster*, 2 *C. & P.* 195 (1825); *Inhabs. of Upper Boddington*, 8 *D. & R.* 726 (1826). So a barrister's clerk, subpœnaed to produce his master's retainer in a cause, was not allowed to be called. *Foote* v. *Hayne*, *Ry. & Moo.* 165 (1824).

Documents in a previous action remain privileged, but secondary evidence of their contents may be given; *Calcraft* v. *Guest* (1898), 1 *Q. B.* 759; *C. A.* Although some doubt has been entertained as to the extent to which matters communicated to a barrister or a solicitor in his professional character are privileged, where they do not relate to a suit or controversy either pending or contemplated, and although the rule was attempted to be restricted by L. Tenterden C.J. to the latter cases only; *Clark* v. *Clark*, 1 *Moody & Rob.* 3; *Williams* v. *Mundie*, *Ry. & Moo.* 34 (1824); yet it seems to be at length settled, that all such communications are privileged, whether made with reference to a pending or contemplated suit or not. See all the cases commented upon by L. Brougham C. in *Greenhough* v. *Gaskell*, 1 *Myl. & K.* 100 (1833), p. 130. See also *Walker* v. *Wildman*, *Madd. & G.* 47 (1821); *Mynn* v. *Joliffe*, 1 *Moo. & Rob.* 326 (1834); *Moore* v. *Tyrrell*, 4 *B. & Ad.* 870 (1833). As to when the client may be compelled in equity to disclose communications made before any dispute arose, see T. ss. 924–5 and *n.*, ss. 1793, 1793A.

Nor can a solicitor give evidence as to the destruction of an instrument which he has been admitted in confidence as attorney to see (or to know) destroyed. "One sense is privileged as well as another," *per* L. Ellenborough. *Robson* v. *Kemp*, 5 *Esp.* 54 (1803), p. 128. Cf. *Downer*, p. 47, at 490.

The rule applies also to the professional advisers of strangers to the inquiry. Thus a solicitor is not at liberty to disclose what is communicated to him confidentially by his client, although the latter be not in any shape before the court. *Withers*, 2 *Camp.* 578 (1811).

A communication in writing is privileged, as well as one by parol; deeds and other writings deposited with a solicitor in his professional capacity, will not be allowed to be produced by him.

To prove the contents of a deed, the defendant's counsel offered a copy, which had been procured from the solicitor of a person under whom the plaintiff claimed, but Bayley J. refused to admit it. He said, "The attorney could not have given evidence of the contents of the deed, which had been entrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or a verbal communication. It is the privilege of his client, and continues from first to last." *Fisher* v. *Heming* (1809), 1 *Phill. Ev.* 116. But see *Cleave* v. *Jones*, p. 116, and *Lloyd* v. *Mostyn*, 10 *M. & W.* 481, 482 (1842), where Parke B. questions the correctness of the decision in *Fisher* v. *Heming*, which, at any rate, was distinctly overruled in *Calcraft* v. *Guest*, above. In *Volant* v. *Soyer*, 13 *C. B.* 231; 12 *L. J. C. P.* 83 (1853), a solicitor refused to produce a client's title deed; he was

then asked what the deed was, but the judge disallowed the question, and refused also to examine the deed; the court held that he was right. Nor where a solicitor holds a document for a client can he be compelled to produce it, by a person who has an equal interest in it with his client. *Newton* v. *Chaplin*, 10 *C. B.* 356 (1856): p. 108. See *Dixon* and *Bate* v. *Kinsey*, pp. 9, 10.

The information must have been necessarily obtained by the legal adviser in his professional capacity. Thus a solicitor, who has witnessed a deed produced in a cause, may be examined as to the true time of execution; or if a question arise as to a rasure in a deed or bond, he may be asked whether he ever saw the instrument in any other state, that being a fact within his own knowledge; "but he ought not to be permitted to discover any confessions his client may have made to him on such head." *B. N. P.* 284. But L. Abinger C.B. said that that passage applies only "where the attorney has his knowledge independently of any communication from the client." *Wheatley* v. *Williams*, 1 *M. & W.* 533 (1836). It was there held that a solicitor is not compellable to state whether a document shown to him by his client during a professional interview, was in the same state as when produced at the trial, namely, whether it was stamped or not. In *Dwyer* v. *Collins*, p. 9, at 646 *Ex.*, it was held, that the right of a solicitor not to disclose matters with which he has become acquainted in the course of his employment as such, does not extend to matters of fact which he knows by *any other means* than confidential communication with his client, though, if he had not been employed as solicitor, he probably would not have known them; and that upon this ground, a solicitor of a party to a suit, called by the other side, is bound to answer on a trial, whether a particular document belonging to his client *is in his possession, and is then in court.* So *Coates* v. *Birch*, 2 *Q. B.* 252 (1841). In both cases secondary evidence was thus let in. In *Doe* v. *Andrews*, p. 93, L. Mansfield said, "An attorney has no privilege to refuse to give evidence of collateral facts" where the attorney refused to give evidence of his own attestation against his client. In *Farley*, 1 *Den. C. C.* 197 (1846), p. 130, when the wife of a prisoner took, by his instructions, a forged will to a solicitor, and asked if he could advance her husband some money upon the mortgage of property mentioned in the will, and the solicitor made no charge for the interview; it was held, on the trial, that he could give an account of the interview. So where a forged will was put into a solicitor's hands among some title deeds, which the prisoner sent with the will, so as to raise no suspicion; it was held, by all the judges, that the communication was not privileged. *J. Jones*, 1 *Den. C. C. R.* 166 (1846).

And the matter must also be one which is a subject of professional confidence. Thus the clerk of a solicitor may be called to identify a person, though he has only become acquainted with him in his professional capacity; for it is a fact cognisable both by the witness and by others, without any confidence being reposed in him; *Studdy* v. *Saunders*, 2 *Dow. & Ry.* 347 (1823); though the contrary was, upon one occasion, ruled by Holroyd J., *Parkins* v. *Hawkshaw*, p. 128. So a solicitor's clerk may be called to prove the receipt of a particular paper from the other party, for it is a mere fact. *Eicke* v. *Nokes*, *Moo. & M.* 303 (1829). So a solicitor conducting a cause may be called and asked who employed him, in order to show who is the real defendant and to let in his declarations. *Levy* v. *Pope*, *Moo. & M.* 410 (1829). So he may be called by the other side to prove that his client is in possession of a particular document, in order to let in secondary evidence of its contents, notice to produce having been given. *Beavan* v. *Waters*, *M. & M.* 235 (1828). So to prove his client's handwriting, though his knowledge was obtained from witnessing the execution of the bail-bond in the action. *Hurd* v. *Moring*, 1 *C. & P.* 372 (1824); *Robson* v. *Kemp*, p. 128. So where an attorney is present when his client is sworn to

an answer in chancery, on an indictment for perjury, he will be a good witness to prove the fact of the taking of the oath, "for it is a fact in his own knowledge and no matter of secrecy committed to him by his client." *Bull. N. P.* 28. But in *Watkinson*, 9 *Str.* 1121 (1740), where the solicitor, on a similar indictment, was called to speak to the identity of the defendant, the chief justice would not compel him to be sworn. "*Quære tamen*," says the reporter; "for this was to a fact in his own knowledge, and no matter of secrecy committed to him by his client." And L. Brougham, in *Greenough* v. *Gaskell*, p. 128, observes, "the putting in the answer, so far from being a secret disclosed, was in its very nature a matter of publicity," and that *Watkinson* could not be considered as law. And see *Doe* v. *Andrews*, p. 129.

There is no doubt that the privilege may be equally claimed, whether the client be the prisoner or any other person, or whether the subject of the confidence be the charge against the prisoner or any other professional communication. *T.* s. 919.

The law, and the cases on the subject, were considered by the Court for Crown Cases Reserved in *Cox and Railton*, 14 *Q. B. D.* 153; 54 *L. J. M. C.* 41; 52 *L. T.* 25; 33 *R.* 396; 49 *J. P.* 374; 15 *Cox C. C.* 611 (1884); when the judgment of the court was delivered by Stephen J. The court were unanimously of opinion that those communications *only* are privileged which pass between a solicitor and his client in professional confidence, and in the *legitimate* course of professional employment; and that communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it are not privileged from disclosure. See also *Farley*, p. 130; *Avery*, 8 *C. & P.* 596 (1838), p. 464; *Annesley* v. *Lord Anglesea*, 17 *How. St. Tr.* 1229 (1743); and *Russell* v. *Jackson*, 9 *Hare* 392 (1851). Cf. *Brown*, p. 93.

Privileged on the ground of public policy—Grand Jury.] In *Watson*, p. 1 (*St. Tr.* 112, at 107), a witness was questioned by the prisoner's counsel, as to his having produced and read a certain writing before the grand jury. On its being objected that he could not be asked *what* he then deposed, L. Ellenborough C.J. said, he had considerable doubts upon the subject: he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer. The question was not put. But it has since been held, that a witness for the prosecution in a case of felony, may be asked on cross-examination, whether he has not stated certain facts before the grand jury, and that the witness is bound to answer the question. *Gibson, Carr. & M.* 672 (1842).

According to a case in 1650, a clerk attending before a grand jury shall not be compelled to reveal what was given in evidence. *Trials per Pais*, ch. 15, p. 387, 8*th ed.* (1766); see 12 *Vin. Ab.* 38, *Evidence* (*B. a.* 5). Where a bill of indictment was preferred for perjury committed at the quarter sessions, and it was proposed to examine one of the grand jury, who had acted as chairman at such sessions, Patteson J. said, "This is a new point, but I should advise the grand jury not to examine him. He is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court." *Gazard*, 8 *C. & P.* 595 (1838), p. 108.

Privilege on the ground of public policy—informers, &c.] Another class of privileged communications are those disclosures which are made by informers, to the government, the magistracy, or the police, with the object of detecting and punishing offenders. The general rule on this subject is thus laid down by Eyre C.J.: "It is perfectly right that all opportunities should be given

to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made appear that really and truly it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it." *Hardy*, p. 117, at 808. It is not every communication made by an informer, to any person to whom he thinks fit to make it, that is privileged from being inquired into, but those only which are made to persons standing in a certain situation, and for the purposes of legal investigation or state inquiry. Communications made to government respecting treasonable matters are privileged, and a communication to a member of government is to be considered as a communication to government itself; and that person cannot be asked whether he has conveyed the information to government. *Watson*, p. 1 (*St. Tr.* 101; *Stark.* 136). So a person employed by an officer of the executive government, to collect information at a meeting supposed to be held for treasonable purposes, was not allowed to disclose the name of his employer, or the nature of the connection between them. *Hardy*, at 753; *Watson Gurney's Rep.* 159; p. 1 (*St. Tr.* 100, *Stark.* 135). So where a prosecution is carried on by the Director of Public Prosecutions and he is called as a witness, he may refuse to give the names of persons from whom he has received information and the nature of that information, unless the judge should think the disclosure necessary in the interests of the prisoner. *Marks* v. *Beyfus*, 25 *Q. B. D.* 494; 59 *L. J. Q. B.* 579; 38 *W. R.* 705 (1890).

The protection extends to all communications made to officers of justice, or to persons who form links in the chain by which the information is conveyed to officers of justice. A witness who had given information, admitted on a trial for high treason that he had communicated what he knew to a friend, who had advised him to make a disclosure to another person. He was asked whether that friend was a magistrate, and on his answering no, he was asked —who was the friend? It was objected, that the person by whose advice the information was given to one standing "in the situation of magistrate," was "to all intents and purposes the informer," and that his name could not be disclosed. The judges differed. Eyre C.J., Hotham B., and Grose J. thought the question objectionable; Macdonald C.B. and Buller J. were of opinion it should be admitted. Eyre C.J. said, "all those questions which tend to the discovery of the channels by whom the disclosure was made to the officers of justice," are not permitted to be asked. Such matters cannot be disclosed, "upon the general principle of the convenience of public justice." If it is objected to "it is no more competent for the defendant to ask who the person was that advised him to make a disclosure, than it is to whom he made the disclosure in consequence of that advice;—than it is to ask any other question respecting the channel of information, or all that was done under it." Hotham B. said, that the disclosure was made under a persuasion, that through the friend it would be conveyed to a magistrate, and that there was no distinction between a disclosure to the magistrate himself, and to a friend to communicate it to him. Macdonald C.B. said, that if he were satisfied that the friend was a link in the chain of communication, he should agree that the rule applied, but that not being connected either with the magistracy or the executive government, the case did not appear to him to fall within the rule; and the opinion of Buller J. was founded on the same reason. *Hardy*, p. 117, at 811. The above cases were cited and considered in *Att.-Gen.* v. *Briant*, 15 *M. & W.* 169 (1846), where the court decided, that upon the trial of an information for a breach of the revenue laws, a witness for the crown cannot be asked in

cross-examination, "Did you give the information?" But on an indictment for administering poison with intent to murder, the police having, in consequence of certain information, found the bottle containing the poison, in a place used by the prisoner, a policeman declined to state from whom he had received that information; but Cockburn C.J. ordered him to answer the question put to him, as in the particular instance it was material, the information having been supplied by two witnesses not called for the Crown; verdict, "not guilty." *Richardson*, 3 *F. & F.* 693 (1863).

Privilege on the ground of public policy—official communications.] It has always been held that official communications relating to matters which affect the interests of the community at large may be withheld; thus the communications between the governor and law officers of a colony, *Wyatt* v. *Gore*, *Holt N. P. C.* 299 (1816); between the governor of a colony and one of the secretaries of state, *Anderson* v. *Hamilton*, 2 *B. & B.* 156 *n.*; 8 *Price*, 244 (1816); between a governor of a colony and a military officer, *Cooke* v. *Maxwell*, 2 *Stark.* 183 (1817), are privileged. So where, on a trial for high treason, Lord Grenville was called upon to produce a letter intercepted at the post-office, and which was supposed to have come to his hands, it was ruled that he could not be required to produce it, for that secrets of state were not to be taken out of the hands of his Majesty's confidential servants. *Anderson* v. *Hamilton*, *per* L. Ellenborough. What passes in parliament is in the same manner privileged. Thus, on a trial for a libel upon Mr. Plunkett, a member of the Irish parliament, the Speaker of the Irish House of Commons being called and asked, whether he had heard Mr. Plunkett deliver his sentiments in parliament on matters of a public nature, L. Ellenborough said that the Speaker was warranted in refusing to disclose what had taken place in a debate in the House of Commons. He *might* disclose what passed there, and if he thought fit to do so, he should receive it as evidence. As to the fact of Mr. Plunkett having spoken in parliament, or taken any part in the debate, he was bound to answer. That was a *fact* containing no improper disclosure of any matter. *Plunkett* v. *Cobbett*, 5 *Esp.* 136; 29 *How. St. Tr.* 71, 72 (1804), p. 578. On the same ground, viz., that the interests of the state are concerned, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced on behalf of the prisoner, was accurate. *Watson*, p. 1 (*Stark.* 148). Cf. *Chatterton* v. *Sec. of State for India* (1895), 2 *Q. B.* 189; 64 *L. J. Q. B.* 676; 72 *L. T.* 858; 59 *J. P.* 596; 14 *R.* 504.

In *Dickson* v. *The Earl of Wilton*, 1 *F. & F.* 419 (1859), a clerk from the war office was sent with a paper which had been asked for, with instructions to object to its production and nothing more. L. Campbell ordered it to be produced (perhaps because he did not consider the mere objection of a subordinate officer sufficient, *T.* s. 947): actual malice took away the privilege. See below. In *Beatson* v. *Skene*, 29 *L. J., Ex.* 430; 5 *H. & N.* 838 (1860), the War Secretary had been subpœnaed to produce certain documents written to him by an officer in the army. He attended at the trial, but objected to produce the documents on the ground that his doing so would be injurious to the public service. Bramwell B. thereupon refused to compel him to do so, and a new trial was moved for upon this amongst other grounds. It appeared on discussion that the documents, even if produced, would not have been admissible; but Pollock C.B. in delivering the considered judgment of the Court of Exchequer, said that the majority of the court entirely concurred in the ruling of Bramwell B. He said: "We are of opinion that if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined? It is manifest it must be determined either by the presiding

judge, or by the responsible servant of the crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the document would be injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that, in his opinion, the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. . . . If the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not, as the judge may think proper, or, as was the case in *Dickson* v. *E. of Wilton*, . . . where a subordinate was sent with the document, with instructions to object but *nothing more*, then, indeed, the case may be different, and the judge may compel the production of it."

Where an oath of office has been taken not to divulge matters which have come to the knowledge of a person in his official capacity, he will not be allowed, where the interests of justice are concerned, to withhold his testimony. Thus, where the clerk to the commissioners of the property tax being called to produce the book containing the appointment of a man as collector, objected on the ground that he had been sworn not to disclose anything he should learn in his capacity of clerk, L. Ellenborough clearly thought that the oath contained an implied exception of the evidence to be given in a court of justice, in obedience to a writ of *subpœna*: the witness must produce the book and answer all questions respecting the collection of the tax, as if no such oath had been administered to him. *Lee, q. t.* v. *Birrell*, 3 *Camp.* 337 (1813).

Objection to answer—how taken.] The mode of taking the objection depends on the person to whom the privilege belongs. If the objection be on the ground that the answer would expose the witness to penal consequences, then it belongs to the witness himself, and to him only, who may insist on or abandon it, as he thinks fit. *Thomas* v. *Newton*, *M. & M.* 48 *n.* (1826); *Adey*, 1 *Moo. & R.* 94 (1831); in both of which cases L. Tenterden said that counsel ought not to be allowed to argue the question in favour of the witness. And it seems still more improper for counsel interested in excluding the evidence to suggest the objection to the witness. Frequently, indeed, the court, especially with an ignorant witness, will explain to him his position and the protection to which he is entitled, and the practice has been approved of. It has, indeed, sometimes been asserted that a question tending to criminate a witness cannot be *put*, which is an obvious error, as, until put, it cannot be seen whether or not the witness will insist on his privilege. Of course, the court will not allow a witness to be attacked with questions which he obviously cannot be compelled to answer, merely for the purpose of insulting him, which explains how it is that sometimes the court has interfered without waiting for the witness to claim his privilege. See p. 126 and *T.* ss. 1465-6.

If the privilege be claimed on the ground of professional confidence, then the privilege belongs to the party who reposes the confidence, who may insist upon or waive it at his pleasure. See *Goldstone* v. *Williams*, &c. (1899), 1 *Ch.* at 52. The rule seems to be that it will be assumed that the privilege is insisted on unless the contrary be shown, and that it is not, therefore, generally necessary that the client should be present and insist personally on his privilege. *T.* s. 911, s. 922; *Doe* v. *Ross*, p. 13; *Newton* v. *Chaplin*,

p. 129; *Phelps* v. *Prew*, 3 *E. & B.* 430 (1854). If the professional adviser chose to take upon himself the risk of answering the question, the court could hardly prevent him, though it might express its indignation at a manifest breach of professional confidence. *T.* s. 927.

It was once thought that if the witness began to answer he must proceed; but in *Garbett*, p. 126, nine judges against six held that this was not so; and that the witness was entitled to his privilege at whatever stage of the inquiry he chose to claim it.

Effect of refusing to answer.] Where a witness is entitled to decline answering a question, and does decline, the rule is said by Holroyd J. to be, that "his not answering can have no effect with the jury." *Watson*, p. 1, referring to *Harris* v. *Tippett*, 2 *Camp.* 637 (1811). So where a witness refused to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address to the jury remarked upon the refusal, Abbott C.J. interposed and said, that no inference was to be drawn from such refusal. *Rose* v. *Blakemore*, *Ry. & Moo. N. P. C.* 384 (1826). A similar opinion was expressed by Lord Eldon. *Lloyd* v. *Passingham*, 16 *Ves.* at 64 (1809). And it was said by Bayley J. in *Watson*, p. 1 (*Stark.* 153; *St. Tr.* 491), "If he refuse (to answer), this is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going too far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may."

Effect of not refusing to answer.] Answers given to questions to which the witness might have objected, but does not do so, are admissible against him as admissions. *Smith* v. *Beadnell*, 1 *Camp.* 33 (1867): bankruptcy, as to which see p. 45. But not answers to questions to which he objects, but as to which he is wrongly deprived of the benefit of his objection. *Garbett*, p. 129. See also *Coote*, pp. 52, 125, and *Kinglake*, p. 124.

For 24–5 V. 96, 85, and for 53–4 V. | 71, 27 (compulsory examination in bankruptcy), see p. 237.

DOCUMENTARY EVIDENCE.

By 8–9 V. 113, an Act for facilitating the admission in evidence of certain official and other documents, s. 1: "whenever, by any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence," p. 146. See p. 793.

By s. 2, "All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts of Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

By s. 3, "All copies of private and local and personal Acts of Parliament, not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either house of parliament [or under the superintendence or authority of Her Majesty's Stationery Offices, 45 V. 9, 2], or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

The proviso to s. 4 (p. 455) is: "that whenever any such document as before mentioned shall have been received in evidence by virtue of this Act, the court, judge, commissioner, or other person officiating judicially, who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised at its, or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court, or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the person or persons who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster, on application being made for that purpose."

By 14–15 V. 99, 7: "All proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such Court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies,

or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state, or British colony, to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document, filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs; or in the event of such court having no seal, to be signed by the judge; or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy, that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed, as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement," pp. 143, 146.

By s. 8, certificates of the qualification of an apothecary, under the common seal of the Society of Apothecaries, shall be received in evidence " without any proof of the said seal, or of the authenticity of the said certificate, and shall be deemed sufficient proof " of qualification.

By ss. 9, 10, and 11 provision is made for the admission in Ireland of documents in force in England or Wales and *vice versâ;* and for that of all these in the colonies (repealed as to British India, 38–9 V. 66: S.L.R.).

By s. 13, " whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal as the case may be, omitting the formal parts thereof," p. 169.

By s. 14: " Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice or before any person, now or hereafter, having by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words," pp. 143, 273. Where a certificate from the proper officer, not purporting to be an examined copy, was produced by a witness who had got it from that officer, and had himself compared it with the original register, and found it correct, the contents were considered by the Court for C. C. R. to be proved. *Manwaring*, p. 273.

By s. 15: " If any officer authorised or required by this Act to furnish any certified copies or extracts, shall wilfully certify any document as being a

true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable upon conviction to imprisonment for any term not exceeding eighteen months."

By s. 16: "Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

As to forgery, see s. 17, p. 455.

As to perjury, see 14–15 V. 100, 22, p. 694.

By 28–9 V. 18, 6: "A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of 5*s.* and no more shall be demanded or taken), shall upon proof of the identity of the person be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same." See p. 87 and below, 34–5 V. 112, 18.

By 31–2 V. 37, 2, *primâ facie* evidence of any proclamation, &c., may be given in all legal proceedings either by the production of a copy of the *Gazette* containing such proclamation, &c., or a copy of the proclamation, &c., properly printed, or in cases of proclamations, &c., by the Privy Council, &c., by a properly certified copy or extract, which may be in print or writing, and no evidence of the handwriting of the person certifying is required, p. 144. Applied to other documents, 58–9 V. 9; 62–3 V. 50, 21 (3).

By 34–5 V. 112, 18, "A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer, and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence, in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom, and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorised by this section shall be in addition to, not in exclusion of, any authorised mode of proving such conviction." Cf. p. 793.

Copies.] There are four kinds, viz., exemplifications under the Great Seal; exemplifications under the seal of the particular court; office copies; and examined copies. *T.* s. 1535. See pp. 688, 689.

Proof of Acts of Parliament, &c.] The courts will take notice of public Acts of Parliament, without their being specially proved, cf. p. 689; but previously to the 8-9 V. 113 (p. 135) private Acts of Parliament must have been proved by a copy "compared with the Parliament roll," *B. N. P.* 225, unless the mode of proof was provided for by the Act. Where there was a clause in the Act, declaring that it should be taken to be a public Act, and should be taken notice of as such by all judges, &c., without being specially pleaded, it was not necessary to prove a copy examined with the roll, or a copy printed by the king's printer, but it stood upon the same footing as a public Act. *Beaumont* v. *Mountain*, 10 *Bing.* 404 (1834); *Woodward* v. *Cotton*, 4 *Tyr.* 689; 1 *C. M. & R.* 44 (1834); see also *Forman* v. *Dawes*, *Carr. & M.* 127 (1841). But, with regard to the recital of facts, such a clause in a private Act did not give the statute the effect of a public Act to bind strangers. *Brett* v. *Beales*, *Moo. & M.* 416 (1829).

Every Act of Parliament made since 1850, is now deemed to be a public Act, and is to be judicially noticed as such, unless the contrary be expressly declared. 52-3 V. 63, 9 (Interpretation Act).

By 41 G. 3, 90, 9, the statutes of England and (since the union with Scotland) of Great Britain, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted before the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Ireland; and in like manner the copy of the statutes of the kingdom of Ireland, made in the Parliament of the same, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the Parliament of Ireland before the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain.

Statutes, &c., of British possessions.] Official Government documents in British dominions outside the United Kingdom, if purporting to be printed by the Government printer, are evidence by 7 E. 7, 16, the Evidence (Colonial Statutes) Act, 1907.

Journals of Parliament.] See p. 135. For the old practice see *Gordon*, p. 23 (*Dougl.* 593 and *St. Tr.* 543) and *Melville*, p. 47, at 683. Cf. p. 455.

N.B.—As to the proof of Judicial Proceedings, many cases will be found under *Perjury*, p. 676; and see *Judicial Proceedings* in Index.

Articles of war.] A copy printed by the king's printer is evidence. *Withers*, 5 *T. R.* 446, 442 (1784), see pp. 637, 647, *T.* ss. 5, 1530.

Proof of records.] See *T.* s. 1534. A record is not complete until delivered into court in parchment. Thus the minutes made by the clerk of the peace at sessions, in his minute book, are neither a record nor in the nature of a record so as to be admissible in evidence as proof of the names of the justices in attendance. *Bellamy*, *Ry. & Moo.* 171 (1824). And where, at assizes, to prove an indictment found by the grand jury at quarter sessions,

the indictment itself, indorsed "a true bill," but without any caption, was produced by the clerk of the peace, together with his *minute* book of the proceedings, the Court of King's Bench held, that in order to prove the indictment it was necessary to have the record itself drawn up in strict form or an examined copy. *Smith*, 8 *B. & C.* 341 (1828), cf. *Cooke* v. *Maxwell*, p. 132. Same point in *Porter* v. *Cooper*, 6 *C. & P.* 354; 4 *Tyr.* 456; 1 *C. M. & R.* 388 (1834). So on an indictment for perjury, an appeal to sessions must be proved by a record regularly made upon parchment. *Ward*, 6 *C. & P.* 366 (1834); and see *Pembridge, Inhabs. of*, *Carr. & M.* 157 (1841), pp. 296, 514. But where the object of the evidence was merely to prove the fact of a former trial, it was held on an indictment for perjury committed at such trial that the production by the officer of the court, of the caption, the indictment with the indorsement of the prisoner's plea, the verdict and the sentence of the court upon it, and the minutes of the trial – "all the material from which the record must have been drawn up"—was sufficient, without the production of the record, or a certificate of the same, under 14-15 V. 99, 13, p. 136, or 14-15 V. 100, p. 694. *Newman*, 2 *Den. C. C. R.* 390; 21 *L. J. M. C.* 75 (1852). In *Scott*, 2 *Q. B. D.* 415; 46 *L. J. M. C.* 259 (1877); 13 *Cox C. C.* 594; C. C. R., p. 681, it was held that the existence of an action was sufficiently proved by the production, by the officer of the court, of the copy of the original writ filed, and of pleadings, and by a solicitor, of the original order to dismiss the action, under Ord. V. r. 12, and Ord. XLI. r. 1 respectively of the Rules of the Supreme Court, though the first of these was not signed according to the rule. "Sworn copies . . . must be of the records brought into court in parchment and not of a judgment in paper signed by the master" for that is not yet become permanent. *B. N. P.* 228; cf. *Godefroy* v. *Jay*, 1 *Moo. & P.* 236; 3 *C. & P.* 192 (1828). The minutes of the Mayor's Court of London were allowed to be read as evidence of the proceedings there, the court assigning as a reason for not insisting rigidly upon the record being made up, that it was an inferior jurisdiction; the minutes in such a case ought to be perfect. *Fisher* v. *Lane*, 2 *W. Bl.* 834; 8 *B. & C.* 342 (1772).

The mode of examination usually adopted is, for the person who is afterwards to prove it, to examine the copy while another person reads the original, and this has been held sufficient. *Reid* v. *Margison*, 1 *Camp.* 469; *Gyles* v. *Hill*, *ib.* 471 *n.* (1808). It must appear that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records are kept. *Adamthwaite* v. *Synge*, 1 *Stark.* 183; 4 *Campb.* 372 (1816). Cf. p. 572.

Where a record is lost, an old copy has been allowed to be given in evidence, without proof of its being a true copy. *Anon.*, 1 *Ventr.* 257 (1675); *B. N. P.* 228.

It seems to be the usual practice for the clerk of assize or clerk of the peace to make up the record, and to attend with it at the trial. 2 *Phill. Ev.* 203; 3 *Russ. Cri.* 448*n.*, and p. 136.

Proof by office copies, and copies by authorised officers, &c.] As to copies of depositions in chancery "taken under the old system" see *T.* s. 1576, and *B. N. P.* 229. In a court of common law, an office copy has been held sufficient in the same court and in the same cause; "but in another court or in another cause in the same court, the copy must be proved," *per* L. Mansfield, *Denn* v. *Fulford*, 2 *Burr.* 1177 (1761). And so it seems that an issue out of chancery may be considered as a proceeding in that court, and an examined office copy was held evidence therein. See *Inghfield* v. *Peake*, *Moo. & Mal.* 111 (1827). There appears to be no reason for distinguishing between the effect of office copies in different causes in the same court, the

principle of the admissibility being, that the court will give credit to the acts of its own officers; and accordingly it was held in one case, that an office copy of an affidavit made in another cause in the same court was admissible. *Wightwick* v. *Banks, Forrest*, 154 (1801). But since the passing of the Judicature Acts, these cases have become less important. See *Scott*, p. 139.

There is a clear distinction between copies coming from an officer authorised to deliver them in the course of his duty and those from one not so authorised. *Appleton* v. *L. Braybrooke*, 6 *M. & S.* 34 (1817).

The certificate of the enrolment of a deed pursuant to the statute is a record and cannot be averred against. *Hopper*, 3 *Price*, 495 (1817). A copy of a judgment purporting to be examined by the clerk of the treasury (whose duty is not to make copies but to keep them for all to read), is not admissible without proof of examination with the original. *B. N. P.* 229. A judge's order may be proved by the production of the order itself, or by an office copy of the rule by which it has been made a rule of court. *Still* v *Halford*, 4 *Campb.* 17 (1814). Office copies of rules of court being made out and signed by officers of the court in the execution of their duty are sufficient evidence without being proved to have been examined. *Selby* v. *Harris*, 1 *Ld. Raym.* 745 (1698); so copy of depositions sworn at judge's chambers, signed by him, and duly delivered; *Duncan* v. *Scott*, 1 *Campb.* 99 (1807). And printed copies of the rules of a court for the direction of its officers, printed by the direction of the court, are evidence without examination with the original. *Dance* v. *Robson, Moo. & M.* 294 (1829). Copies of records, in the custody of the master of the rolls, under 1–2 V. 94, purporting to be sealed and stamped with the seal of the record office, are by s. 13 made evidence without further proof. As to the rejection of copies of accounts returned by the Supreme Court at Madras to the Q. B., see *Douglas*, 1 *C. & K.* 670 (1845). As to office copies being rejected for containing abbreviations, see *Christian, Carr. & M.* 388 (1842), p. 689. As to proof of being an attorney, see p. 572.

Proof of inquisitions.] Inquisitions *post mortem* and other private offices* cannot be read in evidence without proof of the commission upon which they are founded, unless, as it seems, the inquisition be old (12 *Vin. Ab. Ev.* (*A. b.* 42), p. 121, where an instance of one read in 1726 is given); "but in cases of more general concern, as the minister's return to the commission in Henry the Eighth's time to inquire into the value of livings . . . the commission is a thing of such public notoriety that it requires no proof." *Per* Hardwicke C. *in Sir H. Smithson's case* (undated), *B. N. P.* 228–9. An ancient extent of crown lands (1327), found in the proper office, and purporting to have been taken by a steward of the king's lands, and following the directions of the statute 4 E. 1, will be presumed to have been taken under a competent authority, though the commission cannot be found. *Rowe* v. *Brenton*, 8 *B. & C.* 747 (1828), p. 142. See p. 146.

Proof of verdicts.] The mode of proving a verdict depends upon the purpose for which it is produced. Where it is offered in evidence, merely to prove that such a cause came on for trial, the *postea* with the verdict indorsed is sufficient (under the old practice) to introduce an account of what a witness, who is since dead, swore at a trial. *Pitton* v. *Walter*, 1 *Str.* 162 (1718); *B. N. P.* 243. So upon an indictment for perjury, committed by a

* "Inquest of Office . . . is a prerogative remedy for the benefit of the crown. . . . It is an inquiry made by a jury before a sheriff, coroner, escheator, or other officer of the crown, or by commissioners specially appointed concerning any matter that entitles the crown to the possession of lands and tenements, goods or chattels, *e.g.* by reason of an escheat, forfeiture, idiocy, &c. Extent is . . . a valuation of property by the oath of a jury." Sweet, *Law Dictionary*.

witness in a cause, a minute by the officer, of the verdict indorsed on the jury panel (instead of a *postea, i.e.* formerly a statement of the proceedings at the trial indorsed on the record), is sufficient to prove that that cause came on for trial. *Browne, Moo. & M.* 315 (1829). But without such minute, the nisi prius record is no evidence of the case having come on for trial, for that may be made up and yet the cause never tried. *Per* L. Tenterden, *ib.* In London and Westminster, it is not the practice for the officer to indorse the *postea* itself as in the country, but the minute is indorsed on the jury panel. *Ib.* Cf. pp. 2–3.

But where it is necessary to prove not merely that a trial was had, but that a verdict was given, it must be shown that the verdict has been entered upon the record, and that judgment thereupon has also been entered on record, for otherwise it would not appear that the verdict had not been set aside or judgment arrested. *Fisher* v. *Kitchingman, Willes,* 367 (1742); *Pitton* v. *Walter,* above. In one case, indeed, Abbott J. admitted the *postea* as evidence of the amount recovered by the verdict; *Foster* v. *Compton, 2 Stark.* 364 (1818), and L. Kenyon also ruled that it was sufficient proof to support a plea of set-off to the extent of the verdict; *Garland* v. *Schoones,* 2 *Esp.* 648 (1794); but these decisions appear to be questionable. *T.* s. 1570 *n.* An allegation in an indictment for perjury that judgment was "entered up" in an action, is proved by the production of the book from the judgment office, in which the *incipitur* is entered. *Gordon, Carr. & M.* 410 (1842). Where an indictment for perjury against A. alleged that B. was convicted of perjury, upon the trial of which a perjury was alleged to have been committed, and it appeared that B. had been convicted, but the judgment against him had been reversed upon error, it was held, that that did not negative the allegation of conviction: the record must be produced. *Meek,* 9 *C. & P.* 513 (1840), p. 688. "When a writ is only inducement (*i.e.* introductory part of a pleading) to the action, the taking out the writ may be proved without any copy of it, because, possibly, it might not be returned, and then it is no record; but where the writ itself is the gist of the action, you must have a copy from the record" in the same manner as any other record. *B. N. P.* 234.

Proof of affidavits made in causes.] In what manner an affidavit filed in the course of a cause is to be proved, does not appear to be well settled. In an action for a malicious prosecution, an examined copy has been admitted. *Crook* v. *Dowling,* 3 *Dougl.* 75 (1782); but in *Rees* v. *Bowen, M'Cl. & Y.* 383 (1825), a copy that had not been used and without proof of identity was refused. A distinction has been taken between cases where the copy is required to be proved in a civil suit, and where it forms the foundation of a criminal proceeding, as upon an indictment for perjury. In *James,* 1 *Show.* 397; *Carth.* 220 (1693), the defendant was convicted of perjury upon proof of a copy of an affidavit having been examined with the original; it was urged that it was only a copy, and that there was no proof that it had been made by the defendant; but it appearing that it had been made use of by the defendant in the course of the cause, the court held it sufficient. This case was, however, doubted in *Crook* v. *Dowling,* where L. Mansfield said that on indictments for perjury he thought the original should be produced. Buller J. also observed that wherever identity is in question, the original must be produced. *Ib.* 77. See p. 681. So as to the proof of answers in chancery. It may be doubted how far the distinction in question has any foundation in principle, the rules of evidence with regard to the proof of documents being the same in civil and in criminal cases, and the *consequences* of the evidence not being a correct test of the *nature* of the evidence. As to affidavits sworn in foreign parts, see p. 135, *T.* ss. 1564–9, and 52–3 V. 3 (2). Jurats, &c., in prize proceedings abroad are evidence, 7 E. 7, 25, 1.

Proof of proceedings in equity.] A bill (*now* replaced by a writ) or answer in chancery, when produced in evidence for the purpose of showing that such proceedings have taken place, or for the purpose of proving the admissions made by the defendant in his answer, may be proved either by production of the original bill or answer, or by an examined copy, and is *prima facie* evidence of the identity of the parties (which may be rebutted). *Hennell* v. *Lyon*, 1 *B. & Ald.* 182 (1817); *Ewer* v. *Ambrose*, 4 *B. & C.* 25 (1825). But a distinction is taken (p. 141) where the answer is offered in evidence upon an indictment for perjury, in which case it is necessary that the answer itself should be produced at the trial (if not before the grand jury), and positive proof given, by a witness acquainted with him, that the defendant was sworn to it. *Chambers* v. *Robinson*, *B. N. P.* 239 (1726); *Lady Dartmouth* v. *Roberts*, 16 *East*, 340 (1812). In order to prove that the answer was sworn by the defendant, it is sufficient to prove his signature to it and that of the master in chancery before whom it purports to be sworn. *Benson*, 2 *Camp.* 507 (1810); *Morris*, *B. N. P.* 239; 2 *Burr.* 1189; 1 *Lea.* 50 (1760), p. 682.

A decree in chancery or exchequer may be proved by an exemplification (*T.* s. 1535), or by an examined copy, or by a decretal order in paper, with proof of the bill and answer, or without such proof, if the bill and answer be recited in the decretal order. *B. N. P.* 244. *Com. Dig. Testmoigne* (*C.* 1). With regard to the proof of the previous proceedings, the correct rule appears to be, that where a party intends to avail himself of the contents of a decree, as an adjudication, and not merely to prove a collateral fact (as that *a decree* was made by the court), he ought regularly to give in evidence the bill and answer on which the decree is founded. 2 *Phill. Ev.* 207. See *Blower* v. *Hollis*, 3 *Tyr.* 356; 1 *C. & M.* 393 (1833).

As to the admissibility of decrees in equity, see *Pim* v. *Currell*, p. 26.

Proof of depositions not before magistrates, &c.] The depositions of witnesses, who are since dead, may without any order of the court (when admissible), be proved by the judge's notes, or by notes taken by any other person who can swear to their accuracy, or the former evidence may be proved by any person who will swear from his memory to its having been given. *Per* Mansfield C.J. *Mayor of Doncaster* v. *Day*, 3 *Taunt.* 262 (1810).

Where depositions in chancery are offered in evidence as an admission against a party to the suit, or for the purpose of contradicting a witness, it is not necessary to produce the bill and answer. But the general rule is that they are not to be admitted in evidence without producing the bill and answer. 2 *Phill. Ev.* 210. When they are put in to show that the depositions are admissible, the other side has no right to read or use them; the judge only is to look at them for the purpose of determining, by seeing what was in issue in the suit, whether the depositions sought to be put in are evidence. *Chappell* v. *Purday*, 14 *M. & W.* 303 (1845). Where the suit is so ancient that it was before bills and answers were enrolled, the depositions may be read without proof of them. "Depositions taken by the command of Queen Elizabeth upon petition without bill and answer, were upon a solemn hearing in chancery allowed to be read." *B. N. P.* 240, *Lord Hunsdon* v. *Lady Arundell*, *Hob.* 112 (1617). So depositions taken in 1686 were allowed to be read without such proof; *Byam* v. *Booth*, 2 *Price*, 234 (1816); and answers to interrogatories in 1558, which were searched for and not found, were read in 1828. *Rowe* v. *Brenton*, p. 140. But, in general, depositions taken under a recent commission cannot be read without proof of the commission; but an old commission may be presumed to be lost. *Bayley* v. *Wylie*, 6 *Esp.* 85 (1807). See p. 146.

Proof of proceedings in bankruptcy.—See p. 264.

Proof of judgments and proceedings of inferior courts, not of record.] The judgments and proceedings of inferior courts, not of record, may be proved by the minute-book in which the proceedings are entered, as in the case of a judgment in the county court. *Chandler* v. *Roberts* (1799), *Peake, Ev.* 72, *5th. ed.* So an examined copy of the minutes will be sufficient. *Hains*, p. 3; 12 *Vin. Ab. Evid.* (*A. b.* 26), 26–8, p. 99. If the proceedings of the inferior court are not entered in the books, they may be proved otherwise. See *Dyson* v. *Wood*, 3 *B. & C.* 451, 453 (1824). *T.* s. 1572.

Proof of records and proceedings in county courts.] Under 9–10 V. 95, 111, repealed by 51–2 V. 43, 188, and Sched., see now s. 28, it has been decided that such minutes of proceedings must prevail even over the contradictory evidence of the judge. *Dews* v. *Ryley*, 20 *L. J. C. P.* 264 (1851). And the proceedings of the county court can be proved in no other way. *Rowland*, pp. 2, 689.

Proof of probate and letters of administration.] The probate of a will is proved by the production of the instrument itself; and proof of the seal of the court is not necessary. In order to prove the title of the executor to personal property, the probate as well as the will must be given in evidence. *Pinney* v. *Pinney*, 8 *B. & C.* 335 (1828). When the probate is lost it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd* v. *Shorthose*, 1 *Str.* 412 (1721). To prove that the probate was revoked an entry of the revocation in the book of the Prerogative Court is good evidence. *Ramsbotham*, 1 *Leach* 25 *n.* (1787).

Administration is proved by the production of a certificate of the letters of administration granted by the Ecclesiastical Court. *Kempton* v. *Cross*, *Lee ca. temp. Hardw.* 108 (1735); *B. N. P.* 246. So the book (of acts) of that court directing the grant of the letters is evidence. *B. N. P.* 246. And an examined copy of such act book is also evidence. *Davis* v. *Williams*, 13 *East*, 232 (1811).

By 20–1 V. 77, 69, an official copy of the whole or any part of a will, or a certificate of letters of administration, may be obtained, and it seems will be admitted in evidence where the probate is lost. *T.* ss. 1589–90.

Proof of foreign laws.] The law of a foreign state may be proved by the parol evidence of witnesses possessing competent legal skill; p. 122. The witness to prove a foreign law must be a person *peritus virtute officii*, or *virtute professionis*. A Roman Catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such was authorised to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Sussex Peerage Case*, p. 122.

That a judgment duly verified by a seal proved to be that of the foreign court, is presumed to be regular and agreeable to the foreign law, until the contrary is shown, is perhaps shown by *Alivon* v. *Furnival*, p. 12; see 14–15 V. 99, 7, p. 138. See also p. 67.

Proof of public books and other documents.] Wherever the contents of a public book or document (p. 12) are admissible in evidence as such, examined copies are likewise evidence, as in the case of registers of marriages, deaths, &c.; as are likewise *certified* copies under 14–15 V. 99, 14; p. 136. Thus an examined copy of an order in council or of a secretary of state's licence is

sufficient, without the production of the council books or the licence themselves. *Eyre* v. *Palsgrave*, 2 *Campb.* 605 (1811). See now 31-2 V. 37; p. 137. So copies of the transfer books of the East India Company; *Anon.*, 2 *Dougl.* 593 *n.* (1771); and of the Bank of England; *Marsh* v. *Collnett*, 2 *Esp.* 665 (1798); *Bretton* v. *Cope*, *Peake N. P. C.* 43 (1791); of a bank note filed at the bank; *Man* v. *Cary*, 3 *Salk.* 155 (1697); so of the books of commissioners of land-tax; *King's case*, 2 *T. R.* 234 (1788); or of Excise; *Fuller* v. *Fotch*, *Carth.* 346 (1695); or of a poll-book at elections, *Mead* v. *Robinson*, *Willes*, 424 (1743), where the copy was signed by the returning officer. In one case the copy of an agreement contained in one of the books of the Bodleian Library (which cannot be removed) was exceptionally allowed to be read in evidence. *Downes* v. *Mooreman*, *Bunb.* 189; 2 *Gwill.* 659 (1724). Copies of entries or extracts from the register of newspaper proprietors, purporting to be certified by the registrar, or his deputy, or under the official seal of the registrar, are to be received as conclusive evidence; and certified copies or extracts are to be received as *primâ facie* evidence in all proceedings under 44-5 V. 60, 15, p. 575.

Regulations, minutes, and notices purporting to be signed by a secretary or assistant secretary to the Commissioners of Inland Revenue may be proved by the production of a signed copy, 53-4 V. 21, 24. As to proof of documents under the Merchant Shipping Act, see 57-8 V. 60, 695, 719; under the Friendly Societies Act, see 59-60 V. 25, 53, 100. As to documents in elections, see p. 287, and as to the Customs, p. 776.

Corporation books may be given in evidence as public books, when they have been kept as such, the entries having been made by the proper officer, or by a third person, in his sickness or absence, which must be proved. *Mothersell*, 1 *Str.* 93 (1718). But a book containing minutes of corporation proceedings, kept by a person not a member of the corporation, and not kept as a public book, is inadmissible. *Ib.* An examined copy of a corporate book is evidence. *Brocas* v. *Mayor of London*, 1 *Str.* 307 (1720); *Gwyn's case*, 1 *Str.* 401 (1721). It is not settled whether the attesting witness to the seal of a corporation need be called; *Doe* v. *Chambers*, 4 *A. & E.* 410 (1836); or whether the seal of such a deed proves itself after thirty years. *Bathwick*, p. 127. Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases, where it would have the effect of making a defendant furnish evidence to criminate himself. *Heydon*, 1 *W. Bl.* 351 (1762); *Purnell*, *ib.* 37; 1 *Wils.* 239 (1748); *Cornelius*, 2 *Str.* 1210 (1734). By 45-6 V. 50, 24, provision is made for the proof of bye-laws of any town council by the production of a written copy of such bye-laws authenticated by the corporate seal, and by s. 22, for the proof of minutes purporting to be signed by the mayor, or a member of the council, or of the committee, appearing to be chairman of the meeting at which the minute is signed; *Robinson* v. *Gregory*, 20 *Cox C. C.* 781 (1905). Certificates of incorporation, and certified copies of documents, filed and registered under the Companies Acts, 1862 to 1877, may now be received in evidence under 40-1 V. 26, 6, and 63-4 V. 48, 1, (1), (4); p. 562.

By the Industrial and Provident Societies Act, 1893, 56-7 V. 39, 75, "every copy of rules or other instrument or document, copy or extract of an instrument or document, bearing the seal or stamp of the central office, shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature."

Proof of bankers' books.] By the Bankers' Books Evidence Act, 1879, 42-3 V. 11, copies of entries in the books of any bank are made admissible,

where the conditions imposed by the Act have been complied with; and the provisions of that Act are extended, by 45–6 V. 72, 11 (2), to any company carrying on the business of bankers, to which the provisions of the Companies Acts, 1862 to 1880, are applicable. Under this Act any judge in any division of the United Kingdom has jurisdiction in any other. *Kissam* v. *Link*, (1896) 1 *Q. B.* 574; 65 *L. J. Q. B.* 433; *C. A.*

Proof of wages paid.] See p. 328.

Proof of registers of births, deaths, and marriages and of others.] "*The register of christenings, marriages, and burials* is good evidence or the copy of it. Nay, proof *viva voce* of the contents of it without a copy has been admitted; yet the propriety of such evidence may well be doubted, because it is not the best evidence the nature of the case is capable of." *B. N. P.* 247. A copy of a record or of a public book is not, in fact, secondary evidence; and therefore the opinion of Buller J. appears to be correct. A register is only one mode of proof of the fact which it records, and the fact may be proved without producing the register, by the evidence of a person who was present at it. Thus upon an indictment for bigamy, it was held sufficient to prove the marriage, by the evidence of a person who was present at it, without proving the registration of either marriage or of any licence, or banns. *Allison, Russ. & Ry.* 109 (1806); cf. pp. 3–4.

In proving a marriage (whether there is a register or not) some evidence of the *identity* of the parties, sufficient to satisfy the jury, must be given, as by proof of the handwriting, or by the bell-ringers, &c., but it is not necessary to call the subscribing witnesses. *Per* L. Mansfield, *Birt* v. *Barlow*, 1 *Dougl.* 170 *a* (1779), p. 272. The identity is usually established by calling some person who was present at the ceremony.

By 52 G. 3, 146, 6, 7 (which is still in force for the registration of births and burials by clergymen of the church of England), it is provided that verified copies shall be annually sent to the registrar of the diocese. It seems that such verified copies, being public documents, are evidence as well as the originals, and may be proved by examined copies. But it is otherwise of the returns enjoined by the canons of 1603, which (*semble*) can only be used as secondary evidence, and so can examined copies of them. *Per* Alderson B., *Walker* v. *Beauchamp*, 6 *C. & P.* 552 (1834). By 6–7 W. 4, 86, 38, p. 273, for registering births, marriages, and deaths in England, certified copies of entries purporting to be sealed or stamped with the seal of the office of the registrar-general, shall be evidence of the birth, death, or marriage to which they relate, without further proof of such entries. By 3–4 V. 92, certain non-parochial registers of births, marriages, and deaths, transferred to the general register office, or certified extracts therefrom, are made admissible in evidence; but in criminal cases the original registers must (s. 17) be produced: ss. 5–9 were extended by 21–2 V. 25, 3. But under 14–15 V. 99, 14, p. 136, an extract from such register is admissible in evidence on its mere production. One certified by a deputy superintendent registrar is good. *Weaver, L. R.* 2 *C. C. R.* 85; 43 *L. J. M. C.* 13 (1873). By 37–8 V. 88, 38, "an entry or certified copy of a birth or death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea."

As to marriage registers in Ireland, see 7–8 V. 81.

In *Nash*, 2 *Den. C. C. R.* 493; 21 *L. J. M. C.* 147 (1852), p. 475, upon an indictment for forging and uttering a transfer of shares in a railway company, it was held that the register of shareholders, kept under 8–9 V. 16, 9, was evidence to prove that an individual was a shareholder without any authentication of the seal, and that in order to sustain the indictment it was unnecessary to give further proof that such individual was a shareholder.

As to proof of licence or certificate under the Lunacy Act, see p. 519.

Proof of ancient documents, terriers, &c.*] In many cases ancient documents are admitted in evidence, to establish facts which, had they been recently made, they would not have been allowed to prove. These documents prove themselves, provided it appear that they are produced out of the proper custody. See pp. 140, 142. The proper repository of ecclesiastical terriers or maps is the registry of the bishop or archdeacon of the diocese; or, of a copy, if the original is lost, the parish registry. *Atkins* v. *Hatton*, 2 *Anst.* 386 (1794); *Potts* v. *Durant*, 3 *Anst.* 795 (1797). On an issue to try the boundaries of two parishes, an old terrier or map of their limits, drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, not being signed by any person bearing a public character or office in the parish. *Earl* v. *Lewis*, 4 *Esp.* 1 (1801). See *Milton, Inhabs. of*, p. 508, and cf. p. 26.

So also with regard to private ancient documents, it must appear that they came from the custody of some person connected with the property. Thus, where upon an issue to try a right of common, an old grant to a priory, brought from the Cottonian MSS. in the British Museum, was offered in evidence, it was rejected by Lawrence J., the possession of it not being sufficiently accounted for nor connected with any one who had an interest in the land. *Swinnerton* v. *Marquis of Stafford*, 3 *Taunt.* 91 (1810). So a grant to the abbey of Glastonbury, contained in an ancient MS., deposited in the Bodleian Library, was rejected, as not coming from the proper repository. *Michell* v. *Rabbets, ib.* (1810). See also *Barber*, 1 *C. & K.* 434 (1844), p. 463; Kirk Session Book and Certificate.

Proof of seals.] Where necessary, a seal must be proved by some one acquainted with it, but it is not requisite to call a witness who saw it affixed. *Per* Lawrence J., *Moises* v. *Thornton*, 8 *T. R.* 307 (1799). Some seals, as that of London, require no proof. *Doe* v. *Mason*, 1 *Esp.* 53 (1793). See also p. 135. The seal of a foreign court need no longer be shown to be genuine. *Henry* v. *Adey*, 3 *East*, 221 (1803), is no longer law by reason of 14–15 V. 99, 7, p. 135. But that of the Bank of England must (*semble*), *Doe* v. *Chambers*, p. 144. So must that of the Apothecaries' Company. *Chadwick* v. *Bunning*, *R. & Moo.* 306 (1825).

As to the seals of corporations, joint stock or other companies, see pp. 135–6.

A long list of seals proving themselves will be found in *T.* s. 6, and notes. "The seal of a foreign or colonial notary public will not generally be judicially noticed." *Ib.*

Although the seal need not be shown to be affixed by the proper person, yet the deed (it seems) may be invalidated by proof of the seal being affixed by a stranger, or without proper authority. The presumption, however, is that it was properly affixed. *Clarke* v. *Imperial Gas Co.*, 4 *B. & Ald.* 315 (1825).

Proof of private documents—attesting witness.] The execution of a private document, which has been attested by a witness subscribing it, must be

* An account or list of lands, with details.

proved by calling that witness, "when the validity of an instrument depends upon its formal attestation." *T.* s. 1843.

Proof of private documents—attesting witness—when proof waived.] Where the attesting witness is dead, beyond sea, or cannot be found after strict inquiry; *Anon.*, 12 *Mod.* 607 (1701); or blind; *Wood* v. *Drury*, 1 *Lord Raym.* 734 (1699); *Pedler* v. *Paige*, 1 *Moo. & Rob.* 258 (1833); or insane; *Currie* v. *Child*, 3 *Campb.* 283 (1812); or under sentence of death (but see p. 104); or absent in a foreign country, or not amenable to the process of the superior courts; *Prince* v. *Blackburn*, 2 *East*, 252 (1802); as in Ireland; *Hodnett* v. *Foreman*, 1 *Stark.* 90 (1815); or where he cannot be found, after diligent inquiry; *Cunliffe* v. *Sefton*, 2 *East*, 183 (1801); in all these cases evidence of the attesting witness's handwriting is admissible. Some evidence must be given in these cases of the identity of the executing party; and although there are cases to the contrary, it is now held that mere identity of name is not sufficient proof of the identity of the party. *Whitelock* v. *Musgrave*, 1 *Crom. & Mee.* 511; 3 *Tyr.* 541 (1833). The illness of a witness, although he lies without hope of recovery, is no sufficient ground for letting in evidence of his handwriting. *Harrison* v. *Blades*, 3 *Campb.* 457 (1813). Where the name of a fictitious witness is inserted; *Fasset* v. *Brown*, 1 *Peake, N. P. C.* 33 (1791); or where the attesting witness denies all knowledge of the execution; *Talbot* v. *Hodson*, 7 *Taunt.* 254 (1816); *Fitzgerald* v. *Elsee*, 2 *Campb.* 635 (1811); evidence of the handwriting of *the party* is sufficient proof of its execution. So where an attesting witness subscribes his name without the knowledge or consent of the parties, *M'Craw* v. *Gentry*, 3 *Campb.* 232 (1812). Where there are two attesting witnesses, and one of them cannot be produced, being dead, &c., it is not sufficient to prove his handwriting, but the other witness must be called. *Ib. Cunliffe* v. *Sefton*, above. But if neither can be produced, proof of the handwriting of one only is sufficient. *Adam* v. *Kerr*, 1 *B. & P.* 360 (1798). It is not necessary now to call the attesting witness in the case of any instrument to the validity of which attestation is not necessary. 28–9 V. 18, 7. The former incapacity of convicted persons (*Jones* v. *Mason*, 2 *Str.* 833, in 1729) was abolished by 6–7 V. 85, 1.

Proof of private documents—evidence of handwriting.] Where a party cannot sign his name, but makes his mark, that mark may be proved by a person who has seen him make the mark, and is acquainted with it. *Per* Tindal C.J. with hesitation: *George* v. *Surrey*, *Moo. & M.* 516 (1830). Where a witness had only seen the person sign a bail-bond, and stated that the signature to the bill produced was like the handwriting which he saw subscribed, but that he could form no belief on the subject, this was held to be evidence of the handwriting to go to the jury: he was not allowed to form a judgment by comparing the two. *Aliter* if he had never seen the party write. *Garrells* v. *Alexander*, 4 *Esp.* 37 (1801); or where the witness has only seen the person write his name once, and then for the purpose of making the witness competent to give evidence in the suit. *Stranger* v. *Searle*, 1 *Esp.* 14 (1793). Where the witness stated that he had merely seen the person sign his name to an instrument to which he was attesting witness, and that he was unable to form an opinion as to the handwriting, without inspecting that other instrument, his evidence was held inadmissible. *Filliter* v. *Minchin*, *Manning's Digest of N. P. Reports* 131 (1819). In another case, under similar circumstances, Dallas J. allowed a witness to refresh his memory, by referring to a genuine signature in his possession, which he had formerly seen written. *Burr* v. *Harper*, *Holt, N. P. C.* 420 (1816). It is sufficient if

the witness has seen the person write his surname only. *Lewis* v. *Sapio*, p. 5; contradicting *Powell* v. *Ford*, 2 *Stark.* 164 (1817).

It is not essential to the proof of handwriting, that the witness should have *seen* the person write. There are various other modes in which he may become acquainted with the handwriting. Thus where the defendant's attorney stated that he had never seen M. S., an attesting witness to the plaintiff, write, but that her name was subscribed to an affidavit, which had been used by the plaintiff, and that he had examined that signature, so as to form an opinion which enabled him to swear he believed the handwriting in question was hers, this was held by Park J. to be sufficient. *Smith* v. *Sainsbury*, 5 *C. & P.* 196 (1832). "If when letters are sent, directed to a particular person, on particular business, an answer is received in due course, it is a fair presumption that the answer was written by the person whose handwriting it purports to be." *Per* L. Kenyon, *Cary* v. *Pitt*, 2 *Peake, N. P. C.* 130 (1797). The farthest extent to which the rule has been carried is to admit a correspondent to prove handwriting, where he has acted upon the letters, *ib.*; *Tharpe* v. *Gilsburne*, 2 *C. & P.* 21 (1825); and even if the witness has never done any act upon them, *Doe* v. *Wallinger*, *Mann. Digest*, 131 (1819), *per* Holroyd J. Formerly, a document could not, in criminal cases, be proved by comparing the handwriting with other handwriting of the same party, admitted to be genuine. But now by 28–9 V. 18, 8, it is enacted, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." A witness giving evidence under this section need not be a professional expert, or a person whose skill in the comparison of handwriting has been acquired in his profession or business. *Silverlock* (1894), 2 *Q. B.* 766; 63 *L. J. M. C.* 233; 18 *Cox C. C.* 104; 72 *L. T.* 298; 58 *J. P.* 788; *C. C. R.*, p. 424.

Where a party to a deed directs another person to write his name for him, and he does so, that is a good execution by the party himself. *Inhabs. of Longnor*, 4 *B. & Ad.* 647 (1833). In such cases the subscription of the name by the agent, and his authority to subscribe it, must be proved.

Whether the evidence of persons skilled in detecting forgeries is admissible, in order to prove that a particular handwriting is not genuine, is a point not well settled. Such evidence by a post-office clerk, accustomed to inspect franks and detect forgeries, was admitted in *Goodtitle* v. *Braham*, 4 *T. R.* 497 (1792). But in *Cary* v. *Pitt*, above, L. Kenyon, who had "laid no stress" on it, in *Goodtitle* v. *Braham*, rejected similar evidence. This was followed, after much discussion and consideration, by Hotham B. who, however, thought that a post-office witness might, as an expert, give his opinion whether a handwriting was feigned or natural, *Cator*, 4 *Esp.* 117 (1802), p. 1; but even that was rejected in *Gurney* v. *Langlands*, 5 *B. & Ald.* 330 (1822), where the K. B. refused to disturb the verdict, partly on the ground that such evidence in any case had very little weight. In both cases the witness had never seen the party write. The K. B. was equally divided on the question whether, after a witness had sworn to the genuineness of his signature, a bank inspector could be called to prove that in his judgment the signature was not genuine, such judgment being solely founded on a comparison before and pending the trial. *Doe* v. *Suckermore*, 5 *A. & E.* 703; 2 *N. & P.* 16 (1836). See also *Fitzwalter Peer.*, 10 *Cl. & Fin.* at 198 (1843). *T.* s. 1877.

As to proof of telegrams, see p. 783.

Proof of execution, when dispensed with.] When a deed is thirty years

old it proves itself and no evidence of its execution is necessary, "however, there ought to be some account given of the deed, where found, &c." *B. N. P.* 255; *Doe* v. *Burdett*, 4 *A. & E.* 1 (1835). And so with regard to a steward's books of account if they come from the proper custody; *Wynne* v. *Tyrwhitt*, 4 *B. & Ald.* 376 (1821); letters, *Bere* v. *Ward*, 2 *Phill. Ev.* 246, 10*th ed.* (1821); a will produced from the Ecclesiastical Court, *Doe* v. *Lloyd* (1806), *Peake on Ev. App.* xli.; a bond, *Chelsea W. Co.* v. *Cooper*, 1 *Esp.* 275 (1795); and other old writings, *e.g.* receipts, *Fry* v. *Wood*, 2 *Selw. N. P.* 495, 13*th ed.* (1738). Even if it appear that the attesting witness is alive and capable of being produced, it is unnecessary to call him where the deed is thirty years old. *Doe* v. *Wolley*, 8 *B. & C.* 22 (1828). If there is any erasure or interlineation in an old deed it ought to be proved in the regular manner by the witnesses, if living, or by proof of the handwriting of at least one, and that of the party, if dead. "And this ought more especially to be done if the deed import a fraud" (by the alteration); *B. N. P.* 255; or it should be shown that possession has accompanied it. *Gilb. Ev.* 6*th ed.*, 89.

Where a person producing a deed upon a notice to produce, claims a beneficial interest under it, the party calling for the deed need not prove its execution; "for, by claiming an interest under it, he admits its validity." *T.* s. 1848. *Pearce* v. *Hooper*, 3 *Taunt.* 62 (1810). As where assignees produce the assignment of the bankrupt's effects. *Orr* v. *Morice*, 3 *B. & B.* 139 (1821). See also *Carr* v. *Burdiss*, 4 *Tyrwh.* 136; 1 *C. M. & R.* 782 (1835); *Doe* v *Wainwright*, 5 *A. & E.* 520 (1836). But it must be an interest in the subject-matter of the cause; *Rearden* v. *Minter*, 5 *M. & Gr.* 204 (1843); *Collins* v. *Bayntun*, 1 *Q. B.* 117 (1841); that it must be still subsisting at the time of the trial is, *perhaps*, the effect of *Fuller* v. *Pattrick*, 18 *L. J. Q. B.* 236 (1849), but all the judgment says is, "It is true that the defendant was not seeking to enforce the agreement, but the very circumstance of this action being brought upon it by the plaintiff shows that the subject-matter of the agreement was yet unsettled, and it follows that the defendant, a party to it, had an interest in it." So in an action against the vendor of an estate, to recover a deposit in a contract for the purchase, and the defendant on notice produced the contract, L. Tenterden C.J. held that the plaintiff need not prove its execution. *Bradshaw* v. *Bennett*, 5 *C. & P.* 43; 1 *Moo. & R.* 143 (1831). So where in an action by a pitman against the owners of a colliery for wages due to him under an agreement usually called a pit bond, the defendants produced the agreement upon notice, Cresswell J. held that it was unnecessary for the plaintiff to call the attesting witness. *Bell* v. *Chaytor*, 1 *C. & K.* 162 (1843).

Where, however, a defendant to prove that he had been in partnership with the plaintiffs, offered in evidence a written contract purporting to be made by the plaintiffs and the defendant as partners with K., a builder, for work to be done by K. upon the premises, where the plaintiffs carried on the business in which the defendant alleged himself to have been a partner, and the document was in the plaintiffs' custody, produced by them on notice, it was held that the contract was not admissible without proof of the execution, as an instrument under which the plaintiffs claimed an interest. *Collins* v. *Bayntun*, above.

But where the person producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner, *Gordon* v. *Secretan*, 8 *East*, 548 (1807); *Doe* v. *Cleveland*, 9 *B. & C.* 864 (1829). See further, *Roscoe N. P.* 143, 18*th ed.*

Stamps.] By 54-5 V. 39, 14 (4):—"Save, as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever

executed, to any property situate, or to any matter or thing done or to be done in any part of the United Kingdom, shall not, *except in criminal proceedings*, be given in evidence or be available for any purpose whatever unless it is duly stamped in accordance with the law in force at the time when it was first executed." Cf. pp. 12, 460, 576.

As to *Privileged Documents*, see pp. 127–30.

B. AIDERS, ACCESSORIES, &c.

Statutes.] See pp. 157–8.

What offences admit of accessories.] In all offences below felony there can be no accessories; "all persons concerned therein, if guilty at all, are principals." 1 *Hale, P. C.* 613, p. 158; 4 *Bl. Com.* 36; *Greenwood*, 2 *Den. C. C.* 453; *L. J. M. C.* 127 (1852): p. 341. Also in manslaughter it has been said there can be no accessories *before* the fact, for the offence is sudden and unpremeditated, and therefore, if A. be indicted for murder, and B. as accessory *before*, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale*, 437, 616, referring to *Bibithe*, 2 *Rep.* 43*b* (1597). In *Gaylor*, *Dears. & B. C. C.* 288 (1857), p. 591, where a wife voluntarily took poison, provided by the husband to procure abortion, and he was convicted of manslaughter, the above passages in Hale were relied on, but Erle J. said the solution of Hale's dictum was, "If the manslaughter be *per infortunium*, or *se defendendo*, there is no accessory; but there are other cases in which there may be accessories." The conviction was upheld. With respect to accessories after the fact, it seems now settled (*Greenacre*, pp. 48, 65, 591, 617, 650; *Richards*, 2 *Q. B. D.* 311; 46 *L. J. M. C.* 200 (1877), *C. C. R.* p. 591), that persons harbouring and receiving a prisoner indicted for murder but convicted of manslaughter become accessories to the manslaughter. See p. 591. It is said generally in the older books that in forgery all are principals, 2 *East P. C.* 973, "but this must, I think, be understood of forgery at common law," which is a misdemeanor.

Aiders and abettors, or "principals in the second degree" in felonies.] Aiding and abetting a person to commit a felony is in itself a substantive felony, whether the felony be such at common law or by statute. *Tattersal* (1801), 1 *Russ. Cri.* 162. An aider and abettor, who is present, is also called "a principal in the second degree." *The Coalheavers' case*, 1 *Lea.* 64 (1768); *Midwinter & Sims*, *Fost. C. C.* at 428 (1749).

To make a man principal in the second degree he must be *present* at the commission of the felony. *Soares*, 2 *East P. C.* 974; *Russ. & Ry.* 25 (1802), prisoners not present at the uttering of a forged note, pp. 341, 473, 478: *Davis*, *Ib.* 113 (1806), pp. 341, 478, the same; *Badcock*, *Ib.* 249 (1810), the same, and other cases in the same report. By presence is meant such contiguity as will enable the abettor to render assistance to the main design; it "need not always be an actual immediate standing by, within sight or hearing of the fact," 4 *Bl. Comm.* 34. See p. 612. See as to murder, p. 649, coining p. 341, and as to forgery p. 478, and *Completion of a Crime*, in Index.

"Bare being present can never amount to an aiding and abetting," *per* Raymond C.J., *Huggins*, p. 621. With regard to what will constitute such a presence as to render a man a principal in the second degree, it is said: "Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him; some to commit the fact, others to watch at proper distances and stations, to prevent a surprize, or to

favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it." *Foster, C. C.* 350, p. 612. This is sometimes called "constructive presence," as by Blackstone, above: p. 484. Thus, where A. waits under a window, while B. steals articles in the house, which he throws through the window to A., the latter is a principal in the offence. *Owen*, 1 *Moody C. C.* 96 (1825), p. 738. There must be a participation in the act, for although a man be present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 *Hale*, 439; *Foster*, 350. And the design actually participated in must be felonious. Where a smuggler fired a gun while the king's officers were resisting the attempt, and killed an accomplice, it was held murder in all the smugglers if he intended to kill an officer, but not if he intended to kill the accomplice. 1 *East, P. C.* 258; *Plummer, Kel.* 109; 12 *Mod.* 627 (1700). Thus if a master assault another with malice prepense, and the servant, ignorant of his master's malice, take part with him, and kill the other, it is manslaughter in the servant and murder in the master. 1 *Hale*, 446.

And, generally where several persons are in company together, engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in his guilt, unless the act done was in some manner in furtherance of the common intention. Several soldiers employed by the messenger of the secretary of state to assist in the apprehension of persons unlawfully broke open the door of a house where the person was supposed to be. Having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony at all. Holt C.J. observing upon this case, says, "That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first . . . all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; and the reason was, because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands." *Anon.*, 1 *Leach*, 7 *n.* (1664); 1 *Russ. Cri.* 168 *n.* See also *White, R. & R.* 99 (1806); *Hawkins*, 3 *C. & P.* 392 (1828). Three men went out into a field to shoot with one rifle, and placed a target in a tree near some houses, eight feet from the ground. They lay down on the ground, and each fired at it in turn. Their rifles were sighted to shoot 950 yards, and would probably be deadly at a mile. A boy in an apple-tree 393 yards off was killed by one of the shots; but it was uncertain which of the prisoners had shot him. They were all held to be guilty of manslaughter, no proper precautions having been taken. *Salmon*, 6 *Q. B. D.* 79; 50 *L. J. M. C.* 25; 14 *Cox C. C.* 494 (1880): C. C. R. p. 598. It is perhaps open to doubt whether if only one had fired his rifle, all would have been equally guilty. L. Coleridge C.J. said, "It was manslaughter in him who killed the boy—the death resulted from the *action* of the three, and they are all liable," and Stephen J. said, "all are responsible, for they unite to fire at the spot in question."

Where several are present, aiding and abetting, and the punishment of principals in the first and second degree is the same, an indictment may lay the fact generally as being done by all; 3 & 4 *Hawk. B.* 2, *c.* 23, *s.* 76, and *c.* 25, *s.* 64; even, as in cases of rape, where from the nature of the offence only one can be a principal in the first degree. 1 *Hawk. B.* 1, *c.* 41, *s.* 10; 4 *Hawk. B.* 2, *c.* 29, *s.* 7. (For cases of rape where a woman was convicted as principal, see *Ram &c.* pp. 183, 727.) And as in almost every case the punishment of all principals is the same, this is the course that is usually followed.

It has been long settled that all those who are present, aiding and abetting when a felony is committed, are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty; 2 *Hale*, 223; and may be convicted, though the person charged as principal in the first degree is acquitted. *Taylor*, 1 *Leach*, 360 (1785); *Benson* v. *Offley*, 2 *Show.* 510; 3 *Mod.* 121 (1688); *Wallis*, 1 *Salk.* 334 (1703); *Towle*, *R. & R.* 314; 3 *Price*, 145; 2 *Marsh.* 466 (1816). Cf. *Hughes*, p. 155. See as to receiving, pp. 737–8.

Accessories before the fact in felonies—bare permission—countermand.] "An accessary *before*," as defined by Hale, "is he that, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony, and it is an offence greater than the *accessary* after." 1 *Hale*, *P. C.* 615. The bare concealment of a felony to be committed will not make the person concealing it an accessory before the fact, but "guilty only of a misprision of felony." 2 *Hawk. P. C.*, *B.* 2, *c.* 29, *s.* 23. So words amounting to a bare permission will not render a man an accessory, as if A. says he will kill J. S., and B. says, "you may do your pleasure for me." 1 *Hale*, 616. The procurement must be continuing; for if before the commission of the offence by the principal, the accessory countermands him, and yet the principal proceeds to the offence, he who countermanded him will not be guilty as accessory. 1 *Hale*, *P. C.* 618. If the person was *present* when the offence was committed he is not an accessory. *Gordon*, p. 6. In such case he should be indicted as a principal. *Brown*, 14 *Cox C. C.* 144 (1878). Several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places. *Barber*, 1 *C. & K.* 442 (1844).

Accessories before the fact in felonies—by the intervention of a third person.] A person may render himself an accessory by the intervention of a third person, without any direct communication between himself and the principal. Thus if A. bid his servant hire somebody to murder B., and furnish him with money for that purpose, and the servant hires C., a person whom A. never saw or heard of, who commits the murder, A. is an accessory before the fact. "It is a principle in law which can never be controverted that he who procureth a felony to be done is a felon. If present he is a principal, if absent an accessary before the fact." *Fost. C. C.* 125, *Macdaniel*, *ib.*, 121, cf. 130 and 131, see p. 756 (1755: this is not the case at 1 *Lea.* 44). 4 *Hawk. P. C.*, Bk. 2, ch. 29, ss. 1, 11; 1 *Russ. Cri.* 172; *Cooper*, p. 43.

Accessories before the fact in felonies—degree of incitement.] "With respect to the measure of incitement and force of persuasion used, no rule is laid down; that it was sufficient to effectuate the evil purpose is proved by the result. In principle it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed although the incitement had never taken place." 2 *Stark. Ev.* 9, *3rd ed.* Where a man furnished a woman with corrosive sublimate under strong pressure from her, which she took with intent to procure abortion, but he did not instigate her to take it, and his conduct was consistent with his having hoped that she would change her mind, it was held that he was not a principal nor an accessory before the fact. *Fretwell*, *L. & C.* 161; 31 *L. J. M. C.* 145 (1862), pp. 232, 649. So a mere holder of stakes for a prize-fight

who is not present, but who afterwards paid over the stakes to the winner, was held not an accessory after the fact to the manslaughter of the man who was killed in the fight. *Taylor, L. R.* 2 *C. C. R.* 147; 44 *L. J. M. C.* 67 (1875), p. 591.

Incitement by detectives, &c.—"traps" to catch criminals.] See *Innocent Agent* in Index and *Bannen*, p. 343, and p. 257; *Holden*, p. 475; and *O'Callaghan*, p. 178, and *Titley*, *ib.*

Accessories before the fact in felonies—principal varying from orders given to him.] With regard to those cases where the principal varies, in committing the offence, from the terms of the instigation, the following rules are laid down by Sir Michael Foster. "If the principal totally and substantially varieth, if being solicited to commit a felony of one kind, *he wilfully and knowingly* committeth a felony of another, *he* will stand single in that offence, and the person soliciting will not be involved in his guilt. . . . But if the principal in substance complieth with the temptation, varying only in circumstances of time, or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessary before the fact, if present, a principal. . . . A. commandeth B. to murder C. by poison; B. doth it by a sword or other weapon, or by any other means; A. is accessary to this murder; for the murder of C. was the object principally in his contemplation, and that is effected. So where the principal goeth beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such orders or advice will be an accessary to that felony. A. upon some affront given by B. ordereth his servant to waylay him and give him a sound beating: the servant doth so, and B. dieth of this beating. A. is accessary to this murder. . . . A. soliciteth B. to burn the house of C.; he doth it, and the flames taking hold of the house of D., that likewise is burnt. A. is an accessary to this" felony. The principle in all these cases is, that though the event might be beyond the original intention of the accessory, yet, as in the ordinary course of things, that event was the probable consequence of what was done under his influence, and at his instigation, he is in law answerable. *Foster*, 369, 370; see also 1 *Hale, P. C.* 617; 4 *Hawk. P. C.*, Bk. 2, ch. 29, s. 18. Cf. p. 247. Where the principal *wilfully* commits a different crime from that which he is commanded or advised to commit, the party counselling him will not, as above stated, be guilty as accessory. But whether, where the principal *by mistake* commits a different crime, the party commanding or advising him shall stand excused, has been the subject of much discussion. It is said by Hale, that if A. commands B. to kill C., and B. by mistake kills D., or else in striking at C. kills D., but misses C., A. is not accessory to the murder of D., because it differs in the person. 1 *Hale, P. C.* 617, citing 3 *Inst.* 51 (*Coke, P. C.* c. 7); *Saunders, Plow. Com.* 473 (1573), p. 618. The circumstances of *Saunders*, cited by Hale, were these: Saunders, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple and gave it to her to eat; she ate a small part of it, and gave the remainder to their child. Saunders making only a faint attempt to save the child, whom he loved and would not have destroyed, stood by and saw it eat the poison, of which it soon afterwards died. It was held that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to the murder.

Upon the law as laid down by Hale, and upon *Saunders*, Foster J. has made the following observations, and has suggested this case: B. is an utter stranger to the person of C., and A. therefore takes upon himself to describe him by his stature, dress, &c., and acquaints B. when and where he may

probably be met with. B. is punctual at the time and place, and D., a person in the opinion of B. answering the description, unhappily coming by, is murdered under a strong belief on the part of B. that he is the man marked out for destruction. Who is answerable? "B. undoubtedly is: the malice on his part *egreditur personam*. And may not the same be said on the part of A.? The pit which he, with a murderous intention, dug for C., D., through his guilt, fell into and perished. For B., not knowing the person of C., had no other guide to lead him to his prey than the description A. gave of him. B. in following this guide fell into a mistake, which it is great odds any man in his circumstances might have fallen into. I therefore, as at present advised, conceive that A. was answerable for the consequences of the flagitious orders he gave; since that consequence appeareth in the ordinary course of things to have been highly probable." *Foster*, 370. Foster J. then proposes the following *criteria* of the cases. "Did the principal commit the felony he standeth charged with, under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind or upon a different subject?" *Ib.* 372. See also 4 *Hawk, P. C.*, Bk. 2, ch. 29, s. 22.

Accessories before the fact in felonies—how indicted.] Before 7 G. 4, 64, 9, accessories could not, except by their own consent, be tried until the guilt of the principal offender was established. It was necessary, therefore, either to try them after the principal had been convicted, or upon the same indictment with him, and the latter was the usual course. 1 *Russ. Cri.* 180. This section is now repealed, and by 24–5 V. 94, 1, "Whosoever shall become an Accessory before the Fact to any Felony, whether the same be a Felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal Felon." See pp. 530–1. By s. 2, "Whosoever shall counsel, procure or command any other Person to commit any Felony, whether the same be a Felony at Common Law, or by virtue of any Act passed or to be passed, shall be guilty of Felony, and may be indicted and convicted, either as an Accessory before the Fact to the principal Felony, together with the principal Felon, or after the conviction of the principal Felon, or may be indicted and convicted of a substantive Felony, whether the principal Felon shall or shall not have been previously convicted, or shall or shall not be amenable to Justice, and may thereupon be punished in the same Manner as an Accessory before the Fact to the same Felony, if convicted as an Accessory, may be punished."

Soliciting and inciting a person to commit a felony is not a substantive felony under this section, unless the felony is actually committed, but only a misdemeanor, and it is doubtful whether a soliciting and inciting is equivalent to a counselling and procuring. *Gregory, L. R.* 1 *C. C. R.* 77; 36 *L. J. M. C.* 60 (1867).

It was decided upon 11–12 V. 46, 1 (repealed, but in the same terms as 24–5 V. 94, 1), that a person charged as an accessory before the fact may be convicted even though the principal be acquitted. *Hughes, Bell C. C.* 242; 29 *L. J. M. C.* 71 (1860). The two first counts charged A. and B. with stealing, and the third, B. with receiving. No evidence was offered against A., who was acquitted and called as a witness. The evidence went to show that B. was an accessory *before* the fact, and the jury found a general verdict of guilty. It was held that the conviction was good. Erle C.J. stated that the judges considered that being an accessory before the fact now stands "as a substantive and absolute" felony, and that no wrong is done the prisoner though he should be tried before the principal. Cf. *Taylor*, &c., p. 153.

By 24–5 V. 94, 5, "As to accessories generally: If any principal Offender shall be in anywise convicted of any Felony, it shall be lawful to proceed against any Accessory either before or after the Fact, in the same Manner as if such principal Felon had been attainted thereof, notwithstanding such principal Felon shall die or be pardoned, or otherwise delivered before Attainder; and every such Accessory shall, upon Conviction, suffer the same Punishment as he would have suffered if the Principal had been attainted." By s. 6, "Any Number of Accessories at different Times to any Felony, and any Number of Receivers at different Times of Property stolen at One Time, may be charged with substantive Felonies in the same Indictment, and may be tried together, notwithstanding the principal Felon shall not be included in the same Indictment, or shall not be in custody or amenable to Justice."

To an indictment for being accessory before the fact, the having been acquitted as principal is no bar. *Birchenough*, 7 *C. & P.* 575 (1836), p. 169.

Evidence.] How far the proof of the principal's conviction is evidence against the accessory, see pp. 695, 735, and cf. p. 47.

Accessories after the fact in felonies.] An accessory after the fact, says Hale, is "where a person knowing the felony to be committed by another receives, relieves, comforts, or assists the felon"; 1 *P. C.* 618; whether he be a principal, or an accessory before the fact. 4 *Hawk.* B. 2, ch. 29, s. 1; 3 *P. Wms.* 475. But a *feme covert* does not become an accessory "for the receipt of her husband for she ought not to discover him." This, however, is the only relationship which will excuse such an act. The husband is liable for receiving the wife. 1 *Hale, P. C.* 621. So if a master receives his servant, or a servant his master, or a brother his brother, they are accessories, in the same manner as a stranger would be. 4 *Hawk. P. C.* Bk. 2, ch. 29, s. 34. If a husband and wife knowingly receive a felon, it shall be deemed to be the act of the husband only. 1 *Hale, P. C.* 621. But if the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband. *Ib.*

With regard to the acts which will render a man guilty as an accessory after the fact, it is laid down, that, "generally any assistance whatever, given to a person known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape: or where one harbours and conceals in his house a felon under pursuit, by reason whereof his pursuers cannot find him, and much more, where one harbours in his house and openly protects such a felon, by reason whereof pursuers dare not take him." 4 *Hawk. P. C.* Bk. 2, ch. 29, s. 26. So if one takes money of such a person to suffer him to escape. *Year Book*, 9 Hen. iv. p. 1 (3). See *Lee*, 6 *C. & P.* 536 (1834). So a man who employs another person to harbour the principal may be convicted as an accessory after the fact, although he himself did no act to relieve or assist the principal. *Jarvis*, p. 110, p. 772. So it appears to be settled that whoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is guilty as accessory. 4 *Hawk. P. C.* Bk. 2, ch. 29, s. 27, cf. s. 29. In the same manner conveying instruments to a felon, to enable him to break gaol, or to bribe the gaoler to let him escape, make one an accessory. "But to relieve a felon in gaol with clothes or other necessaries is no offence, for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law." 4 *Bl. Com.* 38. See p. 697.

Merely suffering the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission. 1 *Hale*,

619. See, generally, p. 716. So if a person speak or write, in order to obtain a felon's pardon or deliverance; 4 *Year Books*, *Liber Ass.* (E. 3), 26th year, 129, p. 47, or an attorney advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 *Inst. c.* 64, 139; 1 *Hale*, 620 (though it is a misdemeanor punishable by fine and imprisonment); or even if the person injured agree for money not to give evidence against the felon, *Francis Moore's Rep.* 8 (29), or if one know of the felony, and do not discover it "in convenient time"; 1 *Hale*, 371, 618; none of these acts will make a person an accessory after the fact.

"The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not, at common law, make him accessory to the homicide, for till death ensues there was no felony committed." 4 *Bl. Com.* 38; so 4 *Hawk. P. C.* Bk. 2, ch. 29, *s.* 35.

In order to render a man guilty as accessory, he must have notice, either express or implied, of the principal having committed a felony. 4 *Hawk. P. C.* Bk. 2, ch. 29, *s.* 32. It was formerly considered that the attainder of a felon was a notice to all persons in the same county of the felony committed, but the justice of this rule has been denied. 4 *Hawk. P. C.* Bk. 2, ch. 29, *s.* 33. It was observed by Lord Hardwicke, that though this may be some evidence to a jury, of notice to an accessory in the same county, yet it cannot, with any reason or justice, create an absolute presumption of notice. *Burridge*, 3 *P. Wms.* at 496 (1735). In order to support a charge of receiving, harbouring, comforting, assisting and maintaining a felon, there must be some act proved to have been done to assist the felon personally; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen. *Chapple*, 9 *C. & P.* 355 (1846). As to harbouring thieves in public-houses and brothels, see 34–5 V. 112, 10, 11.

Accessories after the fact in felonies—how indicted.] With regard to the trial of accessories after the fact, 24–5 V. 94, 3 enacts: "Whosoever shall become an accessory after the fact to any felony, whether the same shall be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished." The "substantive" felony of being accessory after the fact must be charged: it cannot be found on another indictment. *Fallon*, 32 *L. J. M. C.* 66; 1 *L. & C.* 217 (1862): C. C. R. Where an indictment contains two counts, the first charging the accused as principal, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed. *Brannon*, 14 *Cox C. C.* 394 (1880), p. 174.

Sections 5 and 6 of 24–5 V. 94, p. 156, apply to accessories *after* as well as *before* the fact.

By 24–5 V. 94, 4, "Every accessory after the fact to any felony (except where it is otherwise specially provided), whether the same be a felony at common law or by virtue by any Act passed or to be passed, shall be liable, at the discretion of the Court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour; and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either,

for keeping the peace, in addition to such punishment: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

By 24–5 V. 100, 67: "In the case of every felony punishable under this Act, every principal in the second degree and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour." See p. 610; and cf. p. 280.

An accessory may avail himself of every matter, both of law and fact, to contest the guilt of his principal whether indicted with him or not. *Foster*, 365; 1 *Russ. Cri.* 188; and see *Turner*, p. 47, and p. 735.

Aiders and abettors as principals in the second degree in misdemeanors.] Aiding and abetting in the commission of a misdemeanor is itself a misdemeanor: p. 409. But it has always been the custom to indict principals in the second degree in misdemeanors, the same way as principals in the first degree. And now by 24–5 V. 94, 8, it is enacted "As to abettors in misdemeanors. Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender." The same provision is repeated in the other Consolidation statutes (*e.g.* in s. 67 above), and 33–4 V. 90, 12. See *De Marny*, p. 710. On an indictment for aiding and abetting a felony, a verdict of aiding a misdemeanor may be found. *Waudby*, p. 800. As to aiding and abetting a prize-fight, see *Coney*, 8 *Q. B. D.* 534; 51 *L. J. M. C.* 66; 15 *Cox C. C.* 46 (1882); C. C. R. set out p. 595: pp. 234, 252, 253.

Accessories in misdemeanors.] In misdemeanors all are principals, and there are no accessories in the technical sense of that term. Some difficulty about this was created by the case of *Else*, *Russ. & Ry.* 142 (1808), but the law was set right by *Greenwood*, cited in 2 *Den. C. C.* 453; 21 *L. J. M. C.* 127 (1852), also overruling *Page* (1841) there cited.

Venue and jurisdiction.] By 24–5 V. 94, 7, "Where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory, either before or after the fact, to any such felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become accessory, shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without."

By the Explosive Substances Act, 1883, 46–7 V. 3, 5, "Any person who within or (being a subject of Her Majesty) without Her Majesty's dominions by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any crime under this Act, shall be guilty of felony, and shall be liable to be tried and punished for that crime, as if he had been guilty as a principal."

C. PRACTICE.

1. PROCEEDINGS BEFORE THE HEARING.

The rigorous strictness in the framing of indictments, which was formerly a notorious characteristic of the law, has disappeared. Even in 1858 in a case (*Lyons*, p. 245) which turned on the sufficiency of an indictment, Pollock C.B. said: "It is likely that a hundred [*v. l.* fifty] years ago such an objection might have succeeded. Statutes were then required to be perfectly precise, and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature." See also *Kenny, Outlines of Crim. L.*, ch. 31.

Preferring and finding bills of indictment.] By 19–20 V. 54, 1, it is "lawful for the foreman of every grand jury in England and Wales, and he is hereby authorised and required to administer an oath to all persons whomsoever who shall appear before such grand jury to give evidence in support of any bill of indictment, and all such persons attending before any grand jury to give evidence may be sworn and examined on oath by such grand jury touching the matters in question; and every person taking an oath in support of any bill of indictment who shall wilfully swear falsely shall be deemed guilty of perjury; and the name of every witness examined, or intended to be so examined, shall be endorsed on such bill of indictment; and the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment." By s. 3, "the word 'foreman' shall include any member of such grand jury who may for the time being act on behalf of such foreman in the examination of witnesses. . . "

It has been said that two indictments for the same offence, one for the felony under a statute, and the other for the misdemeanor at common law, ought not to be preferred or found at the same time. *Doran*, 1 *Leach* 538 (1790); *Smith*, 3 *C. & P.* 413 (1828). But where two indictments had been found, one for stealing and another for a misdemeanor, and it was sworn that they were for the same identical offence, the Q. B. (into which court the indictments had been removed by *certiorari*) refused to grant a rule for quashing one or both of such indictments. *Stockley*, 3 *Q. B.* 238 (1842), p. 176. Where there are two indictments (*sic*) for the same act (*e.g.* by coroner's inquisition and the grand jury) defendant ought to be tried on both at once. *Culliford*, 1 *Salk.* 382 (1705), p. 170.

The grand jury are not usually very strict as to evidence, as they only require that a *primâ facie* case should be established; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist upon the same strictness of proof as must be observed at the trial, it may be prudent in all cases to be provided, at the time the bill is preferred, with the same evidence which is intended afterwards to support the indictment. A deposition has, however, been allowed to be read before them

without proof of the illness of the witness or of the taking of the deposition. *Gerrans*, p. 64.

The prisoner cannot give evidence on his own behalf before the grand jury. *Rhodes*, p. 83; *Saunders*, 63 *J.P.* 24 (1898), C. C. R.

When the grand jury found, upon a bill preferred against A. and B. for murder, a true bill against A. for murder, and against B. for manslaughter, Williams J., after consulting Campbell C.J. and Greaves Q.C., held that the finding against A. was good, and that against B. a nullity, and directed that a fresh bill should be preferred against B. for manslaughter. *Bubb*, 4 *Cox C. C.* 455 (1851). Where the grand jury have found a bill, the judge before whom the case comes on to be tried ought not to inquire whether the witnesses were properly sworn previously to their going before the jury; and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge only, "and were anciently in the habit of doing so." *Russell, Carr. & M.* 247 (1842).

If the bill be not found, "a fresh bill may afterwards be preferred to a subsequent grand jury," 4 *Bla. Comm.* 301. And it would seem from *Bacon's Abridgement, Indictment D.*, that where a bill for one offence, such as murder, is ignored by the grand jury but one for manslaughter is found, "the safest way is to deliver them a new" bill against the same person, relating to the same subject-matter, but charging another offence, viz. manslaughter; and this course is frequently adopted in practice, as above. Cf. *North-Eastern Ry. Co.*, p. 515.

But if the grand jury at the assizes or sessions have ignored a bill, they cannot find another bill at the same assizes or sessions, against the same person for precisely the same offence, and if such other bill be sent before them they should take no notice of it. *Humphreys, Carr. & M.* 601 (1842); *Austin*, 4 *Cox C. C.* 385 (1850); but it was done in *Newton*, p. 272.

Where a true bill has been found by the grand jury at quarter sessions for offences not triable there, *e.g.*, rape, the person against whom the bill is found may be tried upon it at the assizes. *Allum*, 2 *Cox C. C.* 62 (1846).

Where a coroner's jury found manslaughter, but the grand jury ignored the bill, Byles J. is reported (probably wrongly) to have said, "In no case could he permit a trial to take place on the coroner's inquisition, where the grand jury had thrown out a bill for the same offence, for to do so would be to constitute the petty jury a court of appeal against the grand jury." *Hutchinson*, p. 598. *Sed quære*; cf. p. 333.

By the act to prevent Vexatious Indictments for certain misdemeanors, 22–3 V. 17, 1: "No Bill of indictment for . . . perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling-house, keeping a disorderly house, and any indecent assault, shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment," if charged to have been committed in England or Ireland, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law, or of the attorney- or solicitor-general, or (in the case of an indictment for perjury) by the direction of any court, judge, or "public Functionary," authorised by 14–5 V. 100, so to direct. This act is amended, by the 30–1 V. 35, 1, 2, see p. 826; and misdemeanors by fraudulent debtors are now within the Act. See p. 263 and p. 288. So are offences under the Newspaper Libel Act, 44–5 V. 60, 6, p. 575. And misdemeanors under the

Criminal Law Amendment Act, 1885, 48-9 V. 69, 17; the Merchandise Marks Act, 1887, 50-1 V. 28, 13; and the Prevention of Cruelty to Children Act, 1904, 4 E. 7, 15, 25. The consent in writing of the judge may be given *ex parte*, *Bray*, 32 *L. J. M. C.* 11; 3 *B. & S.* 255; 26 *J. P.* 723; (trial) 9 *Cox C. C.* 218; (1862), pp. 688, 694. The preferable course is to apply to a magistrate, *per* Blackburn J. *Ibid.* The fiat of the attorney-general need not be produced or proved at the trial. *Dexter*, p. 121. If a count be improperly added to an indictment without the authority of the court, the proper course is for the judge at the trial to quash it. An indictment contained two counts for obtaining goods by false pretences, one false pretence being laid on the 26th, the other on the 29th September. The defendant had been committed by the magistrates on the charge relating to the 26th, but not on that relating to the 29th. He moved to have the indictment or its second count quashed, which was refused. Evidence was admitted on both counts and a *separate* conviction and sentence passed on each. It was held upon a case reserved that the second count should have been quashed, and that as the evidence relating to it was inadmissible on the trial of the first count, the conviction on the first count was also bad. *Fuidge*, p. 85. Since the passing of 30-1 V. 35, it would seem that the consent to add new counts to an indictment must not be general so as to authorise the prosecution to add any number of counts, nor must the consent include counts founded on facts and evidence which were not disclosed before the committing magistrate. *Bradlaugh*, 15 *Cox C. C.* 156; 47 *L T.* 477 (1882), *Q. B. D.*; cf. pp. 109, 565. An *attempt* to obtain money or other property by false pretences is not within this statute. *Burton*, 13 *Cox C. C.* 71 (1875); *C. C. R.* In cases where the justices refuse to commit, by dismissing for want of evidence, the prosecutor is entitled to require them to take his recognisance to prosecute the charge. *Lord Mayor of London* and *Stubbs*, 16 *Cox C. C.* 77 (1886). But the charges must be exactly the same as those dismissed: *Bode*, *Times* newspaper, Oct. 23, 1906. Where a person, charged with an offence punishable summarily, elects, under s. 17 of 42-3 V. 49, p. 69, to be tried by a jury, he may be committed to take his trial as if he had been charged with an indictable offence, and not with one summarily punishable, and if the Vexatious Indictments Acts apply to the offence charged in the summons, then by 30-1 V. 35 an indictment for a different offence may be presented, or counts may be added for offences other than that for which he was committed for trial, provided the depositions in the opinion of the court justify the new charges. *Brown*, 1895, 1 *Q. B.* 119; 18 *Cox C. C.* 81; 64 *L. J. M. C.* 1; *C. C. R.*, pp. 173, 492, where there is another instance of election under s. 17. See *Jury* and *Summary Jurisdiction*, in Index.

It is not necessary that the indictment should state that the provisions of the Act have been complied with. *Knowlden*, 5 *B. & S.* 532; 33 *L. J. M. C.* 219 (1864).

For perjury, see pp. 688-9.

Count for previous conviction.*] See pp. 87, 198. Various statutes have been passed permitting a statement to be made in the indictment that the prisoner has been previously convicted, and providing modes of proving that statement, and for arraigning the prisoner thereon, see p. 190.

With respect to the mode of stating the previous conviction in the indictment, 7-8 G. 4, 28, 11 provided that it should be sufficient to state that the offender was at a certain time and place convicted of felony without otherwise describing the previous felony. The Larceny Act, 1861, 24-5 V. 96, 116, provided that in any indictment for an offence under that Act, committed after *any* previous conviction, it should be sufficient to state that

* *Count* is from the French *conte*, a story or account.

the offender was at a certain time or place convicted of felony or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction without otherwise describing the previous felony, misdemeanor, offence, or offences. As to offences relating to coin, see 24–5 V. 99, 37, set out pp. 342–3, and *Martin, L. R.* 1 *C. C. R.* 214; 39 *L. J. M. C.* 31 (1869), pp. 191, 343, and see the form for an indictment under s. 12 of the above statute in consequence of the decision in this case, *Saunders, Indictments, 3rd ed., No.* 86. In both the Larceny Act and the Coinage Act it is necessary that the *subsequent* offence should be first stated. In other cases it is immaterial which offence is first stated. *Hilton*, 28 *L. J. M. C.* 28 (1858), *C. C. R.* The effect of alleging a previous conviction in an indictment for uttering counterfeit coin is to make the offence charged a felony, and if the jury negative the previous conviction, the prisoner cannot be found guilty on the charge of felony, as it is not proved, nor of a misdemeanor of uttering, as the indictment is for a felony. *Thomas*, p. 71.

The state of the law with respect to the power to insert a count for a previous conviction is peculiar. The Act of G. 4 enables a count for previous conviction for *felony only* to be inserted in an indictment for *felony only*. The Larceny Act (s. 116, above) seems to permit a count for previous conviction for any *felony, misdemeanor, or offence punishable by summary conviction* to be inserted in an indictment for *any offence under that Act*; but see p. 190. The Coinage Act permits a count for previous conviction for *any offence against that Act* or any former Act relating "to the Coin" to be inserted in an indictment *for any offence against that Act*. The result of these Acts is that in indictments for misdemeanors and offences not felonies, which are not included in the Larceny or Coinage Acts, a previous conviction cannot be charged at all, and under the Coinage Act only a previous conviction for offences against that Act. In *Deane*, 46 *L. J. M. C.* 155 (1877), *C. C. R.*, a count for a previous conviction of *felony* was inserted in an indictment for false pretences (misdemeanor) without objection being taken, but the decision in *Garland, Ir. Rep.* 3 *C. L.* 383; 11 *Cox C. C.* 224 (1869), *C. C. R.*, not cited to the English court, is to the contrary. See p. 198. It is still doubtful whether in misdemeanors under the Larceny Act not punishable by penal servitude a previous conviction can be inserted in the indictment.

As to cases of receiving stolen goods, &c., see 34–5 V. 112, 19, p. 732, and cf. p. 137.

Copy of indictment.] A prisoner is not entitled as of right to a copy of the indictment in order to draw up his plea, but the court will direct the indictment to be read over slowly, in order that it may be taken down. *Parry* 7 *C. & P.* 836 (1837), p. 170. But the counsel for the prosecution may give a copy of the indictment with a view of saving time. *Ib.* See also *Newton*, 1 C. & *K.* 469 (1844), where Tindal C.J. said "he never in his life knew this [the reading] to be done." In the case of an acquittal on a prosecution for felony, a copy of the indictment cannot be regularly obtained without an order from the court. The rule is *confined* to cases of felony. In prosecutions for misdemeanors the defendant is entitled to a copy of the record as a matter of right, without a previous application to the court. *Morrison* v. *Kelly*, 1 *W. Blackst.* 385 (1762); *Evans* v. *Phillips* (1763), 2 *Selw. N. P.*, 2*nd ed.*, 1062; 2 *Phill. Ev.* 162, 10*th ed.* See further, 3 *Russ. Cri.* 463 *n.*

Particulars.] See p. 358. With respect to the general law relating to the delivery of particulars in criminal cases, very little is to be found in the books. Now that the indictment is in many cases perfectly general, it seems

to be a matter of right that the prisoner should have some information as to the particular charges intended to be brought against him. *Carr. Supp.* 321. Those offences in which the right of the accused to particulars has been recognised, and in which they are most commonly required, are barratry, nuisance, offences relating to highways, conspiracy, and embezzlement. See under those respective titles. See especially, as to barratry, *Carr. Supp.* 322. The learned author, in speaking of the generality allowed in indictments for larceny and embezzlement in 1828 says, "Under these circumstances, it seems hardly possible for an innocent man to know what charges he has to meet, because three of them may be included in one indictment; and, when put there, they are all wholly indefinite as to time, place, sum, and person from whom the money was received. It is true that the prisoner may, in his defence, say, that if he had had a knowledge of what particular sums he was charged with embezzling, he could have procured the attendance of witnesses to show that he had applied those monies to his master's use, and not to his own; but as this may be as easily said by the most guilty man as by the most innocent, it would, perhaps, when said, be not much attended to by the jury." *Ib.*

It seems that the proper course is for the defendant to apply to the prosecutor in the first instance for particulars of the offence: and, if they are refused, to apply to the court or a judge, upon an affidavit of that fact, and that he is unable to understand the precise charge intended. *Bootyman*, 5 *C. & P.* 300 (1832), p. 389; *Hodgson*, 3 *C. & P.* 422 (1828), pp. 386, 389; *Marquis of Downshire*, 4 *A. & E.* 699 (1836), pp. 500, 514. The application may be made to the judge at the assizes; *Hodgson*. In barratry, however, it seems to be necessary to give particulars without any demand. 2 *Hawk. P. C.* Bk. 1, ch. 81, s. 13; *Carr. Supp.* above.

If particulars have been delivered, the prosecutor will not be allowed to go into other charges than those contained therein. If particulars have been ordered, but not delivered, it seems that the prosecutor cannot be precluded from giving evidence on that head. *Esdaile*, 1 *F. & F.* 213 (1858). The proper course is to apply to put off the trial.

Jurisdiction.] So far as *locality* is concerned, the jurisdiction of the court generally depends upon the venue, *i.e.* "a place next to that where anything that comes to be tryed is supposed to be done." *Termes de la ley;* cf. 35 H. 8, c. 6, 3; the venue must be laid within the area over which the court has jurisdiction; the place where the offence is actually alleged to have been committed must be within that area, unless there be some rule or statute which permits any other venue. These are very numerous, and the whole subject will be found discussed under *Venue*, p. 210, and *Change of Venue*, p. 220.

So far as *power* is concerned, the only distinction to which it is necessary here to advert is that relating to courts of quarter sessions. The jurisdiction of these courts is now regulated by 5–6 V. 38, 1, which enacts that, after the passing of that Act, "Neither the justices of the peace acting in and for any county, riding, division or liberty, nor the recorder of any borough, shall, at any session of the peace, or any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas [now penal servitude] for life, or for any of the following offences: that is to say, 1, misprision of treason: 2, offences against the Queen's title, prerogative, person, or government, or against either House of Parliament: 3, offences subject to the penalties of præmunire:* 4, blasphemy and offences against religion: 5, administering or taking

* Now obsolete. See Sweet's and Wharton's Lexicons, *ad verbum.*

unlawful oaths: 6, perjury and subornation of perjury: 7, making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor: 8, forgery: 9, unlawfully or maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze or fern: 10, bigamy and offences against the laws relating to marriage: 11, abduction of women and girls: 12, endeavouring to conceal the birth of a child: 13, offences against any provision of the laws relating to bankrupts and insolvents (*repealed by* 32–3 V. 62. See p. 263): 14, composing, printing, or publishing blasphemous, seditious, or defamatory libels: 15, bribery: 16, unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person: 17, stealing, or fraudulently taking, or injuring, or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein: 18, stealing, or fraudulently destroying, or concealing wills, or testamentary papers, or any document or written instruments, being, or containing evidence of the title to any real estate, or any interest in lands, titles, tenements or hereditaments." Burglary can now be tried at quarter sessions, 59–60 V. 57, p. 298.

By 24–5 V. 96, 87, offences mentioned in the twelve previous sections (see *Agents, Bankers, &c., Frauds by*, p. 235) are not triable at any quarter sessions, though ss. 75–6 have been repealed by 1 E. 7, 10, 2 (1), p. 235, and s. 85 in part by 53–4 V. 71, 27, 29, p. 237. And no indictment under the provisions of the Criminal Law Amendment Act, 1885 (48–9 V. 69), is triable at quarter sessions. See s. 17.

In *Smith* v. *R.*, 18 *L. J. M. C.* 207, 212 (1849), it was held that the jurisdiction of a recorder of a borough was not suspended or affected by the arrival of the judges of assize in the same county, and that this would apply equally to the jurisdiction of the quarter sessions of the county. But Coleridge J. said that though this was the strict law, yet "it would be highly improper and inconvenient, generally speaking," for the magistrates of a county to proceed with the trial of prisoners concurrently with the assizes, though "there may be an obvious distinction between a recorder" and them.

If the court have not jurisdiction, the defendant may take advantage either by a plea to the jurisdiction, or, if it appear on the record, by demurrer, or, as it seems, by motion in arrest of judgment, *Hewitt, R. & R.* 158 (1809), or by a writ of error, p. 199. But the objection may also be taken under the general issue, and this is by far the most usual course. See *Kenny, Outlines of Criminal Law*, ch. 31, pp. 466–8, 489–90.

As to relieving the assize courts from the trial of offences triable at quarter sessions, see 52–3 V. 12, and as to altering the time for holding quarter sessions, so as not to interfere with the assizes, see 57 V. 6.

Certiorari.] Any proceeding in a criminal court may be removed by a writ of *certiorari* into the Court of Queen's Bench, which writ is issued by that court. It is demandable as of right by the crown; *Eaton*, 2 *T. R.* 89 (1787); and issues, as of course, where the attorney-general or other officer of the crown applies for it, either as prosecutor, or as prosecuting the defence on behalf of the crown; *Ib.*; *Clace, Inhabs. of*, or *Lewis*, 4 *Burr.* 2458 (1769); and this, even though the *certiorari* is expressly taken away by statute; for, unless named, the crown is not bound. The granting of the writ of *certiorari* for the purpose of removing indictments into the Queen's Bench Division is regulated by rules 12–19 of the Crown Office Rules, 1906.

It has been held that the mere necessity for a special jury was not alone sufficient ground for granting the writ; *Green*, 1 *Wil. Wol. & Hod.* 35, *New Term Rep.* (1838). A much stronger case of difficulty would have to

be made out now than formerly. See *Wartnaby*, 2 *Ad. & E.* 435 (1835); *Dutchess of Kingston*, *Cowp.* 283 (1775), p. 127. The rule has been granted on the ground of a reasonable probability of partiality in the jurisdiction within which the indictment would otherwise be tried, in cases where the charge had been made the subject of much public discussion; *Lever*, 1 *Wil. Wol. & Hod. New Term Rep.* 35 (1838); but cf. *Mead*, 3 *D. & R.* 301 (1823); where the person accused or interested is a person of influence in the court below; *Reban* v. *Trevor*, 4 *Jur.* 292 (1840); *Grover*, 8 *Dowl. P. C.* 325 (1840, defendant a magistrate); *Jones*, 2 *Har. & W.* 293 (1836); but cf. *Knatchbull*, 1 *Salk.* 150 (1704); and *Thornbury*, *ib.*; where the prosecutor or his attorney is sheriff or undersheriff (p. 179); *Webb*, 2 *Str.* 1068 (1737). The affidavit on which the application must be made by the defendant should state the particular facts relied on very explicitly. *Green* and *Eaton*, above; *Jowle*, 5 *Ad. & E.* 539 (1836, difficult points of law).

The effect of the writ is to remove all proceedings described therein, which have taken place between the *teste* (*i.e.* writ) and return. *Battams*, 1 *East*, 298 (1801); 4 *Hawk.* Bk. 2, ch. 27, s. 73. Where there are several defendants in misdemeanor, all should concur in the application. *Hunt*, 2 *Chit. Rep.* 130 (1820), pp. 4, 220.

If the defendant remove an indictment by *certiorari* he will, if convicted, be liable for costs to the prosecutor or person grieved, on the counts (only) on which he is convicted. *Hawdon*, 11 *Ad. & E.* 143 (1839); *Oastler*, *L. R.* 9 *Q. B.* 132; 43 *L. J. M. C.* 89 (1874). Where an indictment containing several counts had been removed to the High Court by *certiorari*, and the prisoner was acquitted on some counts, but convicted on others, it was held that the prisoner was not entitled to be paid by the prosecutor the costs in respect of the counts on which she had been acquitted; *Bayard*, 1892, 2 *Q. B.* 181, p. 514; and other cases in *Short's* C. O. Rules, R. 30. Rule 15 (1906) provides for the costs of a successful defendant.

See *Wilks*, 5 *E. & B.* 690 (1855); *Jewell*, 7 *E. & B.* 140 (1857); *Mayor of Manchester*, *ib.* 453 (1857).

As to *certiorari*, to remove trials to and from the Central Criminal Court, see *Venue*, p. 220.

As by 36–7 V. 66, 16, the jurisdiction of courts created by commissions of assize, of oyer and terminer, and of gaol delivery, or any such commissions, is vested in the High Court of Justice, a writ of *certiorari* is no longer required to bring up the records of such courts to the High Court. See *Dudley*, pp. 189, 649.

As to costs in indictments for non-repair of highways removed by *certiorari*, see p. 514.

As to the practice relating to *certiorari* generally, see *Corner's* or *Short and Mellor's Crown Office Practice.*

Arraignment in general.*] For arraignment on previous conviction, see p. 190. A person indicted for felony must in all cases appear in person and be arraigned, but this does not apply to misdemeanors in the King's Bench. 1 *Chitt. C. L.* 411, 414; 4 *Bl. C.* 375. The latter states that the trial of "misdemeanor . . . does usually happen in his absence, after he has once appeared." Cf. *Macmichael*, p. 665. On an indictment or information for a crime *less than felony*, the defendant may, by favour of the court, appear by attorney, and this he may do as well before plea pleaded as afterwards unto conviction. *Bacon*, 1 *Lev.* 146; 1 *Keb.* 809 (1665). In all cases of felony the prisoner must take his place within the dock. *Douglas*, *Carr. & M.* 193 (1841); and see also *Zulueta*, 1 *C. & K.* 215 (1843), p. 701. Where, however, a prisoner feigned to be a lunatic, and was very violent and noisy, Wills J.

* From L. Lat. *arrationare* (= to talk to, admonish), through the French.

ordered him to be removed, and, although he had no counsel, the trial (for burglary) proceeded, and verdict and sentence were given in his absence; *Berry*, Northampton Assizes, Nov. 17, 1897. See *Stephen's Digest of Crim. Procedure, Art.* 302, p. 194, and *Law Journal*, Sept. 22, 1906, p. 612; cf. p. 188.

The arraignment consists of two parts; the reading over the indictment to the prisoner, and the asking him whether he is guilty or not guilty. If the prisoner upon his arraignment refuse to or do not answer, it becomes a question whether it is of malice, or whether he is mute by the visitation of God. The court will in such case direct a jury to be impannelled, who are immediately returned, *Jones*, 1 *Leach* 102 (1773), from amongst the bystanders, 1 *Chitty, Crim. L.* 424. The prisoner's counsel may address the jury and call witnesses, for the affirmative of the issue is on him. *Roberts, Carr. C. L.* 57 (1816), prisoner found insane, see p. 167. Where a verdict of *mute by the visitation of God* is returned, the court will order the trial to proceed, if the prisoner is competent in intellect, and can be made to understand the nature of the proceedings against himself. Thus where it appeared that a prisoner, who was found mute, had been in the habit of communicating by means of signs, and a woman was called who stated that the prisoner was capable of understanding her by means of signs, he was arraigned, tried, convicted, and received sentence. *Jones*, above; 1 *Russ. Cri.* 119 *n.* So where a prisoner, who was found mute, could read and write, the indictment was handed to him with the usual questions written upon paper. After he had pleaded, and stated in writing that he had no objection to any of the jury, the trial proceeded. The judge's note of the evidence was handed to him after the examination of each witness, and he was asked in writing if he had any question to put: he was informed of his acquittal in the same way. *Thompson*, 2 *Lew. C. C.* 137 (1827). So the jury having found that the prisoner was mute by visitation of God, and then, being sworn to try whether he was of sound mind, found that he was, his counsel was allowed to plead not guilty for him as it was misdemeanor, and the trial proceeded in the usual manner and the evidence was not interpreted to the defendant. *Whitfield*, 3 *C. & K.* 121 (1850), *coram* Williams J.

But where a prisoner is deaf and dumb, and cannot be made to comprehend the nature of the proceedings and the details of the evidence, the proper course is, after the jury have found him mute by the visitation of God, to re-swear the jury to inquire whether he is able to plead to the indictment; and if that be found in the negative, then to swear them again, to inquire if the prisoner be sane or not, and if the jury find him to be insane, the judge will order him to be confined under 39–40 G. 3, 94, 2, below. "There are three points to be inquired into. 1st. Whether the prisoner is mute of malice or not. 2ndly. Whether he can plead to the indictment or not. 3rdly. Whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence." *Per* Alderson B., *Pritchard*, 7 *C. & P.* 303 (1836). Cf. *Dyson, ib.* 305 *n.* (1831); *Berry*, 1 *Q. B. D.* 447; 45 *L. J. M. C.* 123 (1876), *C. C. R.*

If the prisoner stands mute *of malice*, or will not answer directly to the indictment, or information for treason, felony, piracy, or misdemeanor, it is enacted by 7–8 G. 4, 28, 2, that in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person, and the plea so entered shall have the same effect as if such person had actually pleaded the same. And where the prisoner, who was indicted for murder, remained mute of malice, Erle J. refused to assign counsel for his defence, as he had no authority to do so and the prisoner's assent could not under the circumstances be given. *Ysenado*, 6 *Cox C. C.* 386 (1854); evidence interpreted at end of each examination.

Where the prisoner refused to plead, on the ground that he had already pleaded to an indictment for the same offence (which had been tried before a court not having jurisdiction), it was held that the court might order a plea of "not guilty" to be entered for him under the above statute. *Bitton*, 6 *C. & P.* 92 (1833).

By 39–40 G. 3, 94, 2: if a person indicted for any offence appears insane, the court may, on his arraignment, order a jury to be impannelled "to try the sanity," and if they find him insane, may order the finding to be recorded, and the insane person to be kept in custody till his majesty's pleasure be known. The question is whether the prisoner has sufficient understanding at the *moment*, and it is immaterial to show that at other times insanity has shown itself. *Per* Brett L.J., *Keary*, 14 *Cox C. C.* 143 (1878).

The latter section applies to misdemeanors as well as to felonies. *Little*, *Russ. & Ry.* 430 (1821).

When a jury is impannelled to try the sanity of a prisoner under this section, the prosecution begins and calls its witnesses to prove the sanity of the prisoner. *Per* Williams J., *Davies*, 3 *C. & K.* 328 (1853): cf. *Roberts*, p. 166.

Where a man was indicted for a misdemeanor in uttering seditious words, and upon his arraignment refused to plead, and showed symptoms of insanity, and an inquest was forthwith taken under the above statute to try whether he was insane or not, it was held, 1st, that the jury might form their own judgment of the present state of the defendant's mind from his demeanour while the inquest was being taken, and might therefore find him to be insane without any evidence being given as to his present state; 2ndly, that upon the prisoner showing strong symptoms of insanity in court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine the witnesses on the inquest, or would offer any remarks or evidence. *Goode*, 7 *A. & E.* 536 (1837).

See further as to prisoners found to be insane, pp. 188, 195 and *Insanity*, p. 806.

Postponing the trial.] 14–5 V. 100, 27, enacts that: "No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognisances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognisance for that purpose." Thus, the old *traverse* (= postponement: O. French *traverser*, to deny) is abolished, and misdemeanors are put on the same footing as felonies in this respect.

As to postponements to enable children to be instructed, see p. 99. The trial may also be postponed where it appears by affidavit that a necessary witness for the prisoner is ill. *Hunter*, 3 *C. & P.* 591 (1829), p. 168. Other grounds are that a witness for the prosecution is ill (p. 61), or unavoidably absent, or is kept out of the way by the contrivance or at the instigation of the prisoner (pp. 60, 169); the court will postpone the trial, unless it appear that the requirements of justice can be satisfied by reading the witness's depositions before a magistrate.

If it is moved on the part of the prosecution in a case of felony, to put off

the trial on the ground of the absence of a material witness, who has not made a deposition, the judge will require an affidavit stating the points which the witness is expected to prove, in order to form a judgment whether the witness is a material one or not. *Savage*, 1 *C. & K.* 75 (1843). An affidavit of a surgeon, that the witness is the mother of an unweaned child afflicted with an inflammation of the lungs, who could neither be brought to the assize town nor separated from the mother without danger to life, is a sufficient ground to postpone the trial. *Ib.* Where a prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination this witness could give material evidence for the prisoner, Cresswell J., after consulting Patteson J., held that this was a sufficient ground for postponing the trial, without showing that the prisoner had at all endeavoured to procure the witness's attendance, as the prisoner might reasonably expect, from the witness having been bound over, that he would appear. *Macarthy*, *Carr. & M.* 625 (1842). In *Palmer*, 6 *C. & P.* 652 (1834), the judges at the Central Criminal Court postponed until the next session the presentment of a bill for a capital offence to the grand jury, upon the affidavit of the attorney for the prosecution, that a witness, whose evidence was material, was too ill to attend, and they refused to refer to the deposition of the witness when it was stated that he did not depose to material facts. Where, in a case of murder committed in Newcastle-upon-Tyne, which had created great excitement, several local journals down to the time of the assizes had published paragraphs, implying or tending to show a prisoner's guilt, and it appeared that the jurors at such assizes were chosen from within a circle of fifteen miles round Newcastle, where such papers were chiefly circulated, but that at the summer assizes they would be taken from the more distant parts of the county (into which the indictment had been removed), Alderson and Parke BB. postponed the trial until the following assizes, the latter saying, "The publication of the evidence given before the coroner was, in itself, highly improper, and might have been made the ground of indictment against the publisher." Alderson B. however, said, "I yield to the peculiar circumstances of the case, wishing it to be understood that I am by no means disposed to encourage a precedent of this sort." *Bolam*, 2 *Moo. & R.* 192 (1839). See also *Jolliffe*, pp. 57, 352, 698. And in *Johnson*, p. 29, the same learned judge refused to postpone the trial of a prisoner charged with murder, on the ground that an opportunity might be therefore afforded of investigating the evidence and characters of certain witnesses who had not been examined before the magistrate, but who were to be called for the prosecution to prove previous attempts by the prisoner on the life of the deceased. A trial for murder was postponed upon an affidavit of a medical man as to a witness being unable to travel, although such witness was not examined before the magistrate, and although the trial had been fixed for a particular day. *Lawrence*, 4 *F. & F.* 901 (1866).

In general, a trial will not be postponed before a bill is found and plea pleaded. *Heeson*, p. 84, and *Bolam*, above; but cf. *Chapman*, p. 115, at 560. But where there was an affidavit that the attendance of witnesses from a workhouse in which small-pox had broken out, was necessary, Baggallay L.J. did not require any bill to be sent up before the grand jury, but postponed the trial to the next assizes, admitting the prisoner—who seems to have made no objection to this course—to bail in the meantime. *Taylor*, 15 *Cox C. C.* 8 (1882).

It was not the practice at the Old Bailey to put off a trial on account of the absence of witnesses to character. *Jones*, 8 *East*, 34 (1806).

Where the prisoner applies to postpone the trial, he may be admitted to bail, but he is never required to pay the costs of the prosecutor. *Hunter*,

p. 167. Nor does he receive them when the prosecution postpones. *Crowe*, below, see pp. 204–9. Where the application is by the prosecutor, the court in its discretion will either detain the prisoner in custody, or admit him to bail, or discharge him on his own recognisances. *Beardmore*, 7 *C. & P.* 497 (1836); *Parish*, *ib.* 782 (1837); *Osborne*, *ib.* 799 (1837); see also *Crowe*, 4 *C. & P.* 251 (1829): from these cases it may be gathered that where the prisoner is suspected of colluding with the absent witness, the terms imposed on him, in case of a postponement, are heavier. Before the spring assizes A. was committed to take his trial for shooting B., and a bill was found. The trial was postponed till the summer assizes, on the ground that B. (who shortly afterwards died) was too ill from his wounds to attend to give evidence. At the summer assizes a bill was found against A. for the murder, and an application was made to put off the trial until the following spring assizes, on account of the illness of a material witness. Williams J. granted the application, and held that A. was not entitled to his discharge under the seventh section of the Habeas Corpus Act, 31 Car. 2, 2, saying: "Who can prevent such an occurrence as this? . . . it is a human law and must be humanly interpreted . . . his trial must be subject to human contingency." *Bowen*, 9 *C. & P.* 509 (1840); see *Chapman*, p. 115.

The application should be made before the prisoner is given in charge to the jury, as it is very doubtful whether, if the adjournment of the trial involved a discharge of the jury, it would be granted. See p. 188. It seems that, after the prisoner is given in charge in felony, a judge has no authority to adjourn the trial *till another day* on account of the absence of witnesses, but only to keep the jury in the box or locked up the same day. *Foster*, 3 *C. & K.* 201 (1848); *Parr*, 2 *F. & F.* 861 (1862); but see now 60 V. 18, p. 188.

Plea.] There are several kinds of pleas in criminal cases, but the only ones that are at all likely to occur in ordinary practice are *guilty*, the three special pleas, *autrefois acquit*, *autrefois convict* and *pardon*, and the general issue of *not guilty*. See generally 1 *Russ. Cri.* 38. Pleas *in abatement* "are founded either on some defect apparent on the face of the indictment, without reference to any extrinsic fact, or are founded upon some matter of fact, extrinsic of the record which renders the indictment insufficient." 1 *Chitty Crim. L.* 445. See also *Arraignment*, p. 166.

Guilty.] A plea of guilty does not necessarily admit the truth of the facts contained in the depositions. It is simply an admission that the prisoner is guilty of the offence charged in the indictment and nothing more. *Per* Hawkins J., *Riley*, p. 471. Cf. *Whitney*, p. 290, and see p. 3.

Where one defendant of the three *jointly* indicted for conspiracy pleaded guilty and the other two not guilty and the latter were acquitted, the former had a right to withdraw his plea and to be acquitted. *Plummer*, 20 *Cox C. C.* 269 (1902), *C. C. R.*, p. 203.

Special pleas.] The mode in which the first two of these pleas are pleaded is regulated by 14–15 V. 100, 28: "In any plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the offence charged in the indictment." They may be pleaded orally. See *Birchenough*, p. 156. If the plea fails, the prisoner will be allowed—*in favorem vitæ*—to plead over in felony, but not in misdemeanors, for the plea is a plea in *bar*. *Taylor*, 3 *B. & C.* 502 (1824), p. 490; cf. 1 *Chitt. Crim. Law*, 457. See p. 172, and *Charlesworth*, p. 188.

The onus of proving these pleas lies upon the defendant. By 14–15 V. 99, 13, p. 136, it is enough for him to produce a certified copy of the record. If

the record has not been made up, the court will postpone the case in order that it may be done; *Bowman*, 6 *C. & P.* 101 (1833); and the King's Bench will, if necessary, grant a *mandamus* for that purpose. *JJ. of Middlesex*, 5 *B. & Ad.* 1113 (1834). When the second indictment is preferred during a sitting under the same commission or at the same assizes as the first, the original indictment and minutes of the verdict are receivable in evidence in support of the plea without a record being drawn up. *Parry*, p. 162. To a second indictment for the same act, *e.g.* on a coroner's inquisition after one by a grand jury, these pleas are good. *Culliford*, p. 159.

The jury have to try these pleas as a matter of fact. In *autrefois acquit* it is necessary to prove that the prisoner could have been convicted on the first indictment of the offence charged in the second. This appears by the record, but as was pointed out by Parke B. in *Bird*, 2 *Den. C. C.* 94 (1851), at 198, something more is necessary; because, "as the language of an indictment describing any offence is in general not material as to the date or place, or many other circumstances if in the same county (p. 73), the indictment would be equally descriptive of many offences of a similar character—and an acquittal of the offence charged on one indictment, describing it in proper terms sufficient in point of law, would be an acquittal of every offence of the same sort, in the same county, and against the same person; but in order to constitute a good plea of *autrefois acquit*, the plea must state, and it must be proved that the offence charged in the former indictment was the same identical offence with that charged in the indictment pleaded to. This being clearly the rule, there would not be much difficulty in applying it to an ordinary charge of felony—larceny, for instance, of the goods of A. B., or an ordinary charge of assault upon A. B. The prisoner charged on such an indictment, would have to satisfy the court, first, that the former indictment, on which an acquittal took place, was sufficient in point of law, so that he was in jeopardy upon it; and secondly, that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To prove the identity of the offence may not always be easy. If more or less evidence is gone into on the first trial the difficulty is little; if none is offered and the acquittal takes place, it is still an acquittal, entitling the prisoner to an exemption from any subsequent trial for the same identical offence. In such a case there is more difficulty in showing what the offence charged was, but it may be proved by the testimony of witnesses, who were subpœnaed to go, and did go, before the grand jury, by the proof of what they swore, or perhaps by a grand juryman himself, or by the evidence of the prosecutor, or by proof how the case was opened by the counsel for him; in short, by any evidence which would show what crime was the subject of the inquiry, and would identify the charge, and limit and confine the generality of the indictment to a particular case." In that case a man and his wife had been acquitted of a murder; the indictment had contained six counts, one alleging divers beatings. They were again indicted for the assaults, &c., and pleaded *autrefois acquit*, averring the identity of the assaults in the two indictments. The judge directed the jury that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death, they should convict: they did, and eight judges held the conviction right and six wrong.

The difficulties pointed out by the learned baron have not been removed by decided cases; on the other hand, they have been increased by statutes which provide that on an indictment which charges one crime, the prisoner may be convicted of another crime of a similar nature. Several such sections are set out, pp. 69, 70. Cf. p. 173, and see pp. 284, 297, 563. In most of these cases it is provided, that the person who might have been convicted on the

first indictment, shall not be liable to be tried again for the offence for which, though not indicted, he might have been convicted.

The question as to when the prisoner is entitled to plead the plea of *autrefois convict* or *autrefois acquit* is frequently one of considerable difficulty. The prisoner must have received judgment, of death or imprisonment, or the like if he be convicted, or, if acquitted, *quod eat sine die.* 2 *Stark. Crim. Plead. 2nd ed.* 319. But a judgment reversed by a court of error is the same as no judgment, and in that case, therefore, the plea is not available. *Drury,* 3 *C. & K.,* 193; 18 *L. J. M. C.* 189 (1849). Until reversed, however, judgment upon an erroneous record is good. *Ib.* In this case, Coleridge J. gave an elaborate considered judgment. And in *Charlesworth,* p. 188, the court appears to take the same view.

A prisoner will not be considered to have been in jeopardy—a phrase much considered in *Charlesworth*—where the prosecution fails by reason of a defect in the indictment (ownership wrongly laid) which might have been amended. *Green, Dears. & B. C. C.* 113 (1856), p. 559.

In *Walker,* 2 *Moo. & R.* 446 (1843), it was held that a prisoner who had been convicted summarily of a common assault before two justices could plead *autrefois convict* to an indictment for feloniously stabbing under (repealed) 9 G. 4, 31, the circumstances out of which the charge arose being the same in both cases. As to summary proceedings for assaults being a bar to further proceedings, see p. 255. On the other hand, in *Vandercomb,* 2 *Leach,* 708 (1796), p. 316; 2 *East, P. C.* 519, it was held that a prisoner, indicted for burglary in breaking and entering a dwelling-house with intent to steal, cannot plead in bar an acquittal upon an indictment for burglary in the same dwelling-house on the same occasion, which charged a breaking and entering the same dwelling-house and stealing there. So a conviction for assault is no bar to an indictment for manslaughter, on subsequent death, either at common law or under 24–5 V. 100, 45 (p. 250). *Morris, L. R.* 1 *C. C. R.* 90; 36 *L. J. M. C.* 84 (1867). *Friel,* 17 *Cox C. C.* 325 (1890). An acquittal upon an indictment for murder is a good plea to indictment for manslaughter (for there might have been a conviction on it), and Coke clearly implies that an acquittal or conviction for manslaughter is a bar to an indictment for murder. *Holcroft,* 4 *Co.* 46*b* (1579); *ib.* 40*a* (1583); *Fitzherbert's Justice by Crompton,* 111*b*–12 *pl.* 10; 1 *Russ. Cri.* 42; *Taucock,* 13 *Cox C. C.* 217 (1876). In *Champneys,* 2 *Moo. & R.* 26 (1837), Patteson J. held that an acquittal on an indictment against an insolvent debtor for omitting certain goods out of his schedule was no bar to a second indictment for the same offence in which the same goods and some others were specified; but said that, except under very peculiar circumstances, such a course ought not to be pursued. The prisoners were indicted for larceny at common law, and in a second count for feloniously receiving, and were acquitted on the ground that the goods were fixtures (p. 434) in a building. On a second indictment under 24–5 V. 96, 31, *ib.,* for stealing the fixtures, it was held that they were not entitled to plead *autrefois acquit,* as they had not been in peril on the first indictment. *O'Brien,* 15 *Cox C. C.* 29 (1882), *C. C. R.* explained 1 *Russ. Cri.* 47. So an acquittal upon an indictment under 24–5 V. 97, 35, and 24-5 V. 100, 32, p. 719, charging the prisoner with the felony of obstructing a railway with intent to endanger the safety of the passengers, &c., was held to be no bar to a subsequent indictment, under ss. 36, 31 of the same statutes respectively, preferred on the same facts, charging him with the misdemeanor of endangering the safety of the passengers, &c., by an unlawful act. *Gilmore,* 15 *Cox C. C.* 85 (1882), p. 721. Since 14-15 V. 100, 10, p. 823 (repealing 7 W. 4 and 1 V. 85, 11), on an indictment for assault, acquittal on a previous charge of felony cannot be pleaded. Thus where a man had been acquitted of rape and also of an assault with intent to ravish, he was convicted of a

common assault. *Dungey*, 4 *F. & F.* 99 (1864). A conviction for larceny is no bar to proceedings under 35-6 V. 93, 33, for knowingly pawning the stolen goods. *Pickford* v. *Corsi*, 19 *Cox C. C.* 712 (1901). Where an offence is triable in more than one county an acquittal in one county would be a good bar to a second indictment in another county; but where the offence is triable in one county only, an acquittal in the wrong county would be no bar. 4 *Hawk. P. C.* Bk. 2, ch. 35, ss. 3, 4. An acquittal of murder before a court of competent jurisdiction, in a foreign country, is a good bar to an indictment for the same murder in this country. *Roche*, 1 *Leach* 134 (1775); *Hutchinson*, 3 *Keb.* 785 (1678), explained in *Beak* v. *Tyrwhitt*, 3 *Mod.* 194 (1688); 1 *Russ. Cri.* 52 *n.*

A pardon must be specially pleaded, unless it be by statute, otherwise it is waived. 4 *Hawk. P. C.* Bk. 2, ch. 37, s. 59; 1 *Chitty, Crim. L.* 467.

Formerly a pardon could only be pleaded if it was under the great seal; as in *Bullock* v. *Dodds*, 2 *B. & Ald.* 258 (1819); but now by 7-8 G. 4, 28, 13, where the sovereign by warrant under the sign manual, countersigned by one of the principal secretaries of state, grants a free or conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, has the effect of a pardon under the great seal. Cf. *Harrod*, 2 *C. & K.* 294 (1846).

A discharge or composition in bankruptcy under 46-7 V. 52, 167, does not exempt a guilty debtor from criminal proceedings, p. 264.

General issue, i.e. "not guilty"]. By 7-8 G. 4, 28, 1: "If any person not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court shall in the usual manner order a jury for the trial of such person accordingly."

Not guilty.] A confession of guilt, entitling the prisoner to an acquittal, may be put in under this plea, and after the close of the prosecution. *Skeen*, p. 238.

Pleading over—demurrer.] If the defendant demur in misdemeanor, though the judgment is final, by the permission of the court the defendant may plead over. *Birmingham and Gloucester Railway Co.*, 3 *Q. B.* 223 (1842); 9 *C. & P.* 469 (1840), pp. 294, 511. As to felonies, the question has been much doubted, but in *Faderman*, 1 *Den. C. C.* 565; 19 *L. J. M. C.* 147 (1850), it was held by Alderson B., Cresswell and Vaughan Williams JJ. that on a *general* demurrer judgment for the crown was final, inasmuch as the prisoner thereby confesses all the material facts charged against him in the indictment: such a judgment can only be reviewed on a writ of error. In cases of demurrer of a *special* nature, usually called demurrer in abatement, they thought it might be otherwise, and they thought that the various *dicta* which appeared in the books, in opposition to the above ruling, were probably to be accounted for by this distinction not having been sufficiently attended to. *Contra, Purchase*, at 619, p. 185. See *Duffy*, 4 *Cox C. C.* 24 (1849), and the cases collected in 1 *Den. C. C.* 293, *a.* *Duffy* is said (*ib.* 570 *n.*) to be overruled.

If the defendant plead a (special) plea in misdemeanor, the judgment is final: this is implied by Holt C.J., *Goddard*, 2 *Lord Raym.* 920 (1704). But in treason and felony it is not so. *Ib.*: 2 *Hale P. C.* 257. Whether in misdemeanor the defendant might plead over by leave of the court does not seem to have been decided. See *Strahan*, 7 *Cox C. C.* 85 (1855), p. 169.

Joinder of distinct offences in the indictment—election.] "The object of

calling on . . . the prosecution to elect seems to be that the prisoner may not have his attention divided among different *facts*; the object of making several counts is to take the chance of making that charge which the evidence will exactly support; and these counts being before the jury, they ought to find a verdict on every one of them which is proved, whether . . . the prosecution know which that is or not"; *note* to *Gough*, p. 174. To join even two misdemeanors committed on separate days in one count seemed to Hawkins J. "a little irregular," and to be avoided. *Brown*, p. 161. The same judge said in *King*, p. 198, "I think it is a scandal that a man should be put to answer forty charges. It may, of course, be legally done, but I think it cannot be done without the prisoner being grievously prejudiced. It has occurred to me more than once that it is a cruel thing to multiply the charges in one indictment. I remember in one case of a bankruptcy prosecution an indictment which contained 99 counts, and was told that there was a case in which the indictment had contained 114 counts. In such a case it would not be unreasonable to ask the court to try each case [count or each set of counts] separately." In *Crump, &c.*, or the *West Ham case* (1907), there were 90 counts, 80 for conspiracy, the rest charging three distinct misdemeanors. See *Law Journal* newspaper, June 1, 1907, p. 359. See p. 363.

If two offences be charged in the same count of an indictment it is bad, but, even before 14–15 V. 100, there was no objection in point of law to inserting, in *separate* counts of the same indictment, several distinct felonies of the same degree and committed by the same offender, *e.g.* burglary and larceny; 2 *Hale* 173; *Johnson* (felony at common law joined with felony by statute), 3 *M. & S.* 539; 2 *Leach* 1103 (1814); and it is not a ground for arrest of judgment, *Ib.*; 1 *Chit. Crim. L.* 253; *Young*, 3 *T. R.* 98 (1789), pp. 322, 400, 410, 423, and below; 1 *Leach* 505; 1 *R. R.* 660; 2 *East P. C.* 828, 833; *Hinley*, 2 *Moo. & R.* 524 (1843); cf. *O'Connell* v. *R.*, 11 *Cl. & F.* 155 (1844); 9 *Jur.* 25; 1 *Cox C. C.* 413, pp. 191, 358; *Heywood, L. & C.* 451 (1864), pp. 174, 742; nor is it any ground for arrest of judgment after a prisoner has been convicted of felony, that the indictment contains a count for a misdemeanor. *Ferguson, Dears. & P. C. C.* 427; 24 *L. J. M. C.* 61 (1855). This is the strict law, but in practice, where a prisoner is charged with several felonies in one indictment, and has pleaded, or the jury is charged, the court has a discretion to quash the indictment—if the prisoner would be embarrassed in his defence; or if the fact is not found out till after the jury is charged, will compel the prosecutor to elect on which charge he will proceed. *Young*, above; 2 *East P. C.* 935, cf. 515; *Jones*, 2 *Camp.* p. 110. Cf. p. 757. Now by 24–5 V. 96, 5: "It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them." And by s. 6, "If, upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings." The same Act contains a similar provision as to embezzlement (s. 71). It would seem that the effect of this statute is to restrain the right of the judge to put the prosecutor to his election merely because the indictment contains three charges of larceny committed within six months, or because the property

turns out upon the evidence to have been taken at different times. The Act does not supersede the common law so as to compel the court to put the prosecutor to his election in other cases in which several felonies are charged in different counts, and in which the court does not in its discretion consider that the prisoner will be embarrassed in his defence. *Heywood*, p. 173, where it was suggested that under s. 92, below, where three acts of larceny are charged in separate counts, there may also be three counts for receiving.

The practice of joining a count for stealing and a count for receiving in the same indictment—though strictly legal—was condemned by the judges in *Galloway*, 1 *Moo. C. C.* 234 (1829), p. 741. But now it is enacted, by 24-5 V. 96, 92, "In any indictment containing a charge of feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof knowing the same to have been stolen," and *vice versâ*; "and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same or any part or parts thereof knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving the same or any part or parts thereof knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same or any part or parts thereof knowing the same to have been stolen." Cf. p. 82. By the Explosive Substances Act, 1883, 46 V. 3, 7, p. 396, the same criminal act may be charged in different counts "as constituting different crimes under this Act" in the same indictment, and the prosecutor shall not be put to his election as to the count on which he must proceed. Cf. p. 170.

With respect to offences not provided for by the above enactments: where the prisoners were charged, in one count with robbing, and in a second with an assault with intent to rob, Park J. seemed to think that the two counts ought not to be joined in the same indictment, and called upon the prosecutor to elect on which he would go to the jury. *Gough*, 1 *Moo. & R.* 71 (1831), p. 173. Where, however, the defendant was indicted in several counts for stabbing with intent to murder, with intent to maim and disable, and with intent to do some grevious bodily harm—all felonies—it was held that the prosecutor was not bound to elect on which count he would proceed. *Strange*, 8 *C. & P.* 172 (1837). See also *Jones*, 2 *Moo. C. C.* 94; 8 *C. & P.* 776 (1839). Where an indictment for arson contained five counts, each of which charged the firing of a house of a different person, and it was opened that the five houses were in a row, and that one fire burnt them all; Erskine J. refused, upon this opening, to put the prosecutor to his election, as it was all one transaction. *Trueman*, 8 *C. & P.* 727 (1839); and see *Davis*, 3 *F. & F.* 19 (1862). And see *Brannon*, p. 157.

Counts for distinct misdemeanors may be included in the same indictment, provided the offences be of the same nature, or, as it is sometimes put, provided the judgments upon each be the same, a proviso which, according to the learned editors of *Finacane*, p. 486, "in practice . . . has not been adhered to." *Young*, at 103 (*T. R.*), p. 173; *Towle*, 2 *Marsh.* 466 (1816); *Johnson*, p. 173; *Jones*, pp. 110, 173; *Castro*, p. 73. As to the proviso, see 1 *Stark. Crim. Pl.* 43, and *Benfield*, 2 *Burr.* 984; *Darley*, 4 *East* 179 (1803); and *Kingston*, 8 *East* 46 (1806). Cf. pp. 191-2. Where, however, two defendants were indicted for a conspiracy, and also for a libel, and at the close of the case for the prosecution there was evidence against both as to the conspiracy, but no evidence against one as to the libel; Coleridge J.

put the prosecutor to his election, on which charge he would proceed, before the counsel for the defendants entered upon their defence. *Murphy*, p. 1. Where on an indictment for conspiracy one set of counts laid the offence with reference to a fire on the 7th June, and another with reference to one on the 25th of November, the prosecution was made to elect. *Barry*, 4 *F. & F.* 389 (1865). Cf. *Burch*, *ib.* 407 (1865). "It is unusual to charge in the same indictment misdemeanors of a different nature—as assault, false pretences, and libel." *Saunders* on *Indictments*, *3rd ed.* p. 28. A prosecutor cannot maintain two indictments for misdemeanor for the same transaction, and he must elect to proceed with the one and abandon the other. *Britton*, 1 *Moo. & R.* 297 (1833), But cf. *Leatham*, p. 283, and *Handley*, p. 486.

It is not usual to put the prosecutor to his election immediately upon the case being opened. *Wigglesworth* (1834), *cor.* Alderson J., *Hindmarch's Suppl. to Deacon's Crim. L.* 1583. And *semble*, that the reason for an election being that the prisoner may not have his attention divided between two charges, the election ought to be made, not merely before the case goes to the jury, but before the prisoner is called on for his defence at the latest. *Ib.*

As to joint indictments against defendants, see 1 *Stark. Crim. Pl.*, *ch.* 2, and p. 183. A joint indictment may contain counts against the individuals only as well as against all jointly. *Cox* 18 *Cox C. C.* 672 (1897), *C. C. R.* p. 328; if injustice is apprehended, they may be tried separately, *ib.*, and p. 183. See, for instance, p. 563. Cf. p. 741.

Refusing to try indictment.] A judge may refuse to try an indictment clearly bad in point of law, and may discharge the jury—though the defendant does not move: *Deacon* (1824), *Tremearne* (1824), *Hepper* (1825), *Ry. & M.* 27, 147, and 210; 1 *C. & P.* 608.

Quashing indictments.] Where an indictment is so defective that, in case of conviction, no judgment could be given, and it cannot be amended (p. 176), the court would in general quash it on the application being made on the part of the prosecution.

Indictments have been quashed because the facts stated in them did not amount to an offence punishable by law. *Burkett*, *Andr.* 230 (1738); *Sarmon*, 1 *Burr.* 516 (1758); *Wright*, *ib.* 543 (1758); *Philpotts*, 1 *C. & K.* 112 (1843); or to an indictable offence, *Hall*, pp. 322, 669. They may be quashed on motion. *Ib.*

Where the motion is on the part of the defendant, the courts usually refuse to quash when it is preferred for some great crime, such as treason or felony, "unless upon the clearest and plainest ground," leaving him to his remedy "by demurrer or motion in arrest of judgment or writ of error." 1 *Chitty*, *Crim. L.* 300; *Com. Dig. Indictment* (H.); and see *Johnson*, 1 *Wils.* 325 (1752); "forgery, perjury, subornation, or any crime concerning the highways," *Belton*, *Inhabs. of*, 1 *Salk.* 372 (1696); 1 *Sid.* 54 (1662); *Anon.*, 1 *Vent.* 370 (1685); *Thomas*, 3 *D. & R.*, *K. B.*, 621 (1823). The reason of the practice holds good at the present day; *per* L. Alverstone C.J., *Lynch*, 1903, 1 *K. B.* 444; 72 *L. J. K. B.* 167; 20 *Cox C. C.* 468 (high treason, trial at bar). They have also refused to quash indictments for cheating; *Orbell*, 6 *Mod.* 42 (1704); for selling flour by false weights; *Crooke*, 3 *Burr.* 1841 (1766); and for other minor offences. See also *Heane*, 4 *B. & S.* 947; 33 *L. J. M. C.* 115 (1864), pp. 176, 680.

Where the prosecution is by the attorney-general, an application to quash the information or indictment is never made, because he (and *only* he, *Dunn*, p. 176) may enter a *nolle prosequi*, which will have the same effect. *Stratton* 1 *Doug.* 239 (1779). The practice as to indictments dates from the

end of the reign of C. 2. *Per* Holt C.J., *Goddard* v. *Smith*, p. 270. See also *Burnby*, 5 *Q. B.* 348 (1843).

The application to quash must be made to the court in which the bill is found, except in cases of indictments at sessions, and in other inferior courts, in which cases the application may be made to the King's Bench, when the record has previously been removed thither by *certiorari*. But it has been held that a court of quarter sessions has itself authority to quash an indictment found there before plea pleaded; and that the Court of Queen's Bench would not inquire on *certiorari* whether the indictment was properly quashed, but that the proper way of raising such a question was by writ of error. *Wilson*, 6 *Q. B.* 620 (1844).

The application, if made on the part of the defendant, must, it should seem, be before plea pleaded. *Rookwood*, 13 *How. St. Tr.* 161, 165 (1696). Cf. *Fost*, 231; but where the indictment had been found without jurisdiction, the court quashed it after plea pleaded. *Heane*, pp. 175, 680; and see *Goldsmith*, *L. R.* 2 *C. C. R.* 74; 42 *L. J. M. C.* 94 (1873), p. 199. In one case, Lush J. quashed an indictment (as not amendable) after the close of the case for the prosecution, because it did not contain the words "with intent to defraud." *James*, 12 *Cox C. C.* 127 (1871), p. 423. Where the indictment had, upon the application of the defendant, been removed into the King's Bench, by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment after a forfeiture of his recognisance, he not having carried the record down to trial. *Anon.*, 1 *Salk.* 380 (1704).

And now by 14–15 V. 100, 25: "Every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared," pp. 178, 191. See *Stockley*, p. 159.

But if the application be by the prosecution, on the ground of error or defect, it seems it may be made at any time before the defendant has been actually tried upon the indictment. *Webb*, 3 *Burr.* 1468; 1 *W. Bl.* 460 (1768). Before an application of *this kind* by the prosecution is granted, a new bill for the same offence must have been preferred against the defendant and found. *Wynn*, 2 *East*, 226 (1802). And when the court orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of such former indictment; *Webb;* that the second indictment shall stand in the same condition to all intents and purposes as the first would have done; *Glen*, 3 *B. & Ald.* 373 (1820); *Webb;* and (particularly where there has been any unnecessary delay, *Webb*) that the name of the prosecutor be disclosed. *Glen.* A. was indicted for perjury at the spring assizes, 1843, and entered into recognisances to try at the summer assizes, 1844. It being discovered that the indictment was defective, another indictment was prepared and found at the latter assizes, on which the prosecutor wished the defendant to be tried. Wightman J. held that the defendant was entitled to have the first indictment disposed of before he could be tried on the second, but quashed the first indictment upon the terms of the prosecutor paying the defendant his costs of the traverse and recognisances, and the defendant proceeded to trial on the second indictment without traversing. *Dunn*, 2 *Moo. C. C.* 297; 1 *C. & K.* 730 (1843), p. 681; as to quashing counts, see p. 363.

Amendment.] See p. 73. The power of amendment in criminal cases was

first conferred by 9 G. 4, 15 (repealed, 1890), but was confined to cases of misdemeanor, and the power was only conferred on courts of oyer and terminer and general gaol delivery. It was at first considered that the power ought to be very sparingly exercised; *Cooke*, 7 *C. & P.* 559 (1836), p. 689; one objection to an amendment being that the presentment on oath of the grand jury was thereby altered. *Hewins*, 9 *C. & P.* 786 (1841), p. 689. But by 11–12 V. 46, 4, the power of amendment was extended to cases of felony; and, again, by 14–15 V. 100, which is set out, p. 821.

Cf. p. 307. As to variances in forgery, see p. 447. For instances, see *Variances* in *Index*.

In *Frost*, p. 76, the prisoners were indicted for having by night in pursuit of game entered the lands of George William Frederick Charles Duke of Cambridge; on the trial a witness proved that George William were two of the duke's christian names, and that he had others; no proof was given what they were. The prosecutor prayed an amendment of the indictment by striking out the names "Frederick Charles." This the court refused, and left the case to the jury, who, being satisfied as to the identity of the duke, convicted the prisoners. The Court for Crown Cases Reserved quashed the conviction. Parke B. said, "Quarter sessions have a power of amending given them by the statute 14–15 V. 100, 1, but they have a discretion, they are not bound to allow an amendment. Having omitted to amend at the trial, they cannot amend now. If they had asked us whether they ought to have done so, it is clear that upon the evidence before them they were perfectly right in refusing to make the amendment prayed for; but that they would have been equally wrong in refusing to amend, had the amendment asked for been to strike out all the christian names of the Duke of Cambridge. . . . According to the usual rule, the prosecutor must prove all matter of description alleged, though it was not necessary to allege it [p. 76]. The proper course would have been for them to have found that the person mentioned was a person who had the title of Duke of Cambridge, and to have omitted all the Christian names." See *Murray*, p. 371. It has been held that an indictment for an attempt to murder Annie W. may be amended by substituting for that name, "a certain female child whose name is to the said jurors unknown," although the Act, above, refers only to variances in the name, christian or surname, or both. *Welton*, p. 61. An indictment by mistake charged D. L. as a receiver of goods stolen from A. B., "*the said A. B.*, knowing them to have been stolen"; on verdict of guilty prisoner moved in arrest of judgment, but quarter sessions struck out the words "A. B.," and substituted "D. L." It was held by the Court for C. C. R. that the indictment was bad on its face for not alleging *scienter*, that the court had no power to amend after verdict, that prisoner was entitled to move in arrest of judgment, and that the conviction was bad. *Larkin*, *Dears. & P. C. C.* 365; 23 *L. J. M. C.* 125 (1854), p. 735. See *Oliver*, 13 *Cox C. C.* 538 (1877), *C. C. R.* p. 268. On an indictment against the defendant for obstructing a footway leading from A. to C., it appeared that the so-called footway was for half a mile from its commencement, as described in the indictment, a carriage-way; the obstruction was in the part beyond. The Court of Queen's Bench held that this was a misdescription, which ought to be amended under 14–15 V. 100, 1, by substituting "a footway leading from B. to C." as the description. *Sturge*, 3 *E. & B.* 734; 23 *L. J. M. C.* 172 (1854), p. 537. On an indictment for stealing 19*s.* 6*d.*, the court held that the indictment might be amended by altering the words "nineteen and sixpence" to "one sovereign," or, under s. 18, to "money" simply. *Gumble*, *L. R.* 2 *C. C. R.* 1; 42 *L. J. M. C.* 7 (1872), p. 537; and cf. *Bird*, *ib.* Indictment for embezzlement laid the property in A. B. and others, to which was added by amendment the words "trustees of, &c."

Marks, 10 *Cox C. C.* 367 (1866). The tendency of the later cases is to give the statute "a wide construction." See *Welton*, above, *per* Byles J.; 1 *Russ. Cri.* 57, citing the same judge in *St. Losky* v. *Green*, 9 *C. B. N. S.* 376 (1860). Where an indictment charged the prisoner with supplying a noxious drug to procure the miscarriage of "a certain woman," Stephen J. on objection, amended by altering to "a woman to the jurors unknown." *Tilley*, 14 *Cox C. C.* 502 (1880), p. 154. But the same learned judge refused to allow a count charging the defendants with inciting, endeavouring, &c., to persuade T. to supply a noxious thing "knowing that the same was intended to be unlawfully used with intent to procure the miscarriage of a woman" to be amended by supplying the name of the person to whom the drug was supplied, or for whom it was intended. *O'Callaghan*, 14 *Cox C. C.* 499 (1880), p. 154; but one ground of the refusal was that there had been no inquiry by a magistrate, and that therefore there was the need for greater caution.

It probably was not intended by s. 25, p. 176, to increase the power of amendment given by s. 1, p. 821, but merely to prevent formal defects apparent on the face of the indictment being taken advantage of after verdict, by motion in arrest of judgment, or otherwise. The term "formal defect apparent on the face of the indictment" is rather indefinite; probably it would be held to mean such formal defects as may be amended by virtue of s. 1. See *Goldsmith*, pp. 176, 199.

As to the amendment of the record after judgment, see *Gregory*, 4 *D. & L.* 777 (1847); 7 *Q. B.* 274 (1845); *Gregory* v. *R.*, p. 192; *Bowers* v. *Nixon*, 12 *Q. B.* 546 (1848). In the first of these, Erle J. said, "It is clear that mistaken statements of acts of the court, made by its officers on records, may be amended according to the truth by common law; 8 *Rep.* 156*a*." *Blackamore's case* (1611).

Aliens.] Persons not British subjects are triable just as natural-born subjects, 33–4 V. 14, 5.

Challenge.] Challenges are either to the *array* ("the whole jury as it stands *arrayed* in the *panel* or little square *pane* of parchment on which the jurors' names are written." *Burn's Justice: Jurors*, citing 1 *Inst.* 156-8) or to the *polls* ("persons or heads in the array," *ib.*); they are also either *peremptory* or *for cause*.

Time and mode of taking them.] When one or more defendants have pleaded the general issue, they are informed by the officer of the court that the persons whose names he is about to call will form the jury to try them, and that they are at liberty to challenge any who may be called, as they "come to the book to be sworn, and *before* they are sworn," *i.e.* begin to be sworn, p. 179. The practice as to the mode of getting a jury together is not very clearly defined, and probably differs considerably in different parts of the country. It is difficult to understand whether the rule laid down in *Vicars* v. *Langham*, *Hob.* 235 (1618), that there can be no challenge either to "the pannel," *i.e.* the array, or to the polls until a full jury appear, is of perfectly general application. It is repeated, and no limits indicated, in *Edmonds*, 4 *B. & Ald.* 741 (1821), p. 179; 3 *Burn*, *Just.* ed. 30, p. 90; and *Joy* on *Confessions and Challenges*, ss. 1, 10. It is probably stated somewhat too broadly, and what is meant is, that before the prisoner is put to his challenges, he has a right to have the whole panel called over to see who does and who does not appear. *Fost. Cr. Ca.*, p. 7, on *Townly*, 18 *St. Tr.* 330 (1746), p. 73; *Frost*, 9 *C. & P.* 135; 4 *St. Tr. N. S.* 105, 110 (1839). However this may be, it is the constant practice in some counties

to swear the first juryman who answers as soon as he enters the box, without any further inquiry. In other places it is the practice to get a full jury into the box, and then to commence swearing them; then if any one is rejected, to call another in his place, and so on, *toties quoties*. If there is a defect of jurors, and either party pray a *tales* (*i.e.* a supplement from *such* as can be readily found), he does not thereby lose his right to challenge; *Vicars* v. *Langham*, above; *Bull. N. P.* 307; but Hawkins doubts whether a *tales* can be prayed by the crown, upon an indictment or criminal information without a warrant from the attorney-general, "or an express assignment from the court." 4 *Hawk. P. C.* Bk. 2, ch. 41, s. 18. On the other hand, it is said by Blackstone J. that "if by reason of challenges, or defaults of jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn." 4 *Bl. Comm.* 355. See *Dolby*, 2 *B. & C.* 104; 3 *D. & R.* 311; 1 *L. J.* (*O. S.*) *K. B.* 241; 24 *R. R.* 645 and 647 (1822 and 1823), p. 180. But inasmuch as if the panel is exhausted, and no *tales* prayed, the court may, of its own accord, order the sheriff or other officer to return a fresh panel instanter (*Joy*, above, p. 180; 1 *Chitty*, *Crim. L.* pp. 506–8), the point is not of very great importance.

It seems that the formal delivery of the book into the hands of a juryman is the commencement of the oath; *Frost*, p. 178; *Brandreth*, 32 *How. St. Tr.* 770 (1817). See also *Giorgetti*, 4 *F. & F.* 546 (1865), p. 180; but if the juryman, of his own accord, takes the book into his hands, his doing so not being directed by the court, or sanctioned by the court, that does not take away the right of challenge. *Frost*, at 137. It is not absolutely necessary that the names should be called in the order in which they stand on the panel, but that order may be departed from if convenience requires it. *Mansell* v. *R.*, *Dears. & B. C. C.* 375 (1857), p. 180.

The challenge to the array must, of course, be before *any* juryman is sworn.

Where the indictment charged a subsequent felony in one count, and a previous conviction in another, and the prisoner, at the request of his counsel, was arraigned separately on the felony, and afterwards on the previous conviction, it was held unnecessary to re-swear the jury, and give the prisoner his challenges. *Key*, 3 *C. & K.* 371 (1851), *C. C. R.* See now, p. 190.

Challenges to the array.] The learning on this subject has to be sought out of old books; and there is great difficulty in deriving from them any precise rules. It is, however, quite clear that any partiality in the sheriff, under-sheriff, or other officer who is concerned in the return of the jury, is a good cause of challenge to the array, and that this partiality will be assumed to exist, if the sheriff or other officer be of kindred or affinity to either party; or if any dispute be pending between the sheriff and either party which would be likely to influence the sheriff; or if the sheriff or other officer have been concerned for either party in the same matter, either as counsel, attorney, or the like. *Co. Litt.* 156 *a*; *Bac. Abr.* tit. *Juries*, *E.* 1. Cf. p. 165.

There can be no challenge to the array on the ground of the partiality of the master of the crown office, in a case where he is the officer by whom the jury is to be nominated under a rule of court. *Edmonds*, p. 178. The only remedy in such a case is to apply to the court to appoint another officer to nominate the jury.

Whether there is the same right in a subject as in the crown to challenge for *favour* (*i.e.* on the suggestion of partiality which must be *tried*, whereas "principal challenges" on definite facts, need not) has been doubted; see 4 *Hawk. P. C.* Bk. 2, ch. 43, s. 32. But that doubt is obsolete.

A challenge to the array should be in writing, so that it may be put upon the record, and the other party may plead or demur to it; and the cause of challenge must be stated specifically. 1 *Chitty, Crim. L.* 546–7. Cf. *Hughes*, 1 *C. & K.* 235 (1843).

When the opposite side pleads to the challenge, two triers are appointed by the court: either two coroners, two attorneys, or two of the jury, or indeed any two indifferent persons. For an instance of triers, see *Giorgetti*, p. 179, at 553. If the array be quashed against the sheriff, a *venire facias* is then directed *instanter* to the coroner; if it be further quashed against the coroner, it is then awarded to two persons, called *elisors* ("*ab eligendo*"), chosen at the discretion of the court, and it cannot be afterwards quashed. *Co. Litt.* 158 *a*.

It has been said that there is some distinction between trying challenges; those that are manifest or principal challenges, as they are called, being tried by the court without the appointment of any triers; see *Co. Litt.* 156 *a*; *Bac. Abr.*, tit. *Juries*, *E.* 12; but triers would probably now be appointed in all cases.

The truth of the matter alleged as cause of challenge must be made out by witnesses to the satisfaction of the triers. The challenging side first addresses the triers, and calls his witnesses; then the opposite side addresses them, and calls witnesses if he thinks fit: in which case the challenger has a reply. The judge then sums up to the triers, who give their decision. *Dolby*, 1 *C. & K.* 238 (1821), p. 179. If a challenge to the array be found against the challenger, he may afterwards, notwithstanding, challenge to the polls.

Challenges to the polls.] Challenges to the polls are either peremptory (*i.e.* without any cause shown) or for cause. By the common law, the crown might challenge peremptorily any number of jurors; simply alleging *quod non boni sunt pro rege;* but by 33 E. 1, st. 4 (1305), repealed but re-enacted in nearly the same words by 6 G. 4, 50, 29, this right is taken away, and the crown is bound to assign the cause of its challenge.

A practice, however, which has continued uniformly from the time of E. 1 to the present, enables the prosecutor to exercise practically the right of peremptory challenge; because, when a man is called the juror will, on his request, be ordered to stand by; and it is only when the panel has been exhausted, that is, when it appears that, if the jurors ordered to stand by are excluded, there will be a defect of jurors, that the prosecutor is compelled to show his cause of objection. *Mansell* v. *R.*, p. 179. When it appears that, in consequence of the peremptory challenges by the defendant, and of the number ordered to stand by at the request of the prosecutor, a full jury cannot be had, then the proper course is to call over the whole panel again, only omitting those that have been peremptorily challenged by the defendant. *Geach*, 9 *Car. & P.* 499 (1840). And even on the second reading over of the panel a juryman may be ordered to stand by at the request of the prosecutor, if it reasonably appears that sufficient jurymen may yet appear. *Mansell* v. *R.*, above.

The prisoner has, in cases of felony, twenty peremptory challenges and no more; 6 G. 4, 50, 29; and the right exists whether the felony be capital or not. *Gray* v. *R.*, 11 *Cl. & Fin.* 427 (1844): H. L. In cases of misdemeanor there is no right of peremptory challenge. 1 *Chitty, Crim. L.* 535. But the defendant is generally allowed to object to jurors as they are called, without showing any cause, till the panel is exhausted; and that practice was approved of by Williams J. in *Blakeman*, 3 *C. & K.* 97 (1850). If the panel be thus exhausted, the list must be gone through again, and then no challenge allowed except for cause.

If a juror be challenged for cause before any juror sworn, two triers are

appointed by the court; and if he be found indifferent and sworn, he and the two triers shall try the next challenge: and if the last be tried and found indifferent, then the first triers shall be discharged, and the two first jurors tried and found indifferent shall try the rest. *Co. Litt.* 158*a*; 2 *Hale P. C.* 275; *Bac. Abr.*, tit. *Juries*, *E.* 12.

The trial proceeds in the same manner as a challenge to the array (*e.g. Dolby*, p. 180). The juror challenged may be himself examined as to any cause of unfitness which does "not tend to infamy or disgrace." *Bac. ib.*: cf. *Cook*, p. 182.

A juror may be challenged on the ground that he is not *liber et legalis homo*; "hence it has been always clearly holden that aliens, minors or villeins cannot be jurors. Also infamy is a good cause, . . ." *e.g.* outlaws, which ground is said not to be removed by pardon; *Bac. ib. E.* 2; another ground is that he is not fit to serve from being over or under age, but see *Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306 (1868)—being over age gives exemption but does not disqualify on challenge; or from some other personal defect; or, generally, that he is not qualified within 6 G. 4, 50, 1: "Every man, except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing in any county in England, who shall have in his own name or in trust for him, within the same county, ten pounds by the year above reprizes in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person, or who shall have within the same county twenty pounds by the year above reprizes in lands or tenements, held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, or who being a householder, shall be rated or assessed to the poor-rate, or to the inhabited house-duty in the county of Middlesex, on a value of not less than thirty pounds, or in any other county on a value of not less than twenty pounds, or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on juries for the trial of all issues joined," in all the superior courts, both civil and criminal, "and in all courts of assizes, nisi prius, oyer and terminer and gaol delivery, . . . and shall also be qualified and liable to serve on grand juries in courts of sessions of the peace and on petty juries for the trial of all issues joined in such courts of sessions of the peace. . . ." By 33–4 V. 77, 7 (amended 46–7 V. 39, Sched.), the qualification in Wales is the same as that in England. By 45–6 V. 50, 186, every burgess of a borough having a separate court of quarter-sessions or a borough civil court is qualified and liable to serve on all juries in those courts unless exempted by law, but by the schedule of 33–4 V. 77, they are exempt from serving on the county sessions, and so are members of the town council, justices of the peace, the town clerk and treasurer for the time being, of the borough. Justices are also exempt from serving on juries within their jurisdiction. *Ib.* See also 25–6 V. 107.

A juror may also be challenged on the ground that he is not indifferent. The same circumstances which would support a challenge to the array for unindifferency in the sheriff would support a challenge to the poll for the same defect in a juryman. 1 *Chitty, Crim. L.* 542. It is no cause of challenge by the prosecutor that the juror is a client of the prisoner, who is an attorney; *Geach*, p. 180; nor that the juror has visited the prisoner as a friend since he has been in custody. *Ib.* It is not allowable to ask a juryman if he has not previously to the trial expressed himself hostilely to the prisoner, in order to found a challenge, but such expressions must be proved by some other evidence. *Edmonds*, p. 178; *Peter Cook*, 13 *How. St. Tr.* 333 (1696), p. 114. And that they must amount to something more than an

expression of opinion in order to constitute a good cause of challenge, that they must lead directly to the conclusion that the juryman is not likely to act impartially after he has heard the evidence seems to be suggested by *Joy on Confessions*, p. 189. On a trial for a riot, it is ground for challenge by the prosecution that the juror is an inhabitant of the town where the riot took place, and that he took an active part in the matter which led to it. *Per* Coleridge J., *Swain*, 2 *Moo. & R.* 112 (1838).

No juror on the coroner's inquest ought to be on the petty (or, perhaps, grand) jury on the same matter. Where several jurors had been on both, without the judge's knowledge, and both juries found murder, the judge mentioned the fact in his note of the case (*Snow*, p. 634, which see for the result): 1 *Lea.* 152*n.*

After the prisoner has challenged twenty jurors peremptorily, he may still challenge others for cause, and examine as to qualification. *Geach*, p. 180.

Perhaps the ground of challenge should be specifically stated in writing, in order that it may be placed on the record. 1 *Chitty, Crim. L.* 546–7: cf. p. 180.

Challenges improperly allowed or disallowed.] It is said that if a challenge be overruled without demurrer, the ruling may be made the subject of a bill of exceptions; *City of Worcester*, *Skin.* 101 (1684); but see p. 200.

If there is a demurrer and judgment thereon, there would be matter of error on the record. See *Edmonds*, 178. If a challenge be improperly allowed, it is doubtful whether there is any matter for error. See *Mansell* v. *R.*, p. 179.

Persons unqualified to serve or unfit.] A juror who is not qualified may object to serve though not challenged; *L. Grey*, 9 *St. Tr.* 129 (1682) pp. 226, 352; and, if upon examination on oath he be found not to be so, he will be ordered to retire. *Cook*, 13 *St. Tr.* 313, 318. A juryman, on being called to serve on a trial for murder, stated that he had conscientious objections to capital punishment. Upon this the judge, on the prayer of the crown, ordered him to stand by, although the prisoner demanded that he should serve; the Queen's Bench (confirmed by the Exchequer Chamber), on a writ of error, without attaching any weight to the juror's statement, or the judge's remark on it, viz., "If you feel that you cannot do your duty, you are quite right in saying so," thought a right course had been taken, and said that they wished it to be understood that they by no means acquiesced in the doctrine contended for on the authority of an anonymous case in *Brownlow & Gold Rep.* 41 (1608), "that a judge on the trial of a criminal case, has no authority, if there be no challenge on either side, to excuse a juryman on the panel when he is called, or to order him to withdraw, although he is palpably unfit, by physical or mental infirmity, to do his duty." *Mansell* v. *R.*, p. 179.

Miscalling a juror.] On a trial for murder the panel returned by the sheriff contained the names of J. H. T. and W. T. The name of J. H. T. was called from the panel as one of the jury, and J. H. T., as was supposed, went into the box, and was duly sworn by the name of J. H. T. The prisoner was convicted. The following day it was discovered that W. T. had by mistake answered to and been sworn in the name of J. H. T., and that W. T. was really the person who had served on the jury. It was held in the Court for Crown Cases Reserved, by Lord Campbell C.J., Cockburn C.J., Coleridge and Wightman JJ., Martin and Watson BB., that there had been a mistrial; by Erle, Crompton, Crowder, Willes, and Byles JJ., and Channell B.

that there had been no mis-trial. It was doubted in this case whether the objection was matter of error; and Pollock C.B., Erle, Williams, Crompton, Crowder, and Willes JJ., and Channell B., thought that this was not a question of law arising at the trial over which that Court had jurisdiction: consequently the conviction was affirmed (by eight to six). *Mellor, Dears. & B. C. C.* 468 (1858), p. 203; and see as to the jurisdiction of this court for irregularity in procedure, *Martin, L. R.* 1 *C. C. R.* 378; 41 *L. J. M. C.* 113 (1872).

Giving the prisoner in charge.] When the jury have been brought together and sworn, the usual proclamation is made, and then the prisoner or prisoners, intended to be tried, are *given in charge* to the jury as their turn comes. It is not necessary that, after the prisoner has had his challenges, that jury should try him, if he be not given in charge; a fresh jury may be got together for the purpose, each of the prisoners, of course, having the same right of challenge as before. As the prisoner is not to be arraigned upon a previous conviction charged in the indictment until a verdict has been given for the subsequent offence, so also he cannot be given in charge upon the count charging the previous conviction until he is arraigned upon it: p. 190. Where two or more prisoners are jointly indicted it is in the discretion of the judge to decide whether they shall be tried separately or not. *Ram*, 17 *Cox C. C.* 610 (1893), pp. 152, 727.

The Criminal Appeal Act, 1907, p. 834, assumes (s. 8) that the judge or chairman takes notes of a trial and makes it obligatory on the court to have shorthand notes "taken of the proceedings" (s. 16) which, presumably, include the summing up and the speeches of counsel or the prisoner.

2. THE HEARING.

Opening the case—conversations and confessions.] Where there is counsel for a prisoner in a case of felony, the counsel for the prosecution ought always to open the case. *Gascoine*, 7 *C. & P.* 772 (1837). But sometimes he does not open it if the prisoner has no counsel, *Jackson, ib.* 773 (1837), unless there is some peculiarity in the circumstances: *Bowler, ib.* (1837)—all *per* Parke B. Where there is no counsel for the prosecution there can be no opening, as the prosecutor himself is never allowed personally to address the jury, because the prosecution is "for the interests of the public, in the name of the King, and not to gratify the objects of an individual." Counsel are privileged and trained to state nothing to the jury "but what is fit for them to hear." *Brice*, 2 *B. & Ald.* 606 (1819). Counsel for the prosecution strictly has a right to state the details of a conversation which one of the witnesses whom he intends to call had with the prisoner, but the correct practice is to state the general effect of it. *Deering*, 5 *C. & P.* 165; *Hartel*, 7 *C. & P.* 773 (1837); *Swatkins*, p. 50. In a later case, however, Parke B., after consulting Alderson B., ruled that, with regard to conversations, the fair course to the prisoner was to state what it was intended to prove; *Orrell*, 7 *C. & P.* 774, 1 *Moo. & R.* 467 (1835); *Davis, ib.* 785 (1837); but as a general rule conversations would appear upon the depositions. Parke B. seems to have thought that *confessions* ought not to be opened, as they may turn out to have been made under circumstances rendering them inadmissible, and counsel certainly ought not to open them unless he has satisfied himself that they are admissible. See *Thompson*, p. 50.

Summing up by counsel.] To *sum up* here means strictly to state the effect of evidence for one side without reference to that of the other. It is now provided by 28–9 V. 18, 2: "If any prisoner or prisoners, defendant or defendants,

shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present." See p. 186.

As to the duty of counsel for the Crown under this Act, see the judgment of Blackburn J. in *Berens, Holchester*, &c., 4 *F. & F.* 842; 10 *Cox C. C.* 226 (1865): where the prisoner calls no witnesses, they should not sum up, unless in their discretion they think it in the interests of justice because in a *criminal* court (though not in a civil) they are "in a kind of judicial position . . . not as if trying to obtain a verdict;" cf. p. 1.

At the close of the evidence for the prosecution, if the only witness (to fact) for the defence is the prisoner and he elects to give evidence he shall immediately be called: 61–2 V. 36, 2, p. 830. Counsel for the prosecution then sums up, and in doing so he can comment upon the evidence given by the prisoner: *Gardner*, 1899, 1 *Q. B.* 150; 19 *Cox C. C.* 177; C. C. R.; but he cannot reply after the speech for the defence (s. 3, p. 830). A prisoner who does not himself give evidence and calls no witnesses must not make an unsworn statement *after* the summing up for the Crown but *before*, and it may be "summed up" with the rest of the evidence; *per* Darling J., *Sherriff*, 20 *Cox C. C.* 334 (1903), pp. 186, 429; *defended* prisoner.

It is the usual course for counsel to sum up and not to reply where the only witnesses for the defence are witnesses to character. See *Dowse*, 4 *F. & F.* 492 (1865).

The *prosecution* may not comment on the prisoner's or his or her spouse's silence, but the judge may; 61–2 V. 36, 1 *b.*, p. 830. Cf. p. 49: see p. 187. The prisoner's statement (if any) before the magistrate is put in at the trial "as part of the case for the prosecution," at the end of the evidence for the Crown; *Gardner*, above, at p. 155 (*Q. B.*) So *Shimmin*, p. 186, "as a matter of course." Cf. p. 56, and *Haines*, *ib.* and p. 185.

Defence.] As to the mode of conducting the cross-examination, see p. 117. The judge ought to inform an undefended prisoner of his right to address the jury, but the omission to do so is not a mis-trial. *Saunders*, p. 160. When the witnesses for the Crown have all been called, the presiding judge inquires if there are any for the defence; if there are none, the counsel for the prosecution may in his discretion address the jury in summing up, after which the counsel for the defence addresses the jury. If there are any witnesses for the defence, the latter opens his case, and having called his witnesses, sums up, and then the counsel for the prosecution replies, see above, and p. 186. Where there are several defendants, and they are severally defended, the order in which the counsel for the defence are to address the jury is not very clearly settled. In *Barber*, p. 146, Gurney B. (Williams

and Maule JJ. being present) said, that the rule was this: that, if counsel cannot agree among themselves as to the course to be adopted, it is for the court to call upon them in the order in which the prisoners are named in the indictment. In *Esdaile*, p. 163, which was an indictment for a conspiracy to defraud, L. Campbell C.J. called upon the counsel for the defendants in the order of their seniority. In *Belton*, 5 *Jur. N. S.* 276 (1859) Martin B. said that, where one prisoner was defended and another not, he made it an invariable rule to hear the counsel first. In *Thomas and Harris*, 3 *Jur. N. S.* 272 (1857), Channell B. in a similar case, decided upon following the order in the indictment, though only the second there had counsel; but in *Holman*, *ib.* 722, Pollock C.B. said, he would not subscribe to the imaginary rule of following the order in the indictment (*i.e.* "the caprice of the person who draws" it). In *Meadows*, 2 *Jur. N. S.* 718 (1856), Erle J. admitting the rule of the indictment, added, "Attention must, however, be paid to the precise offence with which each prisoner is charged; for instance, the principal should make his defence before the accessory, and the thief before the receiver, and such like; but when an indictment is drawn by a knowing man, he usually puts the principal person first." When counsel for one prisoner had witnesses to facts to examine, counsel for another who had not was not allowed to postpone his address to the jury until after those witnesses had been examined; *Barber*, above; but this is probably a matter for the discretion of the judge.

A prisoner's counsel, in addressing the jury, will not be allowed to state anything which he is not in a situation to prove, or which is not already in proof, *e.g.* to state the prisoner's story if he does not call the prisoner. See *per* Coleridge J., *Beard*, 8 *C. & P.* 142 (1837). Cf. *Pearce*, p. 807. And after his counsel has addressed the jury, the prisoner will not be permitted to make any statement to them; both cannot be heard. *Boucher*, *ib.* 141 (1837). But where a prisoner had, in the absence of his counsel, pleaded to an indictment, Patteson J. on the application of the counsel, allowed the prisoner to demur before the evidence was gone into. *Purchase*, *C. & M.* 617 (1842), p. 172. Where, in a case of shooting with intent to do grievous bodily harm, there was no one present at the committing of the offence but the prosecutor and the prisoner, Alderson B. allowed the latter, in these circumstances, to make his own statement before his counsel addressed the jury. *Malings*, 8 *C. & P.* 242 (1838). And the same course was permitted by Gurney B. in another case, but with an observation that it ought not to be drawn into a precedent. *Walkling*, *ib.* 243 (1838). "The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed." *Per* Patteson J., *Ryder*, 8 *C. & P.* 539 (1838); *Dyer*, 1 *Cox C. C.* 113 (1844), however, is strong in the prisoner's favour. Cf. *Pearce*, p. 807. In *Taylor*, 1 *F. & F.* 535 (1859), Byles J. refused to permit it, but allowed the prisoner to exercise the option of either speaking for himself or of having his counsel to speak for him. The importance of this point arises from the anxiety which frequently existed on the part of the defence to lay the prisoner's statement before the jury, which the prosecutor cannot be compelled to do: but as to the present practice, see p. 184. When the prosecution did not put in that statement and the defence proposed to, Crowder J. declined to allow it, but said that what the prisoner said before the magistrate he might now repeat through his counsel. *Haines*, p. 56. The usual course is for the court to have the statement read to the jury.

On a trial for murder, on the counsel for the prisoner expressing to the jury his regret that he could not tell them the prisoner's account of how the death was caused, Cockburn C.J. allowed him to do so. *Weston*, 14 *Cox C. C.* 346 (1879), pp. 598, 627. It will thus be seen that judges formerly

differed on these points. But in 1882, Cave J. stated that the following course was approved by the judges, namely, that a prisoner may—and if defended, then at the conclusion of his counsel's speech—make his statement to the jury, provided that "what he states from the dock is subject to the right of reply [p. 123] on the part of the prosecution, as being in the nature of new matter laid before the jury:" apparently this does not apply where there was a statement before the magistrates. *Shimmin*, 15 *Cox C. C.* 122 (1822). In *O'Donnell*, 99 *Sess. Papers*, *C. C. C.* 157 (1883), counsel for the defence, after objection taken and withdrawn by the attorney-general, stated the prisoner's own account of the transaction.

The matter is practically settled by a resolution of the judges, stated 10th, 11th, and 12th editions of this work, which give the date of Nov. 26th, 1881, to run: "In the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence." See also *Best Ev.*, s. 635 and note *y* (p. 540, 10*th ed.*), and *Law Journal* newspaper, Jan. 21, 1881.

In *Foster* (1887), prisoner desired to make a statement to the jury, and her counsel applied to the court for directions. Field J. said, "It is in the discretion of the judge when and where the prisoner should make a statement. There is no practice either way, and I consider that the prisoner should make her statement after the speeches of counsel. In my opinion, it would be hard to prevent a prisoner from making a statement if he thinks fit." (Earlier editions of this work.) In *Doherty*, 16 *Cox C. C.* 306 (1887), pp. 591, 617, Stephen J. permitted a similar course, but required the statement to be made before the court was addressed by the prisoner's counsel, and held that it gave the crown a right of reply.

The right of a person charged to make a statement without being sworn is left unaffected by the Criminal Evidence Act, 1898, s. 1 (h), p. 830. This Act has very much diminished the importance of this question as to a prisoner's statement. Especially in view of s. 3, it would seem that a mere unsworn statement confers no right of reply, and cf. *Sherriff*, p. 184.

Right to reply.] Wherever any witnesses other than the defendant are called, or any documents put in, on behalf of the defendant, at any time in the course of the trial, the prosecution will have a right, at the conclusion of the defence, to address the jury in reply. This is so laid down as to depositions offered as evidence on the part of the defendant in the rules drawn up by the judges after the passing of the Prisoners' Counsel Act (see p. 57); but the practice is precisely similar in all cases. An effort is frequently made to induce the court itself to refer to the depositions, and to have them read, either with a view of contradicting a witness without giving the other side a right to reply, or in order to get the prisoner's statement before the jury (p. 181), and this is generally done. Coleridge J. doubted whether this course would not equally give the counsel for the prosecution a right to reply. *Edwards*, p. 118.

Although the evidence for the defence be only as to character, the right to reply still exists, but it is seldom exercised; p. 184.

Where four prisoners were jointly indicted, two for stealing a sheep, and two for receiving separate parts of the sheep so stolen, and counsel for the receivers put in the depositions to contradict the case against them, by showing a variation between the testimony of the principal witness and his deposition, but no evidence was given on behalf of the other prisoners: Parke B. after consultation, stated that the reply must be confined altogether to the case of

the receivers, adding, that he did not wish to lay down a general rule, that in no case, where several were indicted together, would witnesses being called by one entitle the prosecutor to reply against all, but in the case before him the offences were distinct, as the receivers might have been indicted separately from the principals. *Hayes*, 2 *Moo. & R.* 155 (1838), p. 741. Three prisoners were indicted for murder, and witnesses were called for the defence of one only; Talfourd J. held that the counsel for the prosecution was entitled to reply generally on the case, and was not to be limited in his reply to the case as against the prisoner for whom the witnesses were called, although the evidence adduced for the one prisoner did not affect the case as it respected the other two prisoners: but *aliter* if the offences were different, *e.g.* larceny and receiving. *Blackburn*, p. 42. Where two prisoners set up an *alibi*, and one called witnesses to prove it, Williams J. "as the defences were the same" allowed the counsel for the prosecution to reply on the whole case. *Briggs*, 1 *F. & F.* 100 (1858). But in *Burton*, 2 *F. & F.* 788 (1861), Wightman J. advised the counsel for the prosecution to confine his remarks to the case of the prisoner who had severed in his defence and called witnesses. So *Trevelli*, 15 *Cox C. C.* 289 (1882).

A. and B., the drivers of rival omnibuses, were indicted for manslaughter, caused by their negligence in racing. After the case for the prosecution had closed, and A.'s counsel had addressed the jury without calling witnesses, witnesses were called on behalf of B., for the purpose of throwing the blame on A.; it was held that counsel for A. was entitled to cross-examine B.'s witnesses, and again to address the jury, strictly confining himself to that evidence. *Wood*, 6 *Cox C. C.* 224 (1853); so *Burdett*, p. 118.

Where there were cross-indictments for assault, and the same transaction was the subject-matter of both indictments, Gurney B. directed the jury to be sworn on both; counsel for the prosecution of the indictment first entered to open his case and call his witnesses; and then opposing counsel to do the same; neither side to have a reply. *Wanklyn*, 8 *C. & P.* 290 (1838).

The attorney-general of England, prosecuting for the crown *in person*, has the right to reply, whether witnesses be called or not. This is admitted; but it is doubtful whether the crown has the right in any, and, if any, what other cases. In *Esdaile*, p. 163, a prosecution instituted by the crown, the right was exercised without objection by another counsel for the crown, the attorney-general, who had conducted part of the case, becoming Lord Chancellor during its course (1858). In *Beckwith*, 7 *Cox C. C.* 505 (1858), a prosecution instituted by the poor law board, Byles J. refused to permit it to the representative of the attorney-general, saying that the right was confined to the attorney-general of England *in person*, "and if I could do so I would not allow it even in that case," despite *Gardner*, 1 *C. & K.* 628 (1845), p. 711, to the exact contrary, cited to him. In *Christie*, 1 *F. & F.* 75 (1858), a prosecution directed by the Board of Trade, Martin B. refused to permit it to the attorney-general of the *county palatine*, and said that he thought the practice in any case was a bad one. In *Taylor*, p. 185, Byles J. said, he did not admit the right of counsel for the crown—who was not the attorney-general—prosecuting for the mint. In 1884 the judges resolved, That in those crown cases in which the attorney- or solicitor-general is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed as of right to the counsel for the crown and in no others. 5 *St. Trials*, *N. S.* 3, note c and authorities, *ib.* vol. 2, 1019.

Judge's summing up—Right to comment.] S. 1 *b.* of the Crim. Ev. Act, 1898, does not prevent the court commenting on prisoner's not going into the box. *Rhodes*, p. 83. See p. 184.

Discharge of jury without verdict.] If a juryman be taken ill so as to be in the opinion of a competent witness incapable of attending through the trial, the jury may be discharged and the prisoner tried *de novo*; another juryman may be added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn and the trial begin again *de novo*. *Edwards, Russ. & Ry.* 224 (1812); 4 *Taunt.* 309; 2 *Leach* 621 *n.*; 3 *Camp.* 207; *Ashe*, 1 *Cox C. C.* 150 (1845). [So if during the trial *the prisoner* be taken so ill that he is incapable of remaining at the bar the procedure is similar. The court, on a trial for a misdemeanor, doubted whether in such a case the consent of *counsel* was sufficient to justify the proceeding with the trial in the absence of the defendant. *Streek, coram* Park J., 2 *C. & P.* 413 (1826); *Stevenson*, 2 *Leach C. C.* 546 (1791): a different jury, on his recovery. See p. 166.]

"When the evidence on both sides is closed, and, indeed, when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict, but are to consider of it and deliver it in with the same forms, as upon civil causes. . . . But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court." 4 *Bl. Com.* 360. Cf. *Wade*, p. 99. And when a criminal trial runs to such length that it cannot be concluded in one day, the court, by its own authority, may adjourn till next morning. *Stone*, 6 *T. R.* 527 (1796); *Langhorn*, p. 89, at 497 (1679); *Hardy*, p. 117, at 414. In the latter case, on the first night of the trial, beds were provided for the jury at the Old Bailey, and the court adjourned till the next morning. On the second night, with the consent of the counsel on both sides, the court permitted the jury to pass the night at a tavern, whither they were conducted by the under-sheriffs and four officers sworn to keep the jury. *Ib.* 572. In misdemeanors the practice has been to allow the jury to separate. See *Kinnear*, 2 *B. & Ald.* 462 (1819). Now by 60 V., 18; "Upon the trial of any person for a felony other than murder, treason or treason felony, the court may, if it see fit, at any time before the jury consider their verdict, permit the jury to separate in the same way as the jury upon the trial of any person for misdemeanor are now permitted to separate."

So where, during the trial of a felony, it was discovered that the prisoner had a relative on the jury, Erskine J., after consulting Tindal C.J., held that he had no power to discharge the jury, but that the trial must proceed. *Wardle, C. & M.* 647 (1842). If it should appear in the course of a trial that the prisoner is insane, the judge may order the jury to be discharged, that he may be tried after the recovery of his understanding. 1 *Hale P. C.* 35; *Kinloch*, 18 *St. Tr.* 411 (1746); *Little, Russ. & Ry.* 431 *n.* (1821). On a trial for manslaughter, it was discovered, after the swearing of the jury, that the surgeon who had examined the body was absent, and as *the prisoner* prayed that the jury might be discharged, they were discharged accordingly, and the prisoner was tried the next day. *Stokes*, 6 *C. & P.* 151 (1833). As to postponing the trial on other grounds, see p. 99, and pp. 167–9.

In the case of *Davison*, removed by *certiorari* into the Central Criminal Court, the prisoner demurred on the ground that he had been tried before for the same offence, the jury having disagreed and been discharged, as was stated on the record: they had deliberated till all other business was finished. It was held, however, that the discharge of the jury was a matter for the discretion of the judge, and must be assumed to be for some valid reason. It is implied that no notice of the reason why the jury were discharged need be taken on the record. 2 *F. & F.* 250; 8 *Cox C. C.* 360 (1860).

The power to discharge a jury was very much discussed in the case of *Charlesworth*, 31 *L. J. M. C.* 25; 1 *B. & S.* 460; 8 *Jur. N. S.* 1091; 5 *L. T.* 150; 9 *W. R.* 842; 9 *Cox C. C.* 44; 2 *F. & F.* 326 (1861), p. 171. It was

an information for bribery, at the suit of the crown, and at the trial a witness (*Fernandez*, p. 126) refused to give evidence. Hill J. committed the witness to prison, and a conviction being impossible, discharged the jury, the defendant objecting. The defendant then applied for leave to place upon the record a plea setting out these facts, but this the court refused to permit, on the ground that there was already a plea of not guilty upon the record, and that in misdemeanor a defendant could not plead two different pleas (p. 172); but they said the facts stated in the plea might be placed upon the record as part of the proceedings, which was accordingly done. A rule was then obtained, calling upon the crown to show cause why judgment *quod eat sine die* should not be entered for the defendant, and why the award of jury process and all other proceedings should not be set aside. The rule was discharged, the court being of opinion that, whether the judge had power to discharge the jury *or not*, the defendant was not entitled to final judgment, and that the new trial ought to proceed; it being open to the defendant to take advantage of the objection (if any) upon a writ of error. The judgments of the court contain a great deal of extra-judicial opinion as to what power a judge has to discharge a jury, and the weight of opinion seems to incline to that power being limited in *law* only by the discretion of the judge; but that it *ought* not to be exercised, except in some cases of physical necessity; or where it is hopeless that the jury will agree, or where there have been some practices to defeat the ends of justice. Much reliance is placed by the court on the opinion of Crampton J. (set out in L. J. report), in the case of *Conway* v. *R.*, 7 *Ir. Law Rep.* 149 (1845); 1 *Cox C. C.* 210, where that learned judge differed from his brethren, and took substantially the view taken by the Queen's Bench in England in *Charlesworth*. This question was fully discussed in *Winsor* v. *R.*, *L. R.* 1 *Q. B.* 289, 390; 35 *L. J. M. C.* 121, 161; 7 *B. & S.* 490; 12 *Jur. N. S.* 561; 14 *L. T.* 567; 14 *W. R.* 695; 10 *Cox C. C.* 327 (1866), pp. 109, 200; in which it was held by the Court of Exchequer Chamber, that a judge had power in the case of murder to discharge the jury before verdict, when "a high degree of need" for such discharge was made evident to his mind from the facts which he had ascertained; the statement on the record of his decision establishes its lawfulness; and that the exercise of this discretion could not be reviewed by a court of error, and that such a discharge —even if the discretion was improperly exercised—did not prevent the prisoner from being tried a second time. So where in the course of a trial for murder a juryman separated himself from his fellows and mingled with the public during an adjournment, Kennedy J. discharged the jury, and a fresh jury being subsequently impannelled the prisoner was tried and convicted. *Macrae*, Northampton Assizes, December, 1892.

Verdict.] If by mistake the jury deliver a wrong verdict (as where it is delivered without the concurrence of all), and it is recorded, and a few minutes elapse before they correct the mistake, the record of the verdict may also be corrected. *Parkin*, 1 *Moody, C. C.* 46 (1824), p. 562. In *Vodden, Dears. & P. C. C.* 229; 23 *L. J. M. C.* 7 (1853), a verdict of "not guilty" was entered by the clerk purely by mistake, and the prisoner was discharged; the mistake was immediately corrected, and the prisoner brought back and sentenced. The Court for Crown Cases Reserved held the verdict was properly amended.

The jury have a *right* to find either a general or a special verdict ("setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated it be murder, manslaughter, or no crime at all"). 4 *Bl. Comm.* 361; 1 *Chitty, C. L.* 637, 642; *Mayor, &c., of Devizes* v. *Clark*, 3 *A. & E.* 506 (1835), jury insisting on a general verdict; *Dudley*, 14 *Q. B. D.* 273, 560; 54 *L. J. M. C.* 32; 52 *L. T.* 107; 33 *W. R.*

347; 15 *Cox C. C.* 624; 49 *J. P.* 69 (1884); *C. C. R.*, pp. 165, 649. And in a case of felony, although a judge may make the suggestion, he will not direct the jury to find special facts, and they may, if they think proper, return a general verdict, instead of finding special facts, with a view to raise a question of law. *Per* L. Abinger C.B., *Allday*, 8 *C. & P.* 136 (1837). For a special verdict with words added after explanation by the court, see the italicised words in *York*, p. 551. Pollock C.B. doubted whether the mode of putting questions to the jury, and then recording a verdict without taking a direct answer of *guilty* or *not guilty*, was correct. *Sleep L. & C.* (47), p. 655. Special verdicts which may be returned by statute, in cases in which the prisoner is proved to have been guilty of a minor offence to that with which he is charged, will be found pp. 69–70. The verdict which under 46–7 V. 38, 2, is returnable in cases of insanity, will be found set out, p. 806, *Insanity*.

A judge is not bound to receive the first verdict which the jury give unless the jury insist on having it recorded. He may direct them to reconsider it, and the verdict ultimately returned is the true verdict. *Meaney*, 32 *L. J. M. C.* 24; *L. & C.* 213 (1862). But where a prisoner was charged with larceny, and the jury, being unable to agree, were asked whether they believed the evidence for the prosecution and replied that they did, which was then entered as a verdict of guilty, the conviction was quashed, as the jury had not found *animus furandi*. *Farnborough*, 1895, 2 *Q. B.* 484; 64 *L. J. M. C.* 270; 18 *Cox C. C.* 191; *C. C. R.*, p. 547. In *Jameson and Others*, *Report from Shorthand Notes*, pp. 395–6 (1896), p. 217, the jury answered the categorical questions of the court, and at first declined to find a general verdict, but ultimately did so on the direction of the court.

As to a recommendation to mercy, see p. 549.

Amendment of verdict.] Where the jury have made a clear mistake, *e.g.* have clearly misunderstood the judge's directions, the verdict may, it seems, be amended, and entered as it ought to be from the judge's notes and the record, as in a civil case; but not, if there are no such notes or other documents to amend by. And if the judge at the trial wrongly amends his order will be rescinded. *Virrier*, p. 691.

Arraignment on previous conviction.] Formerly it was merely an act of grace to suppress evidence of a previous conviction before the verdict (*Greaves's Crim. Law Acts*, p. 157, and see *Whitney*, p. 290, where such a conviction was proved, as often in highway cases, pp. 500–1). But by 24–5 V. 96, 116 (larceny and offences connected therewith), p. 161, "the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows:—that is to say, the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence," and after the inquiry into the subsequent offence is concluded, "he shall then, and not before, be asked whether he had previously been convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged," &c. The words "any offence" are perfectly general, and are not limited to offences under the Act. *Faulkner* v. *R.*, 1905, 2 *K. B.* 76, where a prisoner was arraigned upon and pleaded not guilty to three counts, the last for a previous conviction; the trial was stopped, and remitted to the next sessions, when he was tried, without a fresh plea or arraignment, on one count and convicted: the conviction was quashed by K. B. on error. So precisely 24–5 V. 99, 37, set out pp. 342–3, with respect to offences relating to the coin, and this section applies to offences under s. 12 of that Act, see

p. 337, and *Martin*, p. 162. So as to Inebriates, p. 832. See, however, pp. 86–7. As to evidence that stolen property has been found in prisoner's possession, see p. 82, and pp. 733, 741. As to such evidence under the Crim. Ev. Act, 1898, see pp. 87, 830 (s. 1 *f*).

It is not necessary that judgment should have been given on the previous occasion. If the prisoner either pleaded guilty or was found guilty, that amounts to a conviction, though only a recognisance to come up for judgment when called upon was entered into: *Miles*, p. 255. *Blaby*, 1894, 2 *Q. B.* 170; 63 *L. J. M. C.* 133; *C. C. R.*, p. 337.

After plea of guilty, and before judgment, a prisoner is not entitled under 61-2 V. 36, 1, to give evidence on oath in mitigation of sentence. *Hodgkinson*, 64 *J. P.* 808 (1900).

3. THE JUDGMENT.

Arrest of judgment.] A motion in arrest of judgment may be made for any substantial defect which appears on the face of the record. It is made at the time when the defendant is called up to receive judgment, and cannot be made after judgment is given. As to formal defects apparent on the face of the indictment, formerly ground for arrest of judgment, see now 14-15 V. 100, 25, pp. 176, 178. If the objections taken in arrest of judgment be valid, "the whole proceedings shall be set aside; but the defendant may be indicted again." 4 *Rep.* 45; 4 *Bl. Comm.* 375.

Judgment.] On a trial at bar (of cases "of great importance or difficulty," 3 *Bl. Com.* 352), the court may appoint such days as they shall think fit for the trial, and may pass sentence out of term, if on one of the days so appointed. *Castro*, *L. R.* 9 *Q. B.* 350; 43 *L. J. Q. B.* 105 (1874), p. 73.

It is not necessary in recording sentence to refer to the statute which gives the punishment. *Murray* v. *R.*, 7 *Q. B.* at 706; 14 *L. J. Q. B.* 357 (1845).

Where judgment on a record of the Q. B. is pronounced at the assizes (under 11 G. 4 and 1 W. 4, 70, 9, now repealed), the court on motion may, if they think fit, amend the judgment by ordering it to be arrested. *Nott*, 4 *Q. B.* 768 (1843), p. 668. A sentence of imprisonment passed at nisi prius, under the same section, the defendant not being present, may declare that the imprisonment shall commence on the day on which he shall be taken to and confined in prison. *King* v. *R.*, 7 *Q. B.* 782, 795; 14 *L. J. M. C.* 172 (1844).

Where there are several felonies or misdemeanors charged in the indictment, care must be taken in passing sentence, and also in making up the record, that no error is made which will vitiate the judgment. There is some obscurity as to what will constitute error in this respect. In *Powell*, 2 *B. & Ad.* 75 (1831), the first count of the indictment charged an assault with intent to ravish, the second a common assault. The record stated that the jury found that "the said H. P. is guilty of the *misdemeanor and offence* in the said indictment specified, in manner and form as by the said indictment is alleged against him; whereupon all and singular the premises being seen, &c., it is considered and adjudged by the court here, that the said H. P. for the said misdemeanor, be imprisoned in the house of correction at Guildford, in the said county of Surrey, for the space of two years, and be there kept to hard labour." The Q. B. held upon a writ of error that the word "misdemeanor" was *nomen collectivum*, and that the finding of the jury and the judgment applied therefore to the whole indictment, and were good. In the case of *O'Connell* v. *R.*, p. 173, the indictment contained several counts charging different offences against various defendants. The judgment against each of the defendants was stated in the record to be "in respect of his offences aforesaid." Some of the counts turned out to be bad.

A large majority of the English and all the Irish judges (as to whom, see 7 *Irish L. R.* at 340) thought that the judgment being warranted by the counts which were good ought to be confirmed, and in this opinion L. Brougham and L. Lyndhurst concurred; but L. Cottenham, L. Campbell and L. Denman thought otherwise; and the judgment was reversed. In *Campbell* v. *R.*, 11 *Q. B.* 799; 14 *L. J. M. C.* 76 (1846), there were two counts in the indictment, one charging a stealing in the dwelling-house of A., the monies of A., above the value of 5*l.*, the other for a simple larceny of monies and goods, describing them precisely as in the first count, of A. (not "other" monies). The record stated the finding of the jury against the prisoners to be "guilty of the felony aforesaid on them above charged in the form aforesaid, &c.," and what the judgment was: different judgments were applicable to each count. The Queen's Bench held that the word "felony" in this record could not be construed in the same way as the word "misdemeanor" in *Powell*, above (which was doubted), namely, as *nomen collectivum*, so that it was uncertain to which of the felonies charged the finding of the jury applied; and that as the judgment of transportation for ten years was applicable to the first felony charged only, the judgment was erroneous and must be reversed. The Exchequer Chamber confirmed this decision.

It was said in the course of the discussion in *Campbell* v. *R.* that, even if the word "felony" could be construed in the way contended for, the judgment was erroneous, on the authority of *O'Connell* v. *R.*, p. 173; but the Exchequer Chamber seemed to think otherwise, and that in that case the judgment would have been good (11 *Q. B.* 837); cf. p. 175.

In *Gregory* v. *R.*, 15 *Q. B.* 957 and 974 (1848 and 1850); 19 *L. J. Q. B.* 367, p. 178, the sentence passed by the judge was, that "for the offences charged upon him in each and every count of the indictment, the defendant be imprisoned in the Queen's prison for six months now next ensuing." The Exchequer Chamber seemed to think that the judgment as stated in the record was in form a sentence of one term of six months' imprisonment upon the whole indictment, and would, therefore, be erroneous if any count were bad. No final opinion was, however, expressed, because on an application on the part of the prosecution, the court below allowed the judgment to be amended according to the sentence passed, a note of which was contained in the master's book. Where the record set out the finding and judgment on the second count of an indictment, but omitted to notice the finding (viz. an acquittal) or judgment on the first, it was held that each count for the purpose of the verdict was a distinct indictment [cf. p. 363], and that, as there was a good finding upon a good count, the defendant might be convicted upon it. *Latham* v. *R.*, 9 *Cox C. C.* 516; 5 *B. & S.* 635; 33 *L. J. M. C.* 197 (1864), p. 356.

The difficulty was frequently got over by the power conferred by s. 55 of 11–12 V. 78, repealed by E. 7, 23, 22: p. 843. Under that statute, where prisoner was convicted on good and bad counts, and judgment was entered generally on all or on a bad count, the Court of Error could arrest the judgment on the bad counts, and enter judgment, or direct it to be entered on the good ones. *Holloway* v. *R.*, 2 *Den. C. C.* 287; 17 *Q. B.* 319 (1851). See now p. 199.

The form in which sentence was passed in *Gregory* v. *R.* above, was said by L. Denman (at *Q. B.* 968) to be that which the judges had adopted in order to avoid the objection raised in *O'Connell* v. *R.* And the best plan in making up the record will be to state a separate judgment for each count. See *Gregory* v. *R.*, at 973, note *b*.

A prisoner, upon whom sentence of death has been passed, ought not, while under that sentence, to be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the

other felony, and did not plead his prior attainder. *Brady, Russ. & Ry.* 268 (1814).

By 24-5 V. 100, 2: "Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this Act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon." Cf. pp. 194, 610.

By s. 3: "The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct." See as to the sentence for murder under the old law, *Fletcher, Russ. & R.* 58 (1803); *Wyatt, ib.* 230 (1812).

Where the defendant had been convicted of a misdemeanor, in the Queen's Bench, the prosecutor and the defendant upon the motion for judgment might produce affidavits to be read in aggravation or mitigation respectively of the offence. Affidavits in aggravation were not allowed in felonies, although the record had been removed into the Queen's Bench by *certiorari*. *Elias*, at 148, p. 78; 3 *Burn's Justice*, 933, 29*th ed.* Where a prisoner pleaded guilty to a misdemeanor, and affidavits were filed, both in mitigation and aggravation, the judges refused to hear the speeches of counsel on either side, but formed their judgment of the case by reading the affidavits; *Gregory*, 1 *C. & K.* at 232 (1843); but it is usual to hear counsel in mitigation. Affidavits in mitigation containing scandalous and *irrelevant* matter, are a contempt of court, and will be removed from the files; and the opposite party will be allowed to deny by counter-affidavits the defamatory matter. *Ib.*

Where a defendant, having pleaded guilty to the indictment, is brought up for judgment, the counsel for the crown is to be heard before the counsel for the defendant, and the affidavits in aggravation are to be read before the affidavits in mitigation. *Dignam*, 7 *A. & E.* 593 (1837). *Contra*, where a verdict of guilty has been taken, though by consent, and without evidence. *Caistor, ib.* 594 *n.* (1837). *Semble*, that the rule is not to be varied where several defendants are jointly indicted, and some suffer judgment by default, and others are convicted on verdict. And in such a case, where there was no affidavit in aggravation, but affidavits were offered in mitigation, the court heard the counsel for the defendant first. *Sutton, ib.* (1828).

By 33-4 V. 23, 2, a conviction for treason or felony followed by any sentence to imprisonment with hard labour, or any imprisonment exceeding twelve months or any more severe sentence, is to be a disqualification for "any military or naval office or any civil office under the crown or other public employment or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation," and causes a forfeiture of pension or superannuation allowance payable out of the public funds—unless the convicted person gets a royal pardon within two months or before his forfeited place is filled up; and until pardon or sentence served, he cannot be elected or sit in either House of Parliament or exercise any suffrage whatever in England, Wales, or Ireland; and by s. 4, the court by which judgment is pronounced or recorded may, if it shall think fit, on application of any person aggrieved, and immediately after conviction for felony, award (to the limit of 100*l.*) compensation for loss of property, to be deemed a judgment debt, &c., and may also condemn the prisoner to pay the prosecutor's costs; see s. 3, p. 206; and, generally, p. 198.

In the case of a husband convicted of an aggravated assault upon his wife, the court may under certain circumstances give an order having the effect of a judicial separation, together with an order on the husband to pay some weekly sum to the wife for her support, and may give her the custody of the children. 58–9 V. 39, 4.

Recording judgment of death.] By 4 G. 4, 48, 1: "Whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy * in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask, if such offender hath or knoweth anything to say, why judgment of death should not be recorded against such offender; and, in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorised to abstain from pronouncing judgment of death upon such offender; and, instead of pronouncing such judgment, to order the same to be entered of record, and thereupon such proper officer as aforesaid shall and may, and is hereby authorised to enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before which such offender shall have been convicted."

Under 6–7 W. 4, 30 (repealed by 24–5 V. 95, 1), the court was held to be empowered to direct the sentence of death to be recorded also in murder. *Hogg*, 2 *Moo. & R.* 380 (1841), p. 612. It seems doubtful whether the same would be held under the 24–5 V. 100, 2, p. 193, but probably not. See *Greaves's Criminal Acts*, p. 18.

Juvenile offenders.] By 56–7 V. 48, 1 (extended to Ireland, 1 E. 7, 20, 15, 1), "Where a youthful offender, who in the opinion of the court before whom he is charged is less than sixteen years of age, is convicted . . . of an offence punishable with penal servitude, or imprisonment, and either (*a*) appears to the court to be not less than twelve years of age, or (*b*) is proved to have been previously convicted of an offence punishable with penal servitude or imprisonment, the court may, in addition to or in lieu of sentencing him according to law to any punishment, order that he be sent to a certified reformatory school, and be there detained for a period not less than three and not more than five years, so, however, that the period is such as will in the opinion of the court expire at or before the time at which the offender will attain the age of nineteen years." ("Provided that where the offender is ordered to be sent to a certified reformatory school he shall not in addition be sentenced to penal servitude or imprisonment." 62–3 V. 12, 1.) By s. 2, the court has power to remand him to prison or to any place the court thinks fit, for a period not exceeding fourteen days, or until an order is sooner made for his discharge or his being sent to a reformatory. The 29–30 V. 117, 14 (amended 56–7 V. 48, 4), contains directions as to the particular school to which the youthful offender is to be sent.

By 1 E. 7, 20, 5, a Court of Assize or Quarter Sessions may commit a child under twelve to an industrial school, as an inferior court may under 29–30 V. 118, 15, &c.

* Originally the exemption of clerics from the criminal courts: abolished 7-8 G. 4, 28, 6. See 1 Stephen, *Hist. Crim. L.*

By s. 1 (2) of 7 E. 7, 17 (repealing the Probation of First Offenders Act, 50-1 V. 25), "Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

By sub-s. 3, the court may also order the offender (or in certain cases, his parent or guardians) to pay damages or compensation and costs.

By s. 3, a "Probation Officer" may be appointed.

Judgment upon persons found to be insane.] By 46–7 V. 38, 2 (1), the jury may return a special verdict that the accused was guilty of the act or omission charged against him, but was insane at the time he did the act or made the omission. The court shall thereupon order him to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct till the crown's pleasure shall be known. As to the disposal of such persons, see p. 167; and *Insanity*, p. 806. As to other regulations with respect to criminal lunatics, see 23–4 V. 75; and 47–8 V. 64.

Fines and sureties.] By 24–5 V. 96, 117, "Whenever any person shall be convicted of any indictable misdemeanor punishable under this [Larceny] Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorised, fine the offender, and require him to enter into his own recognisances and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the court may, if it shall think fit, require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorised: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

A similar provision is contained in c. 94, 4 (accessory after the fact, p. 157); c. 97 (injuries to property), 73; c. 98 (forgery), 51; c. 99 (coinage), 38; and c. 100 (offences against the person), 71,—all of 24–5 V.

Discharge of prisoners.] By 55 G. 3, 50, 4, extended by 8–9 V. 114: every person charged with any felony or any other crime, or as an accessory thereto, in England and Wales against whom no bill of indictment shall be found by the grand jury, or who on trial shall be acquitted, or who shall be discharged for want of prosecution, "shall be immediately set at large, without payment of any fee or sum of money for or in respect of his, her, or their discharge to any person or persons whomsoever." Cf. p. 392.

On acquittal and discharge the accused must be liberated at once; otherwise an action for false imprisonment lies against the governor of the prison in whose legal custody the detained person is. *Mee* v. *Cruikshank*, 20 *Cox C. C.* 210 (1902); cf. *Demer* v. *Cook*, *ib.* 444 (1903)—where there is a variation of sentence there must be a fresh warrant of commitment.

Property found on the prisoner.] It has been said by some judges that a constable has no right to take away from a prisoner any property which he has about him, unless it is in some way connected with the offence with

which he is charged; *per* Patteson J., *O'Donnell*, 7 *C. & P.* 138 (1835—money); *Jones*, 6 *C. & P.* 343 (1834—money); *per* Gurney B., *Kinsey*, 7 *C. & P.* 447 (1836—watch, &c.); *Bass*, 2 *C. & K.* 822 (1849—money, to be used in conveying prisoner to prison and maintaining him there), *per* Platt B. And if this has been done, as is frequently the case, the court will, on the application of the prisoner, order the property to be given up to him; *Kinsey* (above) and *Barnett*, 3 *C. & P.* 600 (1829—money); unless it be required as evidence. But this will not be done if the property, though not that actually stolen, is the produce of it. *Burgiss*, 7 *C. & P.* 488 (1836); *Rooney*, p. 79.

"It is undoubted law that it is within the power of, and it is the duty of constables to retain for use in court things which may be evidences of crime, and which have come into the possession of the constables without wrong on their part. . . . It is also undoubted law that when articles have once been produced in court by witnesses it is right and necessary for the court or the constable in whose charge they are placed to preserve and retain them, so that they may be always available for the purposes of justice until the trial is concluded." Wright J. in *Lushington, ex parte Otto*, (1894) 1 *Q. B.* 420. Where stolen property was found in the possession of a person who was acquitted of the larceny, and after a demand for delivery by the true owner, it was delivered to some one else by a police-officer, he (though a subordinate) was held liable by K. B. in trover to the true owner. *Winter* v. *Bancks & Lings*, 19 *Cox C. C.* 687 (1901). See as to *civil* remedies, *Addison* on *Torts*, *8th ed.* (1906), ch. 7, s. 5, 579–80, and 604–8.

By 24–5 V. 96, 100, "If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner, or his representative; and in every case in this section aforesaid the court before whom any person shall be tried" [this does not apply to the Court of Queen's Bench; see *Walker* v. *Lord Mayor, &c., of London*, 38 *L. J. M. C.* 107 in 1869] "for any such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner; provided that, if it shall appear before any award or order made that any valuable security shall have been bonâ fide paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been bonâ fide taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, extorted, embezzled, converted or disposed of, in such case the court shall not award or order the restitution of such security; provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent, intrusted with the possession of goods or documents of title to goods for any misdemeanor against this Act." And see below.

The court cannot, under the same words as in the first proviso above, order a Bank of England note, which has been paid and cancelled, to be delivered up to the prosecutor. *Stanton*, *C. & P.* 431 (1836). Where a prisoner was convicted of stealing money, and he was at the time the owner of a horse which it was clear from the evidence had been purchased with the stolen money, an order was made for the delivery of the horse to the prosecutor. *Per* Gurney B. and Williams J., *Powell*, 7 *C. & P.* 640 (1836). A jubilee 5*l.* gold-piece, if not part of the currency, may be restored under this s.

Moss v. *Handcock*, 19 *Cox C. C.* 324 (1899); *Q. B.* In *Goudie, &c.*, 135 *Sess. Papers C. C. C.* 279 (1902), Mr. Justice Bigham made orders of restitution of the proceeds of frauds not only against the convicted prisoners, but against other accused persons not before the court into whose hands some of the proceeds were clearly traced by the depositions and affidavits, and against others who had acquired title from the guilty persons, not by discharge of valuable securities nor by transfer for valuable consideration. See *Law Journal*, March 1, 1902.

After the trial and conviction of a felon, the judges who presided at the trial made an order, directing that property, found in his possession when he was apprehended, should be disposed of in a particular manner. This property was not shown to be part of or connected with the stolen property, or to be the produce of it. The Queen's Bench held that the order was bad, as the judges had no jurisdiction to make it. *Corporation of London*, 27 *L. J. M. C.* 231 (1858).

It would appear that in the case of the prisoner's acquittal, the court, though satisfied the property has been stolen, has no power to order its restitution; *Greaves's Criminal, &c., Acts* 143; but in case of conviction, the court is bound by the statute to order restitution, and the order is strictly limited to property identified at the trial as being the subject of the charge. *Goldsmith*, 12 *Cox C. C.* 594 (1873); *Smith*, 12 *Cox C. C.* 597 (1873): it does not extend to all articles named in the indictment. See 7 E. 7, 23, 6, p. 837.

The vexed question as to the property in goods stolen or obtained by fraud is now set at rest by 56–7 V. 71, 24, (1): "Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise."

(2) "Notwithstanding any enactment to the contrary where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender." See p. 558.

By 30–1 V. 35, 9, it is provided that where stolen property has been purchased from the prisoner the proceeds may be given back to an innocent purchaser on restitution of the property, p. 829. And see 33–4 V. 23, 3, p. 206; and s. 4, p. 193. The application ought only to be granted if the proceeds are in the possession of the convict or of an agent who holds for him. *Justices of the Central Criminal Court*, 17 *Q. B. D.* 598; 18 *Q. B. D.* 314; 55 *L. J. M. C.* 183; 56 *L. J. M. C.* 25 (1886).

By the Pawnbrokers Act, 1872, 35–6 V. 93, 30 (2), "If any person is convicted in any court of feloniously taking, or fraudulently obtaining any goods and chattels, and it appears to the court that the same have been pawned with a pawnbroker . . . the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner, and the other circumstances of the case, seems just and fitting."

By the Prosecution of Offences Act, 1879, 42–3 V. 22, 7, "the prosecution of an offender by the Director of Public Prosecutions shall, for the purpose of enabling a person to obtain a restitution of property, or of obtaining, exercising, or enforcing any right, claim, or advantage whatsoever, have the same effect as if such person had been bound over to prosecute, and had prosecuted the offender, subject to this proviso, that such person shall give all reasonable information and assistance to the said Director in relation to the prosecution."

Penal servitude and imprisonment.] Penal servitude is now substituted for transportation by 20–1 V. 3, 2, which substitutes the same *maximum* term of penal servitude, but permits three years of the latter to be adjudged instead of seven of the former, and by 51–5 V. 69, 1 (1), "Where under any enactment in force when this section comes into operation [Aug. 5, 1891] a court has power to award a sentence of penal servitude, the sentence may at the discretion of the court be for any period not less than three years and not exceeding either five years or any greater period authorised by the enactment."

(2) "Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years with or without hard labour." In consequence of this section a large number of alterations have been made by Statute Law Revision Acts, in 1892 and 1893, in the Consolidation Acts (of 1861), and other criminal statutes in order to bring the latter into conformity with the section. The words, too, "at the discretion of the court" have been repealed in very many passages, but not in all; at the same time the power to award solitary confinement (in the old sense)—a form of punishment which had fallen into disuse—has been taken away; it remains, however, in a (modified) form regulated by the Prison Rules. It has been thought better to print in this book the sections as they now stand, giving a reference in every case to this page, so as to enable a court to appreciate at once what its powers are in regard to punishment.

Where a person is convicted of any felony or the offence of uttering or of possessing false coin, or of obtaining money by false pretences or of conspiracy to defraud, or of being found by night armed with intent to break into any house, after a previous conviction the court may, in addition to any other punishment, direct that he be under police supervision for any period not exceeding seven years, 34–5 V. 112, 8, amended 42–3 V. 55, 2, and 54–5 V. 69, 4, 6, 7. It was pointed out by Hawkins J. in *King*, 1897, 1 *Q. B.* 214; 66 *L. J. Q. B.* 87; 18 *Cox C. C.* 447; *C. C. R.*, pp. 411, 557; that where there is an unexpired term of penal servitude against a prisoner which he may be sent back to serve out, there is no power in the tribunal to make the sentence on the new conviction run concurrently with this term, as such term can only commence to run after the new punishment has been undergone. See 27–8 V. 47, 9, amended by 54–5 V. 69, 3 (3).

In order to affect the judgment of the court it is necessary that the previous conviction should be stated in the indictment, in order to give the prisoner an opportunity of having his identity tried. *Willis*, *L. R.* 1 *C. C. R.* 363 (1872); 41 *L. J. M. C.* 102, confirming *Summers*, *L. R.* 1 *C. C. R.* 182; 38 *L. J. M. C.* 62 (1869); both on 27–8 V. 47, 2 (repealed). See p. 161.

After verdict and sentence (probably) no further question may be put to the jury. *Baines*, 19 *Cox C. C.* 524 (1900), *C. C. R.*, p. 740.

The punishment provided for special offences, when committed after a previous conviction, will be found under the head of those offences.

Hard labour.] This is expressly provided for in certain indictable misdemeanors, p. 825.

Compensation.] See *Index* for instances of compensation awarded on conviction.

Disqualification.] See p. 193 for felony generally, pp. 285–6 for bribery, and p. 673 for trading by exciseman. By 33–4 V. 29, 14, any one convicted of

felony is "for ever" disqualified from selling spirits by retail. As to crimes which disqualify for being an overseer, see pp. 672–3. Cf. p. 566, and as to pilots and masters, p. 770.

Expulsion.] The secretary of state may, in certain cases of conviction here or abroad and in some other circumstances, make an order expelling an alien from the United Kingdom and prohibiting his or her return. See 5 E. 7, 13, 3 and 7. Cf. p. 843.

Detention in a State inebriate reformatory.] See 61–2 V. 60, p. 832.

Banishment.] See as to Jesuits p. 521.

Whipping.] See *Index.*

Outlawry.] Though not absolutely abolished, p. 124, it is practically obsolete. See *Sweet's Law Dict.*

Forfeiture.] See p. 671 for forfeitures of gifts extorted in India; of explosives, p. 396; and of offices, pp. 670, 673, and, generally, p. 124.

Guardianship.] See pp. 326, 725 for the deprivation of parents, &c., of their guardianship of children.

Release on probation.] This is regulated by 7 E. 7, 17, p. 195.

As to the disposition of a convict's property by the Administrator under the Forfeiture Act, p. 124, see *Carr* v. *Anderson*, 1903, 1 *Ch.* 90; 2 *Ch.* 273; 20 *Cox C. C.* 416; and p. 559.

4. APPEAL.

*** For the Criminal Appeal Act, 1907, see p. 834 and p. 200.

Writ of error.] A writ of error lies from all inferior criminal jurisdictions to the King's Bench, for mistakes appearing in the judgment or other parts of the record. 4 *Bl. Comm.* 391. There were formerly many objections which were matter of error, but as to which now, see 14–15 V. 100, 25, p. 176. It has been held that error will lie in the following cases:—where the oath upon which perjury is assigned does not sufficiently appear to have been taken in a judicial proceeding; *Overton*, 2 *Moo. C. C.* 263; 4 *Q. B.* 83 (1843), p. 686; or the court or arbitrator has not competent authority to administer the oath; *Hallett*, 2 *Den. C. C.* 237 (1851), p. 676; *Chapman*, 1 *Den. C. C.* 432; 2 *C. & K.* 846 (1849), p. 257; *Lavey* (*and* v. *R.*), 2 *Den. C. C.* 504; 3 *C. & K.* 26; 21 *L. J. M. C.* 10 (1851), p. 686. So if in an indictment for libel the words do not appear to be libellous, *Penny*, 1 *L. Raym.* 153; *Comb.* 414 (1697); or are insufficiently set out; *Bradlaugh* v. *R.* p. 69; but see p. 567; if an indictment for obtaining by false pretences does not show the false pretences; *Mason*, p. 661, but this case was said to be virtually overruled in *Heymann*, below; *Holloway* v. *R.*, at 296, pp. 192, 716. If in an indictment for burglary it appears from the indictment that the prisoner broke and entered the dwelling-house with intent to commit a trespass or misdemeanor (*e.g.* to steal mortgage deeds, and not goods and chattels), and not a felony, error would lie. *Powell*, 2 *Den. C. C.* 403 (1852), p. 802; cf. pp. 177, 313. It must, however, be borne in mind that in some cases the verdict will cure a defect in the indictment. See *Heymann* v. *R.*, *L. R.* 8 *Q. B.* 102 (1873), p. 348, &c.; *Goldsmith*, p. 176; *Aspinall*, pp. 69, 351; *Bradlaugh* v. *R.*, above; *Knight*, 14 *Cox C. C.* 31 (1878), *C. C. R.*; *Oliver*, p. 177; *Kelleher*, 14 *Cox C. C.* 48 (1877), *C. C. R., Ir.*; *Stroulger*, 17 *Q. B. D.* 327; 55 *L. J. M. C.* 137 (1886), *C. C. R.*, p. 287. As to

challenges, see *Mansell* v. *R.*, p. 179. If a verdict of the jury were returned during the absence of one of the jurors, it would be a matter of error (on the ground of separation, pp. 188–9).

It is in all cases necessary before suing out the writ of error to obtain the *fiat* of the attorney-general; but in cases of misdemeanor, on probable cause being shown, this *fiat* is understood to be granted as of course; *Ex parte Newton*, 4 *E. & B.* 869 (1855); 4 *Bl. Comm.* 391; and it is not generally refused if reasonable ground of error be shown to exist in other cases, though, in felonies, strictly it is *ex gratia*; *Crawle*, 1 *Vern.* 170, cf. 175 (1683), p. 743. But it is entirely in the discretion of the attorney-general whether or not he will grant it, and the court or the Lord Chancellor will not control him. *Newton*; *Lees*, 1 *E. B. & E.* 828 (1858); *Castro* v. *Murray*, *L. R.* 10 *Ex.* 213 (1875); *Pigott*, 11 *Cox C. C.* 311 (1868).

It seems that the defendant ought to be in court personally to receive sentence in the event of the judgment of the court of error being against him. *Howard*, 10 *Cox C. C.* 54 (1865).

As to the procedure and practice on writs of error, see Crown Office Rules, 1906, rules 173–205.

In capital cases the prisoner used to appear in person to assign errors, *Mansell*, at 382, p. 179; but now it is unnecessary under Crown Office Rules 187–8, and he need not be present. *Richards* v. *R.*, (1897) 1 *Q. B.* 574; 66 *L. J. Q. B.* 459.

The K. B. has power to set aside a writ of error sued out for purposes of collusion. *Alleyne*, 5 *E. & B.* 399; 24 *L. J. Q. B.* 282; *Dears. & P. C. C.* 505 and 512 (1854–5).

N.B.—Writs of error and new trials are abolished by 7 E. 7, 23, 20, p. 842. See Preface.

Bill of exceptions.] This is now abolished. *Sweet, Law Lexicon ad verb.* Cf. *Esdaile*, at 228, p. 163. As to challenges, see p. 182.

New trial.] (1) Felony. There can be no new trial in cases of felony whether the defendant be convicted or acquitted. In *Scaife*, p. 59, where a conviction for felony was removed into the Queen's Bench, a new trial was moved for on the ground of the improper reception of depositions in evidence, and was granted; but that case has not been followed, and cannot be considered to be the law. *Bertrand*, *L. R.* 1 *P. C.* 520; 36 *L. J. P. C.* 51 (1867); *Duncan*, 7 *Q. B. D.* 198; 50 *L. J. M. C.* 95 (1881), p. 201. See *Murphy*, *L. R.* 2 *P. C.* 535; 38 *L. J. P. C.* 53 (1869); and *Winsor* v. *R.*, p. 189.

(2) Misdemeanor. In case of a conviction for misdemeanor a new trial may be granted at the instance of the defendant, where the justice of the case requires it; *Mawbey*, 6 *T. R.* at 638 (1796), p. 352; though "inferior jurisdictions" cannot grant a new trial upon the merits, but only for an irregularity; the cases on this point are collected in note (*b*) to *Oxford, Inhabs. of*, 13 *East* 416 (1811). A new trial will be granted after conviction on the ground of surprise. *Whitehouse*, *Dears. & P. C. C.* 1 (1852): acquittal at second trial. It must be moved within the first practicable seven days after the end of the assizes: Crown Office Rule 156, which does not apply to appeals from inferior courts, and it seems that there is no such appeal from quarter sessions: note in *East*, above, and *Pritchard's Quarter Sessions*, p. 354, *2nd ed.*, citing *Peters*, 1 *Burr.* 571 (1758). Where several defendants are tried at the same time for a misdemeanor, and some are acquitted and others convicted, the court may grant a new trial as to all those convicted, even if only one asks for it. *Mawbey*, above; *Gompertz*, 9 *Q. B.* 824; 16 *L. J. Q. B.* 121 (1846). It is a rule that all the defendants

convicted upon an indictment for a misdemeanor who join in the motion for a new trial must be present in court when it is made, unless a special ground be laid for dispensing with their attendance. *Teal*, 11 *East* 307 (1809); *Askew*, 3 *M. & S.* 9 (1814): *Crown Office Rule* (1906) 159; see *Short's ed.*, p. 71, on 1886 rules. In *Caudwell*, 2 *Den. C. C.* 72 *n.*; 21 *L. J. M. C.* 48; 17 *Q. B.* 503 (1851), the defendant had been convicted of perjury, and sentenced to seven years' transportation. On application being made in his absence for a new trial, Campbell C.J. said, "I have always considered it to be a hardship, where there are several defendants who have been found guilty on an indictment, not to allow one of them to move for a new trial, unless all the other defendants are present when the motion is made. But there can be no such hardship when there is but one defendant. In this case peculiarly, the defendant ought to be in court. Sentence has been passed, which he has hitherto evaded; and the court will not permit him to make the experiment of obtaining a new trial, without coming into court to abide the consequences in case we should refuse the rule." Where the defendant is liable to a fine only, it is not necessary that he should be present in court. *Parkinson*, 2 *Den. C. C.* 459; 21 *L. J. M. C.* 48 *n.* (1851).

No new trial can be had when the defendant is acquitted, although the acquittal was founded on the misdirection of the judge; *Cohen*, 1 *Stark. N. P.* 516 (1816); *Sutton*, 5 *B. & Ad.* 52 (1833), p. 515, where, however, the court suspended the judgment so as to give opportunity for a new indictment to be preferred (so *Southampton, Inhabs. of*, p. 292); or where a verdict is found for a defendant on a plea of *autrefois acquit*, "although that raises a collateral issue which may have been found in favour of the defendant on insufficient evidence." *Lea*, 2 *Moo. C. C. R.* 9; 7 *C. & P.* 836 (1837); 3 *Russ. Cri.* 354. In *Russell*, 3 *E. & B.* 942; 23 *L. J. M. C.* 173 (1854), pp. 504, 515, Coleridge J. was of opinion that whenever the substance of a criminal proceeding is civil (see p. 501), a new trial may be granted after an acquittal, on the ground either of misdirection or of the verdict being against the evidence (23 *L. J. Q. B.* 384); but Campbell C.J. and Crompton J. considered that the practice as to granting a new trial in a criminal case, after a verdict for the defendant, did not extend to the case where the defendant, if found guilty, might suffer fine and imprisonment: and they therefore held, that where an indictment charged the defendant with erecting an obstruction to the navigation of the Menai Straits, and the right to an oyster fishery was in question, the court ought not to grant a new trial after a verdict for the defendant. So upon trials for obstructing highways, where the defendants were acquitted, it was held that a new trial on the ground of misreception of evidence, misdirection, or that the verdict was against evidence, could not be granted. *Johnson*, 29 *L. J. M. C.* 133 (1860); *Duncan*, p. 200. See p. 501 and p. 515.

*Court for Crown Cases Reserved.**] See 7 E. 7, 23, 20 (4), p. 842. It must be borne in mind that if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the conviction is bad, notwithstanding that there is other evidence sufficient to warrant it. *Gilson*, 18 *Q. B. D.* 537; 56 *L. J. M. C.* 49 (1887); *C. C. R.* (where the contrary doctrine in *Ball*, p. 80, is attributed to the *reporter* (*Russ. & Ry.*); the correct report is *Camph.*); *Connor* v. *Kent*, (1891) 2 *Q. B.* at pp. 547, 556; 61 *L. J. M. C.* 9; *Makin* v. *Att.-Gen. of N. S. W.* p. 83.

By 11-12 V. 78, 1: "When any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or

* The *title* is not statutory: see, however, Judicature Act, 1873, s. 47, margin, and s. 100, p. 204.

gaol delivery, or court of quarter sessions, the judge, or commissioner, or justices of the peace before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons, &c.," [by 44–5 V. 68, 15 (repealed, p. 843), at least five judges of the High Court, of whom the Lord Chief Justice is, if possible, to be one], "and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment, until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognisance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be."

S. 2: "The judge or commissioner, or court of quarter sessions, shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the" court (above), which "shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said" court "the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said" court "shall be certified under the hand of the presiding chief justice . . . to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons for the execution of the judgment as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognisance of bail, if any; and if the court of oyer and terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session."

The unrepealed part of s. 3 is repealed by 7 E. 7, 23, 22, p. 843.

S. 4: The said court, "when a case has been reserved for their opinion shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended."

The following rules (with others, now obsolete) were promulgated by this court on the 1st June, 1850:—

(2) That every case transmitted for the consideration of this court briefly state the question or questions of law reserved, and such facts only as raise

the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment or the particular count.

(4) That every case state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognisance of bail to appear to receive judgment or to render himself in execution.

(5) That when any case is intended to be argued by counsel or by the parties, notice thereof be given to the clerk of this court at least two days previously to the sitting of the said court.

There are no fees. The court is assisted by the crown office.

Upon 11-12 V. 78, p. 201, it has been decided that a recorder has power to reserve questions of law under it; *Masters*, 1 *Den. C. C.* 332 (1848), p. 385; that the court is bound to examine the validity of the indictment though no questions be reserved upon it; *Webb*, 1 *Den. C. C.* 338; 18 *L. J. M. C.* 39 (1848), p. 659; that a question raised in the court below in arrest of judgment is a question arising "on the trial," and therefore properly reserved; *Martin*, 1 *Den. C. C.* 398; 18 *L. J. M. C.* 137 (1849) p. 742; but that the court has no jurisdiction to hear a case stated from the court below on a judgment given on demurrer, for the Court for C. C. R. has jurisdiction only after a conviction on trial by jury; *Faderman*, p. 172; nor *semble, per* Cresswell J., has it power to amend an indictment, and so make the jury a party to the finding; *Harris, Dears. & P. C. C.* 344; 23 *L. J. M. C.* 110 (1854).

When an amendment has been made by the court below, the Court for C. C. R. cannot consider the indictment as it originally stood. *Pritchard*, *L. & C.* 34; 30 *L. J. M. C.* 169 (1861), p. 555; *Webster*, p. 554.

Where the prisoner had pleaded guilty, and a case was reserved as to whether the act described in the depositions supported the indictment, it was held, that as there was no trial, this was not a point of law arising upon the trial, and that the Court for C. C. R. had therefore no jurisdiction. *Clark*, *L. R.* 1 *C. C. R.* 54; 36 *L. J. M. C.* 16 (1866); but see *Brown*, 24 *Q. B. D.* 357; 61 *L. T.* 594; 16 *Cox C. C.* 715—in which report there is a serious error—(1889); C. C. R., pp. 258, 778; followed in *Plummer*, p. 169. In *Clark*, the objection was, not to the indictment, but to the sufficiency of the proof, which the court thought distinguished it from *Brown*, where the objection was to the indictment. In the latter case the indictment was in fact read to the prisoner, and he might have objected to it, and the court held that the objection was in effect taken, and that, therefore, they had jurisdiction to entertain the case, as it was a point arising at the trial.

In Mellor, p. 183, it was doubted whether the court had power to order a *venire de novo*, but this power has been exercised in a case of misdemeanor. *Yeadon*, *L. & C.* 81; 31 *L. J. M. C.* 70; 9 *Cox C. C.* 91 (1861), p. 255.

The statute was held to apply to points of law arising upon a trial under a special commission. *Bernard*, 1 *F. & F.* 240 (1858).

With respect to the practice of the court, cases reserved should be submitted in a complete form; *Holloway*, 1 *Den. C. C.* 370; 18 *L. J. M. C.* 61 (1848), pp. 527, 548; in which case the court refused to send back the case for amendment. The court will look at the indictment for the purpose of assisting their judgment, although it be not set out in the case; *Williams*, 2 *Den. C. C.* 61; 20 *L. J. M. C.* 106 (1850), p. 477; but they will not consider an objection which has not been reserved, even though it be fairly deducible from the case itself, nor will they go into any matter of evidence which occurred at the trial, if it is not stated in the case. *Smith*, *Temp. & M.* 214; 14 *Jur.* 92 (1850). Where there are two judges of assize, and the one of them, who tries a criminal case, reserves a point, but dies before the case is stated, the other judge may state and sign the case.

Featherstone, Dears. & P. C. C. 369; 23 *L. J. M. C.* 127 (1854), p. 555. The Court for C. C. R. has no power to order the costs of the prosecution incurred by the case being reserved. *Dolan, Dears. & P. C. C.* 436; 24 *L. J. M. C.* 59 (1855), p. 735; *Inhabs. of Hornsea, Dears. & P. C. C.* 291 (1854). But in *Cluderoy*, 3 *C. & K.* 205 (1849), Williams J. held that he had power, under 7 G. 4, 64, 22, below, to allow the costs of the prosecution in such a case reserved. In *Lewis*, 1 *Dears. & B. C. C.* 326 (1857), p. 216, both these cases were confirmed, and Cockburn C.J. said, "We think it would be convenient that the officer of this court should examine into costs incurred in this court; and although this certificate cannot, in law, bind the taxing officer below, yet we have no doubt those officers will accept and consider as binding the certificate of the experienced officer of this court."

The invariable practice of this court is for the defendant's counsel to begin. *Inhabs. of Gate Fulford, Dears. & B. C. C.* 74 (1856).

Where a case reserved had been restated by order of the court, an application supported by affidavit to have it again restated was refused. *Studd*, 14 *W. R.* 806; 14 *L. T. N. S.* 633 (1866); *C. C. R.*, p. 438.

By 38–9 V. 77, 19, "subject to the first schedule" (of the Act) "and any rules of court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, *including the practice and procedure with respect to crown cases reserved*, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act." The words in italics are repealed by 7 E. 7, 23, 22. By the interpretation clause, 36–7 V. 66, 100, "Crown Cases Reserved" shall mean such questions of law reserved in criminal trials as are mentioned in 11–12 V. 78, 201. By 36–7 V. 66, 47, "the determination of any such question [of law arising in criminal trials] by the judges of the High Court in manner aforesaid shall be final and without appeal, and no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record as to which no question shall have been reserved for the consideration of the said judges" under 11–12 V. 78. See *Steel*, p. 571; *Fletcher*, 2 *Q. B. D.* 43; 46 *L. J. M. C.* 4 (1876); *C. A.*

5. COSTS.

Costs in cases of felony.] At common law there was no provision for the payment of costs in criminal cases. By 7 G. 4, 64, 22: "The court, before which any person shall be prosecuted or tried for any felony, is hereby authorised and empowered, at the request of the prosecutor, or of any other person who shall appear on recognisance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expences which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expences they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, bonâ fide have attended the court in obedience to any such recognisance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expences which he or she shall have bonâ fide incurred, by reason of attending

before the examining magistrate or magistrates, and by reason of such recognisance or subpœna, and also to compensate such person for trouble and loss of time, and the amount of the expences of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein shall be ascertained by the certificate of such magistrate or magistrates granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expences and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned."

By 19-20 V. 16, 13, the expenses of a prosecution removed into the Central Criminal Court under that Act may be ordered by that court to be paid, in the same way as if that court were holden under a commission of oyer and terminer and gaol delivery for the county or place in which the indictment was found. By s. 25 (slightly amended S. L. R. Act, 1898), when the trial at the Central Criminal Court is obtained by the crown, a sum not exceeding 20*l.* may be ordered by the King's Bench, or by a judge, to be paid by the Treasury to the person charged, to defray the expenses of the attendance of his witnesses. By s. 26, that court may order the expenses of any person, tried there not on his own application and acquitted, caused by the removal of the trial, to be repaid—deducting any advance made under s. 25, p. 207.

It has been much doubted whether, under 7 G. 4, 64, 22, upon which most of the other statutes depend, any costs can be awarded to a prosecutor or witness who had not been bound over or subpœnaed. Where, however, the prisoner (at assizes) had been apprehended under a bench warrant, and neither the prosecutor nor any of the witnesses were under recognisance to prosecute or to give evidence, and only one of the latter had been subpœnaed, Parke B. said that on comparing the words of 7 G. 4, 64, 22, relating to felonies, with those of the subsequent section, relating to misdemeanors (s. 23), it appeared to him that the court had authority in prosecutions for felony to award the prosecutor his costs, even although he was not under any recognisance; and his lordship accordingly granted the costs of the prosecution generally, including those of the witnesses. *Butterwick*, 2 *Moo. & R.* 196 (1839), p. 208. This section is extended by 29-30 V. 52, to expenses incurred in attending before an examining magistrate, although the parties may not be bound over by recognisance or subpœna, and although no committal for trial may take place. But a person not bound over, and who is not the prosecutor, but who assists in getting up a prosecution, is not entitled to any costs. *Cook*, 1 *F. & F.* 389 (1858); *Yates*, 7 *Cox C. C.* 361 (1857). In *Bushell*, 16 *Cox C. C.* 367 (1888), a wife was allowed the costs of her prosecution against her husband for assault, although she was not bound over to prosecute, the clerk to the magistrate having bound over the police to prosecute. "Where," said L. Coleridge C.J. "there is a private prosecutor, and that prosecutor conducts the case before the magistrates, I do not think the magistrates' clerk ought to step in and take the case out of the private prosecutor's hands."

It seems that in general no costs will be allowed before the trial has taken place; as when it is postponed. *Hunter*, p. 167. However, in a case of murder, which was postponed until the following assizes on the application of the prisoner, and in which the costs of the prosecution were very heavy, Alderson B. made an order for their payment. *Bolam*, p. 168: so stated in previous editions of this work. So where a trial for murder was postponed, as the prisoner had been removed to a lunatic asylum, Pollock C.B. did not allow the costs; but at the next assizes, on an affidavit of the prisoner being in a hopeless state of insanity, Patteson J. allowed the costs and bound

over the witnesses. *Dwerryhouse*, 2 *Cox C. C.* 446 (1847). And where on an indictment for felony in administering noxious drugs to procure abortion, an essential witness was ill and the trial was postponed, costs were allowed by Lush J. upon an affidavit by the prosecutor that he had paid 12*l.*, but that he was poor and quite unable to defray any further expenses. *Wilson*, 12 *Cox C. C.* 622 (1874), and *Dooley* (1871), in the note. By 33–4 V. 23, 3, p. 193, the court by which judgment is pronounced may condemn any person convicted of treason or felony to payment of the costs of the prosecution, or of part thereof, such payment to be made out of the moneys taken from the prisoner or to be enforced by "any person liable to pay or who may have paid the same" in the usual way in which costs are enforced in civil actions; and see s. 4 as to compensation for loss of or injury to property, p. 193. An order under this section is valid, notwithstanding that the prisoner was adjudged bankrupt between the arrest and the conviction. *Roberts*, *L. R.* 9 *Q. B.* 77; 43 *L. J. M. C.* 17 (1873). But a doubt is, perhaps, there implied whether the court could make the order where there was an act of bankruptcy before the arrest. See also p. 195. As to "*Costs of the accused*," see p. 208. Cf. p. 263.

Where murder was alleged in a borough but the death took place in the county, and the prisoner was only charged on the county coroner's inquisition, the borough magistrates having refused to commit, it was held that an order that the borough should pay the expenses of the prosecution was rightly made under 7 G. 4, 64, 12, 24, 25. *Re Brown; Ex parte Mayor, &c., Wigan*, 19 *Cox C. C.* 33 (1898).

Costs in cases of misdemeanor.] There is no general provision for the payment of costs in cases of misdemeanor, but in the case of nearly every misdemeanor of common occurrence it is specially provided for. By 7 G. 4, 64, 23: "Where any prosecutor or other person shall appear before any court, on recognisance or subpœna, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury, every such court is hereby authorised and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorised and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have bonâ fide attended the court in obedience to any such recognisance, to order payment of the expences of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony." Extended by 29–30 V. 52, p. 205, to magistrates.

By 14–15 V. 55, 2, the power of courts to allow expenses of prosecutions is extended to the following misdemeanors, namely, "unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony." Extended by 29–30 V. 52, as above.

By s. 18 of 48–9 V. 69, the court before which any misdemeanor indictable under the Act, or any case of indecent assault, shall be prosecuted may allow the costs of the prosecution in the same manner as in cases of felony, and may, in like manner, on conviction, order payment of such costs by the person convicted.

By 24–5 V. 100, 74: "Where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence." By s. 75, "The court may, by warrant under hand and seal, order such sum as shall be so awarded, to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease."

By s. 77: "The court, before which any misdemeanor indictable under the provisions of this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony."

It was thought that in the case of a common assault the costs cannot be granted by the court except as against the prisoner, under s. 74 (1 *Russ. Cri.* 94 *q.*; but in *Waldron*, 18 *Cox C. C.* 373 (1896), however, Grantham J. held that the court had power under s. 77 to allow costs in common assault.

If a person committing an indictable offence by night is apprehended under 14–15 V. 19, 11, p. 223, and assaults the person who apprehends him, or any of that person's assistants, and is convicted of such assault under s. 12, the costs of the prosecution may be allowed under s. 14. As to prosecutions by guardians, overseers, &c., see s. 73, p. 517.

By c. 96, s. 121; c. 97, s. 77; c. 98, s. 54—all of 24–5 V., similar provisions to s. 77, above, are made with respect to indictable misdemeanors against those Acts respectively.

By 24–5 V. 99, 42: "In all prosecutions for any offence against this Act in England, which shall be conducted under the direction of the solicitors of her Majesty's treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England which shall not be so conducted, it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order, &c.," as above, s. 77.

The sections as to the Central Criminal Court, set out, p. 205, apply to misdemeanors.

By 57–8 V. 60, 687, p. 214, the costs of prosecutions against British seamen for offences against property or person committed ashore or afloat in places out of her Majesty's dominions may be ordered to be paid "as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England," for which see s. 701. For other offences, see ss. 700–1 and 7 G. 4, 64, 22, p. 204.

As to highways, see p. 514.

By 32–3 V. 62, 17: "Where the prosecution of the bankrupt under this Act is ordered by any court, then on the production of the order of the court, the expenses of the prosecution shall be allowed, paid, and borne as expenses of prosecutions for felony are allowed, paid, and borne."

By 12–3, V. 45, 5: "Upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, &c." See *Pritchard's Quarter Sessions, 2nd ed.*, p. 472.

Costs under 46–7 V. 51, are regulated by s. 57, p. 285; under 50–1 V. 28, by s. 14, and 54–5 V. 15, 2 (extended to Board of Agriculture by 57–8 V. 19, 1); under 52–3 V. 69, by s. 5; under 52–3 V. 52 (extended to Census Acts by 63–4 V. 4) by s. 4; and under 4 E. 7, 15, by s. 20 (1); p. 328.

In misdemeanors, the expenses of prosecutors not under recognisance or of witnesses who have not been subpœnaed cannot be allowed. *Dunn*, p. 176. And it is very doubtful indeed whether the costs of a prosecutor, not bound over to prosecute, can be granted; *Jeyes*, 3 *A. & E.* 416 (1835); from which it would seem they cannot; and see *Butterwick*, 205. But if the prosecutor's name be included in a subpœna, he gets both prosecutor's and witness's expenses. *Sheering*, 7 *C. & P.* 440 (1836).

In the case of misdemeanors not provided for by statute, if the defendant submits to a verdict on an understanding that he shall not be brought up for judgment, the prosecutor is not, without a special agreement, entitled to costs. *Rawson*, 2 *B. & C.* 598; 4 *D. & R.* 124 (1824).

Costs of the accused.] By 30–1 V. 35, 2, p. 826, provision is made for the payment by the prosecutor of the costs of one acquitted in the case of certain vexatious indictments. The public prosecutor stands under 42–3 V. 22, 7 (cf. p. 197), in the same position with regard to costs as a private prosecutor, and may be ordered to pay the costs of the accused, but *only* if the original prosecutor has given security for costs. *Stubbs* v. *Director of Public Prosecutions*, 24 *Q. B. D.* 577; 59 *L. J. Q. B.* 201 (1890). Cf. *Stubbs*, 16 *Cox C. C.* 219 (1886): no other security for costs by a prosecutor than by recognisance seems to be known. And by 30–1 V. 35, 3, 5, p. 827, witnesses for the accused (not merely to character) may be allowed their expenses.

By 3 E. 7, 38, 1 (1): "Legal aid" may be granted to a "poor prisoner," regard being had to the nature of his defence as disclosed in the proceedings before the committing justices: (2) *ib.*, regulates the expenses thus incurred, including those of witnesses; they are subject to rates and scales allowed by a secretary of state. Those promulgated in December, 1903, are printed *Statutory Rules and Orders, Revised* to Dec. 31, 1903, *Crim. Proc. Eng.*, p. 6. The Rules under this Act are printed *Stat. R. & O.*, 1904, p. 123.

Rewards for the apprehension of offenders.] By 7 G. 4, 64, 28: "Where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary, or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen, every such court is hereby authorised and

empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable, and sufficient to compensate such person or persons for his, her, or their expences, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace, to have been active in or towards the apprehension of any party charged with receiving stolen property knowing the same to have been stolen, such court shall have power to order compensation to such person in the same manner as the other courts hereinbefore mentioned; provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expences and compensation, as courts are by this Act empowered to allow to prosecutors and witnesses respectively." By 14–15 V. 55, 8, the power of the court of sessions in this particular is extended to all the offences mentioned in s. 28, above, "which such sessions may have power to try," and "provided that such compensation to any one person shall not exceed the sum of five pounds."

It was held by Hullock B. that the case of *sacrilege* was not included in the above section, not coming within the words *burglary* or house-breaking. *Robinson*, 1 *Lew. C. C.* 129 (1828). On the authority of this case, Bolland B. refused a similar application, though both he and Parke B. would otherwise have been disposed to put a different construction upon the statute. *Ib.* But where a woman was indicted for an attempt to murder her child by suffocating it, Patteson J. allowed the constable his extra expenses in apprehending the prisoner, being of opinion that the case was within the spirit and intention of the section, though not within the words. *Durkin*, 2 *Lew. C. C.* 163 (1837). It has been held, however, by Maule J. that a stealing from the person is not within the words "robbery on the person." *Thompson*, *York Spr. Ass.* 1845, *MS.* Under the word "exertions" in the above clause, Parke B. ordered a prosecutor a gratuity of five pounds for his courage in apprehending the prisoner. *Womersly*, 2 *Lew. C. C.* 162 (1836).

By 7 G. 4, 64, 29, there is a fee of five shillings to the officer of the court (except at quarter sessions, s. 8, above) for such an order.

Allowance to the widows and families of persons killed in endeavouring to apprehend offenders.] By 7 G. 4, 64, 30: "If any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned [in s. 28, p. 208], it shall be lawful for the court, before whom such person shall be tried, to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet: and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner" mentioned in s. 29.

Scales of costs, compensation, &c.] Under 14–15 V. 55, 5, a secretary of state may make regulations as to these. The last were put forth in June, 1904, and are printed *Stat. Rules and Orders*, 1904, pp. 117–23.

D. VENUE.

14–15 V. 100, 23.] See p. 163. In general, the offence must on the face of the indictment appear to have been committed within the jurisdiction of the court before which the prisoner is tried; and if it appear by the evidence that the venue of the offence, *i.e.* the place where it was committed, is not the same as that mentioned in the indictment, the variance unamended would be fatal.

But the strictness of this rule has been modified in various ways, so that of late years but little attention has been paid to questions of venue, partly in view of provisions scattered through various Acts of parliament. See, for instance, in the case of corrupt practices, p. 287. Sometimes an Act provides an alternative venue, *e.g.* for the summary jurisdiction of offences against trade unions, 39–40 V. 22, 5.

Formerly, it was necessary in the narrative of the offence itself to show the venue; now, by 14–15 V. 100, 23: "It shall not be necessary to state any venue in the body of any indictment; but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that, in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment, by way of venue." See p. 212, and as to local description, p. 484.

By s. 24, p. 824, no indictment for any offence shall be held insufficient for want of proper or perfect venue.

By s. 1, pp. 177, 821, power is given to the court in any indictment for felony or misdemeanor to amend a variance between the statement therein and the evidence in proof thereof, "in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in such indictment."

By 39–40 V. 57, there is power by order in council to unite neighbouring counties for the purpose of winter assizes, *i.e.* in November, December, or January ("by reason of the small number of prisoners or otherwise"). September and October are brought within that Act by 40–1 V. 46, and by 42–3 V. 1, that Act is extended to spring assizes, *i.e.* in March, April, and May. As to the jurisdiction of the Central Criminal Court under these Acts, see p. 219.

The effect of these provisions appears to be that only two objections are now of much importance with respect to the venue. First, that on the face of the record it appears that the court has no jurisdiction; secondly, that the evidence shows that the court has no jurisdiction. And even the first of these objections may sometimes be overcome by an exercise of the power of amendment.

If it appears upon the face of the record that the court has no jurisdiction a conviction cannot be sustained without amendment, notwithstanding that the court really had jurisdiction to try the offence. *Mitchell*, 2 *Q. B.* 636 (1842).

Offences committed on the boundary of counties, or partly in one county and partly in another.] By 7 G. 4, 64, 12: "Where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein."

It has been held, that the section does not extend to trials in limited jurisdictions, but only to county trials. *Welsh*, 1 *Moody C. C.* 175 (1827: no jurisdiction in Southwark quarter sessions held under a charter of E. 6). Nor does it enable the prosecutor to lay the offence in one county and try it in another; but only to lay *and* try it in either. *Mitchell*, above. It applies to offences which are local in their nature, such as burglary, as well as to larcenies and other transitory felonies. [The distinction is now obsolete.] *Ruck, Hereford Spr. Ass.* 1829; 2 *Russ. Cri.* 46. Questions frequently arise as to whether any material part of an offence has been committed in a particular county where the trial is had, and instances will be found, pp. 386, 424, 562.

Offences committed in detached parts of counties.] By 2–3 V. 82, 1, justices of the peace for any county may act as justices in all things relating to any detached part of any other county, which is surrounded in whole or in part by the county for which such justices act, "and all offenders in such detached part may be committed for trial, tried, convicted and sentenced, and judgment and execution may be had upon them, in like manner as if such detached part were to all intents and purposes part of the county for which such justices" act.

It has been held that the grand jury for the county which wholly surrounds a detached part of another county, may find an indictment for an offence committed in such detached part, and that the prisoner may be tried by a jury of such surrounding county. *Loader* (1840), *Dickinson's Quarter Sessions, 5th ed.* (by Talfourd), p. 188 *e*; 1 *Russ. Cri.* 7 (*w*).

Offences during a journey or voyage.] By 7 G. 4, 64, 13: "Where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever, employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever, employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties through or adjoining to or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such

felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county."

The offence must be committed "in or upon the coach," to bring it within the above s.; therefore, where a guard of a coach, on changing horses at some distance from Penrith in Cumberland, carried a parcel to a privy, and, while there, took two sovereigns from it, Parke B. held, that he must be tried in Westmoreland, where the felony was committed. *Sharpe*, 2 *Lew. C. C.* 233 (1836). This s. is not limited to the carriage of common carriers and public conveyances. *Sharpe, Dears. & P. C. C.* 415; 24 *L. J. M. C.* 40; 6 *Cox C. C.* 418 (1854).

Offences committed in the county of a city or town corporate.] By 38 G. 3, 52, 23, a prosecutor *may* prefer his bill of indictment for any offence committed within the county of any city or town corporate, to the jury of the county next adjoining, and the offender *may* be there tried in the same way as if the offence had been committed in the county: and so he may if the bill is found by the jury of the county-city, or town corporate. Now the cities of London and Westminster and the borough of Southwark are alone exempted from this Act (s. 10). See 45–6 V. 50, 188, and sched. 6 (below).

By 14–5 V. 55, 19: "Whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which her Majesty has not been pleased for five years next before the passing of this Act to direct a commission of oyer and terminer and gaol delivery to be executed, and until her Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this Act, and the recognisances to appear to prosecute and give evidence taken by such justice, justices, or coroner, shall, in all such cases, be conditioned for appearance prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county; . . . and the justice, justices, or coroner, by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognisances, and inquisitions relative to such persons, at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice, or justices, or coroner having authority so to commit, and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer or general gaol delivery for such adjoining county, as in the case of persons charged with offences of the like nature committed within such county." By s. 24 and 45–6 V. 50, 242 (2) and sched. 9 Pt. 2, Northumberland is the next adjoining county to Berwick-upon-Tweed and Newcastle-upon-Tyne; Gloucestershire to Bristol; Cheshire to Chester; Devonshire to Exeter; and Yorkshire to (Kingston-upon-)Hull, as in sched. 6. As to Hull and Newcastle this repeats 38 G. 3, 52, 9.

The proviso of 14–15 V. 100, 23, set out, p. 210, is a very clumsy enactment; probably what it means is, that the offence may be laid in the county corporate, and tried in the county adjoining; but that is exceedingly awkward, and it is better to follow the direction given in *Arch. Crim. Pl.*, 12*th ed.*, p. 23, and state it thus: "County of Chester (being the next adjoining county to the county of the city of Chester), to wit."

An important alteration has been made in the boundaries of some counties by the Boundary Act, 2-3 W. 4, 64, and 45-6 V. 50, 228, so that if a felony

be now committed in that part of the county of a town which has been added to it by these Acts, it is triable within the county of the town. The prisoner was indicted for wounding with intent to do grievous bodily harm. The offence was committed at a place which was added to the borough of Haverfordwest, which is a county of itself, by the Boundary Act, and declared by 5-6 W. 4, 76, to be part of the borough, the place in question not having been within the borough before the passing of those Acts. It was held that the prisoner might be tried by a jury of the county-borough. *Piller*, 7 *C. & P.* 337 (1836). In *JJ. of Gloucestershire*, 4 *A. & E.* 689 (1836), it was held that the effect of these statutes was to transfer the jurisdiction entirely and for all purposes out of one county into the other, so that "Clifton is now a part of Bristol, and not of the county of Gloucester."

Offences committed at sea—jurisdiction of the court of admiralty.] The jurisdiction of the court of admiralty, according to Blackstone, extends to "all crimes and offences committed either upon the sea or on the coasts out of the body or extent of any English county," 4 *Black. Com.* 268. See p. 564. The jurisdiction is expressly extended by 15 R. 2, 3, to death and mayhem happening in great ships being and hovering in the streams of great rivers, and so within the extent of a county. And there are certain parts of the sea which, as being *intra fauces terræ*, are considered as belonging to the adjoining counties, and as to these the court of admiralty has a concurrent jurisdiction. Thus, a murder was committed in Milford Haven, seven or eight miles from the river's mouth, and sixteen miles below any bridge across the river; the passage where the murder was committed was about three miles across, the water was always perfectly salt, and the place itself about twenty-three feet deep, and never known *to be dry but at very low tides*. Sloops and cutters of one hundred tons were able in spring tides to navigate where the body was found, and nearly opposite the place men-of-war were able to ride at anchor. The deputy vice-admiral of Pembrokeshire had of late employed his bailiff to execute process in that part of the haven. The judges were unanimously of opinion that the trial was rightly had at the admiralty sessions at the Old Bailey, though the place was within the body of the county of Pembroke, and although the courts of common law had concurrent jurisdiction. During the discussion, the construction of the statute 28 H. 8, 15 (as to the meaning of "in any other haven, river, creek or place where the admiral or admirals have or pretend to have power, authority, or jurisdiction"), by L. Hale, 2 *P. C.* 16–7, was much preferred to the doctrine of L. Coke, 3 *Inst.* 111, 4 *Inst.* 134–5, who seems to doubt the concurrent jurisdiction; and most, if not all the judges seemed to think that the common law had a concurrent jurisdiction in this haven, and in other havens, creeks, and rivers in this realm. *Bruce*, 2 *Leach* 1093; *Russ. & Ry.* 243 (1812). See also *Cunningham*, 28 *L. J. M. C.* 66 (1859), where a ship in the Bristol Channel, three-quarters of a mile from Glamorganshire, was held to be "within the body" of that county.

With regard to the sea shore, it is clear that the common law and the admiralty have alternate jurisdiction between high and low water mark. 3 *Inst.* 113; 2 *Hale P. C.* 17.

As to offences against ships in the King's navy, see pp. 240, 771. As to mutiny, see p. 520. As to the Post-office Acts, see p. 708.

Both the public and private vessels of every nation on the high seas and out of the territorial limits of any other state are subject to the jurisdiction of the state to which they belong. Every offence committed upon the high seas on board a British ship (as to what is sufficient evidence to prove that a ship is a British ship, see *Bjornsen, L. & C.* 545 (1865); *Seberg, L. R.* 1 *C. C. R.* 264; 39 *L. J. M. C.* 133 (1870); *Leary* v. *Lloyd*, 29 *L. J. M. C.*

194; 3 *E. & E.* 178 in 1860), whether by a subject of this country or a foreigner, is within the jurisdiction of any court in the dominions of the crown which would have had cognisance of the offence if it had been committed on a British ship within its ordinary jurisdiction. *Lopez* and *Sattler, Dears. & B. C. C.* 525 (1858): now under 57-8 V. 60, 686, 1 (extended 4 E. 7, 24, 1, 5, and 5 E. 7, 13, 7, 2); ss. 686–7 (below) also provide for other offences abroad.

An offence by a British subject committed on board a British ship within the dominions of a foreign state, or on a foreign ship to which he does not belong, is expressly within s. 686. Even before that Act it was decided that even when a British ship is within foreign dominions, if it be where great ships go, it is in effect upon the high seas, and the Admiralty has jurisdiction. *Anderson, L. R.* 1 *C. C. R.* 161; 38 *L. J. M. C.* 12 (1868), where one American citizen killed another, both serving aboard, the offence having been committed on the Garonne, a river "where the tide ebbs and flows and where great ships go."

In *Carr*, 10 *Q. B. D.* 76; 52 *L. J. M. C.* 12 (1882), *C. C. R.*, some bonds were stolen from a British ship moored to the quay at Rotterdam, within the ebb and flow of the tide, below bridges, and where great ships go; the receivers were held to be rightly tried in this country, as the larceny took place within the jurisdiction of the admiralty; the court considered the fact that here it was not shown that the thief was a sailor, serving aboard, to be immaterial, holding the true principle to be that a person coming on board a British ship where English law is reigning "becomes entitled to our law's protection," and "as a correlative . . . becomes amenable to its jurisdiction."

By 57–8 V. 60, 687: "All offences against property or person, committed in or at any place, either ashore or afloat, out of her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner, and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the admiralty of England"; p. 207.

There seems to be no express decision whether the jurisdiction of the admiralty extends *at common law* to offences committed by British subjects on board foreign vessels on the high seas; as to statutes, see ss. 686–7, above. It seems very doubtful whether an offence committed within the territorial limits of a foreign country by a subject of this country is cognisable by any of our courts, p. 217; but, in any case, no inference can be drawn from foreign territory to a foreign private ship, for the theory that in law a foreign private ship is part of the foreign country is "an inadmissible fiction." *Hall, Internl. Law, 5th ed.*, Pt. 2, ch. 4, p. 201; ch. 6, p. 248; whence it appears that foreign private vessels lying in ports, do in fact, "enjoy a varying amount of immunity from the local jurisdiction by the practice of most and perhaps of all states," and that there is probably a *concurrent* jurisdiction of both states.

At any rate, it is clear that foreign subjects upon foreign vessels on the high seas are not subject to our jurisdiction. *Keyn*, below. It was sought by six judges to extend the jurisdiction of the admiralty beyond the rivers, &c., to three miles below low water mark, in *Keyn* (The Franconia), 2 *Ex. D.* 63; 46 *L. J. M. C.* 17, 63 (1876); *C. C. R.*, where seven judges held (against the six) that there was no jurisdiction in this country to try a foreigner for manslaughter committed on a foreign ship within (or without) the three-mile limit. But now, by 41–2 V. 73, 2, an indictable offence committed either by a British or foreign subject on the open sea, whether on a

foreign ship or not, within one marine league from low water mark (s. 7), is within the jurisdiction of "the admiralty." In the case of a foreigner the certificate of the secretary of state or the governor of a colony to the effect that it is expedient that proceedings should be instituted must first be obtained.

Public ships, even in a foreign port, are "not subject to the territorial jurisdiction," *Hall*, above, p. 194, so that offences on board these are offences against the municipal law of the country to which the ship belongs, and in this country would at common law be cognisable by the court of admiralty.

By engaging in piracy a person becomes *hostis humani generis*, and forfeits all claim to protection from his own country. Any country, therefore, may assume to punish him, whether he be a subject of that country or not, and wherever the offence is committed. In England this offence comes within the jurisdiction of the admiralty (41–2 V. 73, 6).

As to Smuggling, see p. 774.

Offences committed within the jurisdiction of the admiralty—where tried.] By 4–5 W. 4, 36, 22: "it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commissions to be issued under the authority of this Act or any two or more of them to inquire of, hear, and determine any offence or offences committed, or alleged to have been committed on the high seas, and other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to or detained therein for any offence or offences alleged to have been done and committed upon the high seas within the jurisdiction of the admiralty of England; and all indictments found and trials and other proceedings had and taken by and before the said justices and judges shall . . . be valid and effectual to all intents and purposes whatsoever." Cf. p. 747.

A more general provision was subsequently made by 7–8 V. 2, 1: "her Majesty's judges of assize or others her Majesty's commissioners, by whom any court shall be holden under any of her Majesty's commissions of oyer and terminer and general gaol delivery, shall have separately and jointly all the powers which by any Act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the admiralty of England . . . and to deliver the gaol in every county and franchise within the limits of their several commissions of any person committed or imprisoned therein for any offence alleged to have been committed upon the high seas and other places within the jurisdiction of the admiralty of England; and all indictments found, and trials and other proceedings had by and before the said justices and commissioners shall be valid." S. 2: "In all indictments preferred before the said justices and commissioners under this Act the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had: and all material facts which in other indictments would be averred to have taken place in the county where the trial is had, shall in indictments preferred under this Act be averred to have taken place 'on the high seas.'"

By 24–5 V. 96, 115: "All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence, or for being an accessory to any such offence, the venue in the margin shall be the same as if the offence had

been committed in such county or place, and the offence itself shall be averred to have been committed 'on the high seas'; provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces."

The prisoner having stolen goods in a British ship on the high seas was afterwards apprehended and tried in the borough of Southampton, it was held, under s. 115, rightly. *Peel, L. & C.* 231; 32 *L. J. M. C.* 65 (1862).

C. 97, 72; c. 98, 50; c. 99, 36; and c. 100, 68—all of 24-5 V.—contain the provisions of s. 115.

By 24-5 V. 94, 9: "Where any person shall, within the jurisdiction of the admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed 'on the high seas': provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces."

Offences committed partly at sea and partly on land.] By 24-5 V. 100, 10, pp. 591, 610: "Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county, or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been committed in that county or place."

This section would not apply to a person standing on the shore and firing a loaded musket at a cutter on the high seas, which would be an offence committed entirely within the jurisdiction of the admiralty; *Coombe*, 1 *Lea. C. C.* 388 (1785), which, however, only decides that the admiralty has jurisdiction, not that the common law has not; Hawkins, however, says this is a case of piracy (p. 700); 1 *P. C.* Bk. 1, ch. 37, s. 17, and see 1 *East P. C.* 367; nor would it apply to the case of a foreigner feloniously struck by another foreigner on board a foreign ship, and dying on land in England, which is not an offence cognisable by our laws. *Lewis, Dears. & B. C. C.* 182 (1857), p. 204.

Offences committed abroad, i.e. *out of the United Kingdom.*] For "United Kingdom," see p. 218. Cf. pp. 213–4, and *Garrett*, p. 409. Criminal acts committed by a British subject abroad "are usually left to the courts of the local sovereign, who is in general much more interested in their due punishment than is the country of the criminal. But there are few states which refuse to take cognisance of any criminal act done by their subjects when in foreign territory; the principle of concurrent jurisdiction is maintained; and certain crimes, ordinarily of a kind more or less affecting the state, can be punished on the return of the criminal to the jurisdiction. Though Great Britain has acted to a very limited extent upon the principle, and has not had

frequent occasion to give effect to it of late years, the liability of a subject to be made answerable for crimes committed out of the jurisdiction has been affirmed by statute for more than three centuries and a half." *Hall, Foreign Power and Jurisdiction of the British Crown* (1894), Pt. 1, ch. 1, p. 12; citing 33 H. 8, 23 (repealed 9 G. 4, 31, 1, and 74, 125), and 35 H. 8, 2, still in force; and *Governor Wall*, 28 *State Tr.* 51 (1802), under 33 H. 8, and *Azzopardi*, 2 *Moo. C. C.* 288 (1843, murder), under 9 G. 4, 31, 7 (repealed 24–5 V. 95, 1).

For instances of acts done abroad either constituting an offence here or having an effect here, see p. 426 and *Index* "Abroad."

In the case of *Kohn*, a Prussian ship's carpenter conspired at Ramsgate with certain other Prussians to scuttle, and did scuttle, a Prussian ship. Kohn was indicted for the conspiracy. The question left to the jury by Willes J. was, whether it was agreed and consented to by and between the prisoner and any other person at Ramsgate, that the ship should be destroyed *whether at sea or in port*, and it was distinctly laid down that the offence of conspiracy would be complete "if the conspiracy was in this country, although the overt acts were abroad" (which must here include the high seas, as, in fact, "the principal offence . . . casting away the vessel" was committed there; for which, as it was not piracy, prisoner could not be indicted here): acquittal. *Kohn*, 4 *F. & F.* 68 (1864), p. 359; *Most*, p. 359.

By 24–5 V. 100, 9, pp. 591, 610: "Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of her Majesty or not, every offence committed by any subject of her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such persons might have been tried before the passing of this Act." As to s. 4, see *Most*, p. 359. S. 57 (p. 271) applies outside the King's dominions, *Earl Russell*, 1901, *A. C.* 446; 20 *Cox C. C.* 51 (bigamy); H. L., p. 279. As to marriage abroad, see p. 400.

By 33–4 V. 90, 2: "The Act shall extend to all the dominions of her Majesty, including the adjacent territorial waters."

By s. 11: "If any person within the limits of her Majesty's dominions, and without the licence of her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state the following consequences shall ensue: (1) Every person engaged in such preparation or fitting out or assisting therein or employed in any capacity in such expedition shall be guilty of an offence against this Act."

On an indictment under this section alleging that "within the limits of her Majesty's dominions," certain offences were committed, it was held that the indictment sufficiently alleged the Act to have been in operation in that part of the dominions, and further, that if there be an unlawful preparation of an expedition by some person within those dominions, any British subject who assists in such preparation will be guilty of an offence, although he renders assistance from a place outside them (and apparently if he be employed in such expedition *outside* them). *Jameson*, (1896) 2 *Q. B.* 425; 65 *L. J. M. C.* 218; 18 *Cox C. C.* 392, p. 190; (as to the indictment, see p. 73), where L. Russell C.J. lays it down that statutes *primâ facie* apply only to the United Kingdom (see below); where, as here, it is applicable to the crown's

dominions it applies to all persons therein, including foreigners, "and according to its context it may be taken to apply to the Queen's subjects everywhere."

46–7 V. 3, 3, and s. 687 on p. 214, are other instances of the law relating to the jurisdiction of the crown over British subjects in foreign countries, which is consolidated by 53–4 V. 37.

As to the Extradition of criminals, and the trial of criminals surrendered to this country, see 33–4 V. 52 (s. 27 partly repealed, S. L. R. 1883); 36–7 V. 60, and 88, 28; 44–5 V. 69 (ss. 40, 41, and sched. repealed, S. L. R., 1894), p. 793, and 58–9 V. 33: *Ex parte Bouvier*, 42 *L. J. Q. B.* 17; 12 *Cox C. C.* 303 (1872); *Weil*, 9 *Q. B. D.* 701 (1882); *Re Castioni*, (1891) 1 *Q. B.* 149; 60 *L. J. M. C.* 22; *Re Bellencontre*, (1891) 2 *Q. B.* 122; 60 *L. J. M. C.* 83; *Re Meunier*, p. 110; *Re Arton*, (1896) 1 *Q. B.* 108, 509; 65 *L. J. M. C.* 23, 50; *Re Galwey*, (1896) 1 *Q. B.* 230; 65 *L. J. M. C.* 38; *Spilsbury*, 19 *Cox C. C.* 160 (1898), 303 (v. *R.*, 1898; Judicial Committee); *Ex parte Siletti*, 20 *Cox C. C.* 353 (1902); *Ex parte Percival*, 23 *T. L. R.* 238 (1907). For 33–4 V. 52, 15, see p. 67. In a case of this class, Loreburn C. is reported to have said, "every question affecting public liberty should, if possible, be heard in public, with the safeguard of publicity" (*ex parte Lapierre*: the *Times*, Aug. 7, 1906: *Law Journal*, Aug. 11, 1906).

Property feloniously taken in one part of the United Kingdom and carried into another.] "The primary meaning of the 'United Kingdom' is Great Britain and Ireland . . . but the phrase does not include the Channel Islands or the Isle of Man." *Stroud's Judicial Dictionary* (*United Kingdom*), where see the cases cited, and cf. p. 564. By 24–5 V. 96, 114: "If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen, or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part: and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part." Cf. pp. 562, 733.

The Central Criminal Court.] By 4–5 W. 4, 36, 2, the jurisdiction of the Central Criminal Court extends over all offences committed within the city of London and county of Middlesex, and those parts of the counties of Essex, Kent, and Surrey, within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead St. Mary, Woodford, and Chingford, in Essex; Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is within the county of Kent, the liberty of Kidbrook and the hamlet of Mottingham in Kent; and the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the county of Surrey, Tooting, Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the Clink liberty, and the district of Lambeth palace, in the county of Surrey.

By s. 3, the district situated within the limits of the jurisdiction therein-

before established is to be deemed one county for all purposes of "venue, local description, trial, judgment, and execution not herein specially provided for"; and in all indictments and presentments the venue laid in the margin shall be "Central Criminal Court, to wit," and all offences and material facts (which would otherwise be laid in the county) are to be laid to have been committed and averred to have taken place "within the jurisdiction of the said court"; see also 9–10 V. c. 24. By 51–2 V. 41, 89 (1), 4–5 W. 36 is to be construed as if the county of London were throughout mentioned therein as well as the county of Middlesex.

Under 39–40 V. 57 (and so under the other Assizes Acts, p. 210), the jurisdiction of the court may be extended "to any neighbouring county or part of a county," *i.e.* neighbouring to "the Central Criminal Court district," "with such modifications and exceptions (if any) as to her Majesty may seem fit." *Neighbouring* here has been interpreted as "the home counties" (*Encycl. of Laws of England: Central Criminal Court*), but, it seems, that this is a merely popular phrase with varying meanings or applications. Since 1876 cases from Berks, Herts and Sussex have, in fact, been tried at the Central Criminal Court.* For an instance of an Order in Council conferring jurisdiction on that court in these counties and "such parts of the counties of Essex, Kent and Surrey as are not included in the Central Criminal Court District," see *London Gazette*, Oct. 27, 1876 (vol. 2, pt. 2), p. 5664. Thus Berks, which does not touch Middlesex, has been considered as neighbouring to the "C. C. C. district," while Bucks, which does, never has (cf. p. 564); neither were on the "Home" Circuit which in 1845 included Herts, Essex, Sussex, Kent and Surrey (*Report of Circuit Regulation Commission*, p. 126).

Where an indictment for misdemeanor was preferred at the Central Criminal Court, and the marginal venue was "Central Criminal Court, to wit," and in the body of the indictment the facts were stated to have taken place "at the parish of St. Mary Lambeth, Surrey, within the jurisdiction of the said court," and the indictment was removed by *certiorari*, it was held that the trial must be at the assizes for Surrey. *Connop*, 4 *A. & E.* 942 (1836). See also, as to the venue of the Central Criminal Court, *Gregory*, 7 *Q. B.* 274; 1 *Cox C. C.* 198; 14 *L. J. M. C.* 82 (1845).

An indictment for misdemeanor at the Central Criminal Court had in the margin the words, "Central Criminal Court," and stated that M.A., "late of the parish of *St. Stephen, Coleman-street*, in the city of *London*, and within the jurisdiction of the said Court," "at the parish aforesaid, and within the jurisdiction," &c., did—alleging the offence without further statement of venue. The indictment was removed by *certiorari* and tried in London, and the defendant was convicted. On motion in arrest of judgment, *semble*, that the venue assigned to the material fact appeared sufficiently to be in the city of London; and it was held, assuming this to be otherwise, that the defect was only want of a proper or perfect venue, and was cured by 7 G. 4, 64, 20 (repealed S. L. R. 1873), p. 425, for that the indictment showed jurisdiction in the court at nisi prius to try in London. "This Court (Q. B.)," said Patteson J. "has jurisdiction over any indictment removed into it, let the venue be where it will." *Albert*, 5 *Q. B.* 37 (1843). Where not one of the five† counties in which the jurisdiction of that Court existed was mentioned in the indictment, and the material facts were laid only as having taken place "within the jurisdiction of the said court," and the defendant, having removed it by *certiorari*, was tried at nisi prius in Middlesex and found guilty; the Queen's Bench arrested the judgment, the description of place not being made sufficient by s. 3, above, in cases not tried at the

* Information kindly supplied by the officials of that court.

† *Sic per* L. Denman C.J.; including the county of the City of London.

Central Criminal Court, and the defect not being cured by s. 20 above, the Nisi Prius Court not appearing "by the indictment," "to have had jurisdiction over the offence." The court refused, after verdict, to enter a suggestion [allegation; *Sweet, Law Dict.*] of a trial in Middlesex, *nunc pro tunc*. And, *semble*, such an application would not be granted at any period. An indictment preferred in the Central Criminal Court should, with a view to the possibility of its removal, contain, besides the statutory venue, a venue of the county where the offence really took place. And if that has not been done, it should be made a condition of the removal by *certiorari* that the defendant consent to the insertion. *Stowell*, 5 *Q. B.* 44 (1843); and see also *Gregory*, above; *Hunt*, 10 *Q. B.* 925; 17 *L. J. M. C.* 14 (1847); and *Smythies*, 1 *Den. C. C. R.* 498; 19 *L. J. M. C.* 31 (1849), p. 279, p. 479. On an indictment found at the Central Criminal Court for perjury committed in London, within the jurisdiction of the Central Criminal Court, afterwards removed by *certiorari* into the Queen's Bench, Middlesex was specified in the *certiorari* as the county of trial, and the jury were taken from that county; it was held that the Queen's Bench had a discretion to name in the *certiorari* the county or jurisdiction in which the trial was to take place, and that by the jurors summoned from that jurisdiction the same issues could be tried that would have been tried in the Central Criminal Court. *Castro, L. R.* 9 *Q. B.* 350; 30 *L. T.* 320 (1874); 28 *L. T.* 342 (1873), p. 73. By "Palmer's Act," 19–20 V. 16, 1, the King's Bench has power to order in certain cases indictments found for felonies or misdemeanors committed out of the jurisdiction of the Central Criminal Court, and removed by *certiorari*, to be tried at that Court. By 46–7 V. 51, 50 (p. 284), indictments under it or the Corrupt Practices Prevention Acts (enumerated in *Index*) may, under certain circumstances, be tried there, or, if with a special jury, at the Royal Courts of Justice. Offences under the Official Secrets Act, 1889, 52–3 V. 52 (extended to Census Acts, 63–4 V. 4 & 6, pp. 673, 674), if alleged to have been committed out of the United Kingdom, may by s. 6 (2) also be tried there. For other cases, see Index, *Venue.*

Change of venue.] When a fair and impartial trial cannot be had in the county where the venue is laid, the King's Bench (the indictment being removed thither by *certiorari*, p. 164) will, upon an affidavit stating that fact, permit a suggestion to be entered on the record, so that the trial may be had in an adjacent county. Good ground must be stated in the affidavit for the belief that a fair trial cannot be had. *Harris*, 3 *Burr.* 1330; 1 *W. Bl.* 378 (1762). Cf. *Clendon*, 2 *Barn.* 6; 2 *Str.* 911 (1731), where a house stood partly in one county and partly in another; the court objected to changing the venue. This suggestion need not state the facts from which the inference is drawn that a fair trial cannot be had. *Hunt*, 3 *B. & Ald.* 444 (1820), p. 4. This suggestion when entered is not traversable. *Harris*, at 1333; 1 *Chitty Crim. Law*, 201. And the venue in the indictment remains the same, the place of trial alone being changed. *Ib.* In *Casey*, 13 *Cox C. C.* 614 (1877: libel), the Irish Q. B. refused to entertain a suggestion that a fair trial could not be had because defendant could not afford to pay the fares of his witnesses, and appear to have been of opinion that the venue in a criminal case will not be changed, but in two subsequent cases of murder that Court changed the venue on the ground that an impartial trial could not be had. *McEneany*, 14 *ib.* 87 (1878); *Walter*, *ibid.*, 579 (1881)—in both cases, not without dissent; in the former the prisoner's solicitor swore that there was strong prejudice against him in the venue county, and that many persons qualified as jurors there had expressed their belief in his guilt: in the latter, a "Land League" case, the Crown urged in two counties that an impartial trial could not be had, but only obtained a

change to a third on terms, one of which was to pay the accused's costs incurred by the change. It is only, however, in case of misdemeanor that the King's Bench will, in general, award a *venire* to try in a foreign county, though cases may occur in which the court would change the venue in felony. *Holden*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167 (1833), where one reason for refusing was that Suffolk was "a great county," and that the alleged prejudice would have time to die down; the prisoners were in fact acquitted in Suffolk. And even in the cases of misdemeanor, "the circumstances have almost amounted to a necessity." *Ib.* Upon an indictment for a misdemeanor, the application to change the venue ought to be made before issue joined. *Forbes*, 2 *Dowl. P. C.* 440 (1833).

Accessories.] See pp. 158, 215–16.

E. APPREHENSION OF OFFENDERS.

Authority of constable, &c.] See pp. 636–7, 638–9.

By private persons at common law.] At common law all private persons are justified, without a warrant, in apprehending and detaining until they can be carried before a magistrate all persons found committing or attempting to commit a felony in the night. *Hunt*, pp. 21, 494. *Howarth*, 1 *Moo. C. C.* 207 (1828). Though both these cases expressly refer to the *night* they are sometimes cited without this qualification, *e.g.* Chitty's note to 4 *Bl. Comm.* 296, and 3 *Russ. Cri.* p. 74.

But in cases of mere suspicion of felony, and of offences less than felony, a private person has at common law no right to apprehend offenders. *Fost.* 318. Whether or not a private person may arrest a person who stands *indicted* for felony does not appear to be well settled. 2 *Hale P. C.* 84; *Dalton*, c. 170, s. 5; 1 *East P. C.* 300; 3 *Russ. Cri.* 75–6.

Where a breach of the peace is actually being committed any private person may interfere to prevent it, even though no felony be committed or attempted, after proper warning, and calling upon the parties to desist. *Fost.* 272, 311; 3 *Russ. Cri. ib.*

It has been thought by some that at common law every private person may arrest any suspicious night walker, and detain him till he give a good account of himself. 3 *Hawk. P. C.* Bk. 2, ch. 12, s. 20; ch. 13, s. 6. But this would be an authority even more general than that of a peace officer, p. 223, and it is not law. *Russ. Cri. ib.*

By private persons by statute.] By 24–5 V. 96, 103: "Any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of this Act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person and forthwith taken, together with such (*sic*) property, if any, before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence punishable either upon indictment or upon summary conviction, by virtue of this Act, shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorised and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law." See p. 641.

By 24–5 V. 99, 31: "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in

order to his being conveyed, as soon as reasonably may be, before a justice of the peace, or some other proper officer, to be dealt with according to law."

By 24–5 V. 97, 61: "Any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace to be dealt with according to law."

By 14–15 V. 19, 11: "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law," pp. 207, 488.

So also in the Town Police Clauses Act, p. 224. As to *Game* offences, see p. 481.

By peace officer without warrant at common law.] The power of a peace officer [discussed in *Tooley*, pp. 638–9] to apprehend and detain offenders is much greater than that of private persons. For they may exercise all the powers of the latter, and their right to apprehend persons indicted for felony is undoubted. 1 *East P. C.* 298, 300. And they may, which private persons cannot do, apprehend persons *on a reasonable suspicion* of felony. *Samuel* v. *Payne, Dougl.* 359 (1780); 1 *East P. C.* 301; 2 *Hale P. C.* 83, 84, 89, 92. Although no felony has been committed. *Beckwith* v. *Philby*, 6 *B. & C.* 635 (1827); *East, ib.* But see *Dodson*, p. 496.

What is a reasonable suspicion of felony cannot, of course, be stated with precision. But it has always been considered that a charge of felony by a person not manifestly unworthy of credit, is sufficient to justify the apprehension. 1 *East P. C.* 302. The peace officer should "inform himself as well as he can of the circumstances, and the relation of the party should appear credible." In cases of misdemeanors the warrant *must* be there, whether accused asks for it or not, and produced if required. See *Codd* v. *Cabe*, 1 *Ex. D.* 352; 45 *L. J. M. C.* 101 (1876), p. 637.

Whether a constable or other peace officer is warranted in arresting a person after a mere breach of the peace has been committed, is a point which has occasioned some doubt. There are, indeed, some authorities to the effect that the officer may arrest a person on the charge of another, though the affray is over, for the purpose of bringing him before a justice, "to find surety of the peace for appearance." 2 *Hale P. C.* 90; *Handcock* v. *Sandham* (1785), *Williams* v. *Dempsey* (1787), cited 1 *East P. C.* 306 *n.* But the better opinion was always said to be the other way. 1 *East P. C.* 305; 3 *Hawk.* Bk. 2, ch. 12, s. 20; 3 *Russ. Cri.* 83. See *Timothy* v. *Simpson*, 1 *C. M. & R.* 757 (1835: he may arrest if there is immediate danger of a renewal), p. 234; *Carey*, 14 *Cox C. C.* 214 (1879). And it was so expressly decided in *Walker*, 1 *Dears. & P. C. C.* 358; 23 *L. J. M. C.* 123 (1854); there the prisoner had assaulted a police constable, who went away, and after two hours' time returned and took him into custody; the court held that this was an unlawful apprehension. Pollock C.B. said, "The assault for which the prisoner might have been apprehended was committed some time before, and there was no continued pursuit of the prisoner, and the interference of the prosecutor, was not for the purpose of preventing an affray nor of arresting a person whom he had seen committing an assault." The apprehension was so disconnected from the offence as to render it unlawful, and there was no danger of a renewal. A police constable having been struck by the prisoner went for assistance, and after an interval of an

hour returned with three other constables, when he found the prisoner at home and the door closed; after another interval the constables forced the door open and endeavoured to apprehend the prisoner, who resisted and wounded the prosecutor, but was at last apprehended. The court held, that as there was no danger of any renewal of the original disturbance, and as the facts of the case did not constitute such a fresh pursuit as to justify the breaking in, the arrest was illegal. *Marsden*, *L. R.* 1 *C. C. R.* 131; 37 *L. J. M. C.* 80 (1868). Cf. *Higgs*, p. 484, and *Cumpton*, p. 638.

In *Light*, *Dears. & B. C. C.* 332; 27 *L. J. M. C.* 1 (1857), the defendant was convicted of assaulting a constable in the execution of his duty. The constable, whilst standing outside the defendant's house, saw him take up a shovel, and hold it in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside, I would split your head open." About twenty minutes after, prisoner left the house, saying that he would leave his wife altogether, and he was then taken into custody by the policeman, who had no warrant: he resisted and assaulted the constable, and it was held that the policeman was justified in the circumstances in apprehending the defendant, especially in view of the recency of the threat,—"an assault in point of law." See also *Baynes* v. *Brewster*, 11 *L. J. M. C.* 5 (1841).

By peace officer without warrant by statute.] By 24–5 V. 96, 104: "Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law"; p. 87.

Similar provisions are contained in 24–5 V. 97, 57, and 24–5 V. 100; cf. p. 661.

A policeman acting under these sections may be asked generally whether he had cause to suspect a person whom he had arrested, in order to show that the arrest was in execution of the constable's duty, but he cannot be asked in his examination in chief what were the particular grounds upon which his suspicion was founded when they did not form part of the transaction itself: the prisoner may, if he likes, ask him his grounds. *Tuberfield*, *L. & C.* 495; 34 *L. J. M. C.* (1864), pp. 87, 489.

By the Metropolitan Police Act, 10 G. 4, 44, 7: "It shall be lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs."

By the Metropolitan Police Act, 2–3 V. 47, 65: "It shall be lawful for any constable belonging to the metropolitan police force to take into custody, without warrant, any person who, within the limits of the metropolitan police district, shall be charged by any other person with committing any aggravated assault, in every case in which such constable shall have good reason to believe that such assault has been committed, although not within view of such constable, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender." See also ss. 54, 64, and 66.

So by the Town Police Clauses Act, 10–1 V. 89, 15: "Any person found committing any offence punishable either upon indictment, or as a misdemeanor upon summary conviction, by virtue of this or the special Act [*i.e.* for any particular town or district, s. 2], may be taken into custody, without a warrant, by any of the said constables, or may be apprehended by the owner of the property on or with respect to which the offence is

committed, or by his servant or any person authorised by him, and may be detained until he can be delivered into the custody of a constable; and the person so arrested shall be taken, as soon as conveniently may be, before some justice to be examined and dealt with according to law: provided always, that no person arrested under the powers of this or the special Act shall be detained in custody by any constable or other officer, without the order of some justice, longer than shall be necessary for bringing him before a justice, or than forty hours at the utmost."

By 54–5 V. 69, 2, any constable may without warrant take into custody any holder of a licence under the Penal Servitude Acts (see *Index*), or any person under the supervision of the police in pursuance of the Prevention of Crimes Act, 1871 (34–5 V. 112, pp. 87, 198), "whom he reasonably suspects of having committed any offence, and may take him before a court of summary jurisdiction to be dealt with according to law."

By 34–5 V. 112, 3, 7, extended by 54–5 V. 69, 6, a constable may apprehend without warrant a convict on licence who appears to him to be getting his living by dishonest means, or who is charged with any offence under s. 7.

By 52–3 V. 18, 6, any constable, &c., may arrest without warrant any person whom he shall find committing any offence against that, the Indecent Advertisements, Act.

As to offences against children, see 4 E. 7, 15, 4, p. 325.

By the Lunacy Act, 53–4 V. 5, 15, constables, relieving officers, &c., are authorised to apprehend persons wandering at large and deemed to be lunatics.

As to stores of public departments, see p. 654.

Death through violence on apprehension.] See pp. 516, 592, 636–7.

Rewards for apprehension.] See pp. 208–9.

PART II.

EVIDENCE IN PARTICULAR PROSECUTIONS.

ABDUCTION OF WOMEN AND CHILDREN.

At common law.] It seems very doubtful how far abduction was in any case an offence at common law. Of course, if the woman did not consent, there would be an assault upon *her*; if she consented, but those having lawful charge of her resisted, and force were used, there would be an assault upon *them*. A conspiracy also to seduce would be an offence at common law, or to induce a woman, whether chaste or unchaste, to become a prostitute. *Howell*, 4 *F. & F.* 160 (1864). All the authorities usually quoted to show that this is an offence at common law, may be explained on one or other of these grounds. See *L. Grey*, pp. 182, 352; 1 *East P. C.* 460; *Mears*, 2 *Den. C. C.* 79; 20 *L. J. M. C.* 59 (1851); 1 *Hawk. P. C.* Bk. 1, ch. 42 (1st part), speaks of clandestine marriage only as an offence by statute. East is clear that marrying a woman under age without the consent of her father, &c., is not an offence at common law: but the taking of children from the proper custody to marry them, "by any sinister means," is indictable. 1 *P. C.* 458–60. Cf. 3 *Russ. Cr.*, Bk. 4, ch. 7. As to kidnapping, see p. 521.

Abduction of a woman against her will from motives of lucre, or of any girl under age.] By 24–5 V. 100, 53: "Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen years [see p. 198] . . .; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, co-heiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the attorney-general appoint."

Taking away a woman by force, with intent to marry or carnally know her.] By s. 54: "Whosoever shall by force take away or detain against her

will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years" (see p. 198).

Abduction of a girl under sixteen years of age.] By s. 55: "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be imprisoned for any term not exceeding two years, with or without hard labour." Cf. p. 325.

Abduction of a girl under eighteen with intent to have carnal knowledge.] By 48-9 V. 69, 7: "Any person who, with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes to be taken such girl out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. Provided that it shall be a sufficient defence to any charge under this section that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years."

Evidence of husband or wife of prisoner.] See p. 107 (s. 20), and the Criminal Evidence Act, 1898, ss. 4, 6, pp. 830-1. Under this s. (20), on an indictment under s. 7 above, Wills J. held (apparently, with doubt) that the girl, though the prisoner had since married her, was a compellable witness for the prosecution. *Ellis, L. J. Newspaper*, p. 646, Dec. 2, 1899. Jelf J. ruled the reverse (as to grand jury) with the approval of a learned writer in the same journal (Nov. 16, 1907, p. 704) who points out that s. 20 is not repealed.

Taking or enticing away children under fourteen years of age.] By 24-5 V. 100, 56: "Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away or detained, as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years, or to be imprisoned, &c. . . . [see p. 198]; and, if a male under the age of sixteen years, with or without whipping; provided that no person who shall have claimed any right to the possession of such child, or shall be the mother, or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof."

Any offence under this s. is an offence within several ss. of 4 E. 7, 15, by sched. 1 thereof, p. 329.

What constitutes a taking or detaining.] Even under 3 H. 7, c. 2 (repealed), which did not contain the words "or detain," detaining a person who

originally consented, but afterwards refused to continue, was considered to be within the statute. *Brown* (who was hanged though he had married the girl), p. 106 ; *Hawk. P. C.* Bk. 1, ch. 41 (part 2), s. 7; 1 *East P. C.* 454; 3 *Russ. Cri.* 255.

In s. 55 (p. 227), it is clear that consent does not affect the offence. Thus, it is said by Herbert C.J. that 4 & 5 P. & M. c. 8 (repealed), which was to the same effect, and had the same age limit (16), "was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises or gifts, and married in a secret way to their disparagement." *Hicks* v. *Gore*, 3 *Mod.* 84, (1685); see p. 230. So upon the same statute it was held that it was no excuse that the defendant made use of no other "seducements but common complements among young people; and . . . that the encouragement to this affair proceeded from the daughter," he in fact having eloped with and married her, "a great fortune." *Twistleton*, 1 *Lev.* 257; 1 *Sid.* 387; 2 *Keb.* 432 (1669); 3 *Russ. Cri.* 261. Note that the first part of s. 53, p. 226, contains no limit of age.

It has been argued that, though by the statute a taking by *force* is not necessary, still that a person cannot in any sense be said to be *taken* who goes willingly, as the word *take* in itself imports the use of some coercion. But where the prisoner went in the night to the house of B. and placed a ladder against the window, and held it for the daughter of B., a girl of fifteen, to descend, which she did, and then eloped with him; this was held to be a "taking" of the girl out of the possession (and against the will) of her father within 9 G. 4, 31, 20 (repealed), although she had herself proposed to the prisoner to bring the ladder, &c. *Robins*, 1 *C. & K.* 456 (1844), p. 230. So in *Mankletow*, 1 *Dears. & P. C. C. R.* 159; 22 *L. J. M. C.* 115 (1853), where the prisoner had privately persuaded a girl between twelve and thirteen to go away with him, and on the morning of his departure had secretly told her to make a bundle and meet him at a certain spot, and she accordingly left her father's house and met the prisoner, and the two travelled up to London together: this was held to be a "taking" under the same Act. Jervis C.J. said that as to the contention for the prisoner that the word "take" must mean taking by force, actual or constructive, the section showed that that was not necessary. It was unimportant under that section (substantially the same as s. 55) whether the girl consented or not; when the prisoner met the girl at the appointed place, there was "a taking" of her; till that moment, the father had possession of her. "The statute was framed for the protection of parents and others." So *Booth*, 12 *Cox C. C.* 231 (1871), under s. 55, where prisoner did not know the girl's age and was not actuated by an improper motive. In *Handley*, 1 *F. & F.* 648 (1859), p. 230, Wightman J. said, "a taking by force is not necessary; it is sufficient if *such moral force was used as to create a willingness* on the girl's part to leave her father's home. If, however, the going away was entirely voluntary on the part of the girl, the prisoner would not be guilty of any offence under the statute." It is not clear what the words in italics mean, but the last sentence is quite in accord with *Jarvis*, 20 *Cox C. C.* 249 (1903), under s. 55, where Jelf J. said that if the prisoner "yielded to her suggestion, taking no active part in the matter,"—not even persuading her—he must be acquitted. Cf. *Robb*, 4 *F. & F.* 59 (1864), under s. 55.

A man is not bound to return a girl under sixteen to her father's custody, when she has left home without any inducement and come to him. If, however, he has ever held out any inducement to her to leave, and if, when she has left, he avails himself of her having left to induce her to continue out of her father's custody, this is within the statute, whatever his wishes may have been as to the particular time of her leaving. *Olifer*, 10 *Cox C. C.* 402 (1866), and *Robb* (above).

In *Timmins*, 30 *L. J. M. C.* 45 (1860); *C. C. R.*, the prisoner induced a girl of fourteen years and a half to leave her father's house, and cohabited with her for three days, and then told her to go home. The jury found the prisoner guilty generally (under 9 G. 4, 31, 20, above), but also found that he did not intend, when he took away the girl, to keep her away from home permanently. The conviction was affirmed.

As to s. 56 (p. 227), in *Bellis*, 17 *Cox C. C.* 660 (1893), where an infant of a few weeks was taken away by a fraud on the mother, the C. C. R. (overruling *Barrett*, 15 *Cox C. C.* 658; 1885), laid it down that the fraud need not be on the child itself. In *Duguid* it was held that though any one claiming a right to the possession of a child could not be *prosecuted* under s. 56, for taking the child out of the possession, &c., yet whether a mother doing so out of lawful custody is or is not guilty of an offence under this section, any one conspiring wth her to do so may still be guilty of criminal conspiracy. 75 *L. J. K. B.* 470; 22 *T. L. R.* 506; 21 *Cox C. C.* 200; *W. N.* 100 (1906); *C. C. R.*, p. 348.

As to s. 7, p. 233, see *Henkers*, p. 230.

The possession of father, mother, &c.] This is dealt with in *Mankletow*, p. 228. Maule J. seems to have ruled in the same way in *Kipps*, 4 *Cox C. C.* 167 (1850), under 9 G. 4, 31 above. In *Green and Bates*, 3 *F. & F.* 274 (1862), the prisoners found the girl, who lived with her father, in the street by herself, and invited her to go with them, giving her drink which made her dizzy, and then behaved immorally. Martin B. directed an acquittal on the ground that the girl was not taken out *of the possession of any one*; they might not have known that she had a father. No evidence appears to have been given as to the purpose for which the girl had left home. The case might now be held to be an offence within 48-9 V. 69, 3 (3), p. 722. In *Mycock*, 12 *Cox C. C.* 28 (1871), under s. 55, p. 227, Willes J. followed *Olifier*, p. 228, and added that unless the girl has given up the intention of returning to the father, she is still constructively in his custody. In *Mankletow*, Jervis C.J. said, "So long as she continues a member of her father's family, and is under his control, she is in his possession. If a girl leaves her father's house for a particular purpose with his sanction, she cannot legally be said to be out of her father's possession."

Where a girl lived with her father, and left home to go to a Sunday school, and the prisoner met her and seduced her, and then brought her back, not knowing who she was or whether she had a father, but not believing she was a girl of the town; it was held that, as there was no evidence to show that the prisoner had reason to know that the girl was under her father's protection, a conviction was wrong. *Hibbert*, *L. R.* 1 *C. C. R.* 184; 38 *L. J. M. C.* 61 (1869).

A girl, just under sixteen, entitled to real property, came home to her mother's house from school for the Christmas holidays. Her mother, who was married again, insisted that she should go to her grandmother's according to a previous arrangement. Upon this she went to the house of her uncle H. B., and when her mother heard where she was, she desired her to come home to her. The girl did not return to her mother's house, but, with the knowledge of her uncle H. B., went away with and was married to another uncle F. B. F. B. was indicted for fraudulently alluring the girl, and taking her out of her mother's possession, and H. B. for being an accessory before the fact. A majority of the court held that these *facts* (*on the law* there was unanimity) did not sustain the conviction. *Burrell*, *L. & C.* 354; 33 *L. J. M. C.* 54 (1863), under s. 53, p. 226.

The principles of the above cases govern s. 7 of 48-9 V. 69, p. 227. Where under that section it was proved that the girl was employed as a

barmaid at a distance from her father's home, it was held that she was not in the possession of her father (but in the lawful charge of her employer). *Henkers*, 16 *Cox C. C.* 257 (1886).

Proof of the want of consent.] The want of consent of the father must be presumed, if it appears that, had he been asked, he would not have consented. *Per* Wightman J. in *Handley*, p. 228. In *Hopkins*, *Car. & M.* 264 (1842), Gurney B. seemed to think that where a man by false and fraudulent representations, as by representing that he wished to place her in the service of a lady, induced the parents of a girl between ten and eleven years of age to allow him to take her away, such taking away was an abduction within 9 G. 4, 31, 20. This would be in accordance with the general principle that a consent obtained by fraud avails nothing.

As to the consent of a temporary guardian (such as existed in *Hicks* v. *Gore*, p. 228), Mr. East suggests that "it deserves good consideration before it is decided, that an offender acting in collusion with one who has the temporary custody of another's child for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute. For then every schoolmistress might dispose in the same manner of the children committed to her care." 1 *P. C.* 457. And so Amphlett B., in a case at Leeds, March, 1875 (after consulting Coleridge C.J.), ruled that by the fraud of the temporary guardian, the latter lost all right to possession of the child, which had reverted (10*th ed. of this work*).

Proof of the age.] In cases where the offence depends upon the age this must be proved in the usual way, by a person who can speak to the date of the birth. A certified copy of a register is now admissible, pp. 136, 145, and coupled with evidence of identity, is proof of age. *Weaver*, *L. R.* 2 *C. C. R.* 85; 43 *L. J. M. C.* 13 (1873), p. 731. In *Robins*, p. 228, it was held that it was no defence that the prisoner did not know that the girl was under sixteen, or that from her appearance he might have thought that she was of greater age; followed by Willes J. in *Mycock*, p. 229, and Bramwell B. in *Olifier*, p. 228, or that he really thought she was of greater age. *Per* Quain J. in *Booth*, *ib.* The point was finally settled when fifteen judges out of sixteen held that the prisoner was rightly convicted, though he *bonâ fide* believed and had reasonable grounds for believing that the girl was over sixteen. *Prince*, *L. R.* 2 *C. C. R.* 154; 44 *L. J. M. C.* 122 (1875). Brett J. was the only dissentient judge. 48–9 V. 69, 7, p. 227, expressly provides that "reasonable cause to believe," &c., is a good defence. The strict proof of age is dispensed with in offences under 4 E. 7, 15, by s. 17, p. 328. See *Cox ib.*, and p. 175.

Proof of the intent.] As to absence of bad motive, or presence of even philanthropic and religious motives, see *Booth*, p. 228. The only intent which is necessary to prove under s. 55 is the intent to deprive the parent or other person of the possession of the child. *Timmins*, p. 229.

Under s. 56, p. 227, intent to steal from the child is enough.

By "motives of lucre," in s. 53, p. 226, is meant, it is supposed, that the prisoner when he carried off the woman had in view the advancement of his own pecuniary position, by using the legal rights of a husband over his wife's property. If this is so, why the intent to carnally know was inserted does not clearly appear; because a man can only carnally know a woman *from motives of lucre* when his plan is thereby to coerce her into a marriage, so that if the statute had expressed the intent to marry only, it would have been enough. It is quite clear that carrying off an heiress from motives of lust only would not be an offence under this section.

Looking to the much more general provisions of s. 54, probably the chief value of s. 53 is to make sure that the husband shall be deprived of any benefit from the wife's property, according to the last words of it.

As motives of lucre are not mentioned in the second class of offences in s. 53, it seems that fraudulently alluring, &c., a woman under twenty-one years of age, with intent to marry or carnally know her, would be felony, *whatever the motives might be*, provided she was "such" a woman, namely, an heiress. But alluring a girl of no property or expectations, between the ages of sixteen and twenty-one, from the motive of lust, would be no offence at all *under that statute*. But by 48–9 V. 69, 7, p. 227, it is up to eighteen.

Evidence of the woman when taken away and married.] P. 106.

Evidence of the person charged under 48–9 V. 69, 7.] Pp. 107, 831.

Procuring the defilement of girls and women.] Pp. 722 and foll.

ABORTION.

Offence at common law.] At common law an attempt to destroy a child *en ventre sa mère* appears to have been held to be a misdemeanor: see an actual precedent of indictment, 3 *Chitt. Cr. Law*, 798 *a*. See pp. 611, 619.

If, however, with the attempt to procure abortion a person does an act whereby a living child is brought into the world immaturely, and dies in consequence, that would be murder in the person doing the act, and none the less if it was possible that the death might have been prevented. *Per* Maule J. in *West*, 2 *C. & K.* 784 (1848): cf. p. 612.

By statute.] By 24–5 V. 100, 58: "Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever, with the like intent, and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life" (see p. 198).

By s. 59: "Whosoever shall unlawfully supply, or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude" (see p. 198).

Proof of the administering.] Where the prisoner gave the prosecutrix a cake containing poison (without any design of abortion), which she merely put into her mouth, and spat out again without swallowing any portion of it; the judges held, that a mere delivery did not constitute an administering within 43 G. 3, 58 (repealed), and that there was no administering unless the poison was taken or applied; but if any part is taken, it is not necessary that it should be swallowed. *Cadman*, 1 *Moo. C. C.* 114; *Carr. Supp.* 237 (1825). In *Harley*, 4 *C. & P.* 370 (1830) the report of *Cadman*, in 1 *Moo.*, is stated to be the reverse of the fact, for the judges held that swallowing *was* essential; this is borne out by the report in *Carr.* But to constitute an administering there need not be an actual delivery by the hand of the prisoner. *Ib.*

Under a similar s. (7 W. 4 and 1 V. 85, 6; repealed), it was proved that the woman requested the prisoner to get her something to procure miscarriage and took what she gave her, but not in her presence. It was held, nevertheless, that the prisoner had "caused" the drug to be taken, within the section. *Wilson, Dears. & B. C. C.* 127 (1856); *Farrow, ib.* 164 (1857). See *Fretwell*, pp. 153, 649, distinguishing between s. 58 and s. 59.

See further as to administering, p. 704.

Proof of the nature of the thing administered.] The nature of the noxious thing must be proved. Where the prisoner was indicted under s. 59 for supplying "a certain noxious thing," and the evidence was, that the thing supplied was of a perfectly harmless character in itself, though if taken with the belief that it would procure a miscarriage, it might, by acting on the imagination, produce that effect, the conviction was quashed. *Isaacs*, 1 *L. & C.* 220; 32 *L. J. M. C.* 52 (1862). But where there was no evidence of the ingredients of the thing administered, or its character being harmless or otherwise, except that in fact it made the witness ill and produced miscarriage, it was held that there was evidence of its being a noxious thing. *Hollis*, 12 *Cox C. C.* 463 (1873), *C. C. R.* If the drug be innocuous if taken in small quantities, but harmful if taken in large (with the intent to procure miscarriage), it is a noxious thing; but, *per* Field J. and "possibly" *per* Stephen J., if it be a recognised "poison," it comes within the Act even if administered in so small a dose as to be innocuous. *Cramp*, 5 *Q. B. D.* 307; 49 *L. J. M. C.* 44 (1880), *C. C. R.* p. 705, following *Hennah*, 13 *Cox C. C.* 547 (1877), p. 705, which, however, was under s. 24, *ib.*

The statute is satisfied if the person who supplies the thing intends it to be used for the purpose of procuring abortion, though the person to whom it was supplied had no intent to use it for any such purpose. *Hillman*, *L. & C.* 343; 33 *L. J. M. C.* 60 (1863); under s. 59.

Several of the judges in *Bond*, p. 77, thought that the intent with which instruments were used might be shown by evidence of similar previous acts.

AFFRAY.

An affray (*affrayer* = to terrify) is "the fighting of two or more persons in some public place, to the terror of his Majesty's subjects; for if the fighting be in private, it is not an affray, but an assault." 4 *Bl. Com.* 145. See *Timothy* v. *Simpson*, p. 223. It differs from a riot, in not being premeditated. See p. 747. Thus "if a number of persons being met together at a fair or market, or church-ale, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it." 2 *Hawk.* 1 *P. C.* Bk. 1, ch. 65, s. 3. Two persons may be guilty of an affray, but it requires three or more to constitute a riot. Mere quarrelsome words will not make an affray. 4 *Bl. Com.* 146; 1 *Russ. Cri.* 588.

To support a prosecution for an affray, the prosecutor must prove—1, the affray, or fighting, &c.; 2, that it was in a public place; 3, that it was to the terror of the king's subjects; 4, that two or more persons were engaged in it.

The principals and seconds in a prize-fight were indicted in one count for a riot, and in another for an affray. The evidence was that the two first prisoners had fought together amidst a great crowd of persons, and that the others were present aiding and abetting; that the place where they fought was at a considerable distance from any highway, and when the officers made their appearance the fight was at an end. The prisoners, on being required to do so, quietly yielded. Alderson B. said, "As to the affray, it must occur in some public place, and this is to all intents and purposes a private one. As to the riot, there must be some sort of resistance made to lawful authority to constitute it, some attempt to oppose the constables who are there to preserve the peace. The case is nothing more than this:—Two persons choose to fight, and others look on, and the moment the officers present themselves, all parties quietly depart. The defendants may be indicted for an assault, but nothing more." *Hunt*, 1 *Cox C. C.* 177 (1845); and see *Brown*, *Car. & M.* 314 (1841) p. 749; *Orton*, pp. 252, 594; *Coney*, pp. 158, 595, &c.

"The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for where there is any material aggravation, the punishment proportionably increases." 4 *Bl. Com.* 145; 2 *Hawk. P. C.* Bk. 1, ch. 63, s. 20.

As to suppressing affrays, see pp. 619, 643.

AGENTS, BANKERS, FACTORS, &c.—FRAUDS COMMITTED BY.

Fraud.] "It is impossible to lay down a definition completely comprehending fraud, and no rule can, from the very nature of the subject, be invariable. Fraud is infinite." *Wharton, Law Lex. 10th ed.*, where the meaning given is "deceit in defrauding or endeavouring to defraud another of his right by artful device contrary to the rule of honesty." Perhaps Sweet's is a more strictly legal definition: "Fraud is used in many senses, but the point common to all of them is pecuniary advantage gained by unfair means." *Law Dict.*

As to 24–5 V. 96, 75–6, see p. 164.

By 1 E. 7, 10, 1: (1) "Whosoever (*a*) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or (*b*) having either solely or jointly with any other person, received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanor, and be liable" to seven years' penal servitude at most (see p. 198). "(2) Nothing in this section shall apply to or affect any trustee on any express trust created by a deed or will or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage." By s. 2 (2), s. 1 takes the place of 24–5 V. 96, 75–6.

A debt-collector, paid by commission, is within s. 1 (*b*): *Lord*, 69 *J. P.* 467 (1905), *C. C. R.*

Fraudulently selling property under powers of attorney.] By 24–5 V. 96, 77: "Whosoever, being intrusted, either solely, or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to" seven years' penal servitude at most (see p. 198).

Factors or agents fraudulently obtaining advances on property.] By s. 78: "Whosoever, being a factor or agent intrusted, either solely or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security, for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit,

transfer, or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court," as in s. 77, above.

Clerks wilfully assisting.] The s. goes on: "And every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the same punishments. Provided that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent."

Definitions of terms.] By s. 79: "Any factor or agent intrusted as aforesaid, and possessed of any such document of title whether derived immediately from the owner of such goods, or obtained by reason of such factor or agent having been intrusted with the possession of the goods or of any other document of title thereto, shall be deemed to have been *intrusted* with the possession of the goods represented by such document of title; and every contract pledging or given a lien upon such document of title as aforesaid shall be deemed to be a *pledge* of and *lien* upon the goods to which the same relates; and such factor or agent shall be deemed to be *possessed* of such goods or document whether the same shall be in his actual custody or shall be held by any other person subject to his control, or for him, or on his behalf; and where any loan or *advance* shall be bonâ fide made to any factor or agent intrusted with and in possession of any such goods or document of title on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or document of title, and such goods or document of title shall actually be received by the person making such loan or advance without notice that such factor or agent was not authorised to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not really be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a *contract or agreement* with such factor or agent; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an *advance* within the meaning of the last preceding section; and a factor or agent in possession as aforesaid of such goods or document shall be taken, for the purposes of the last preceding section, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence."

It was doubtful whether a policy of insurance was "a chattel or valuable security" within s. 75, the repeal of which (p. 235) renders the discussion in this case unnecessary; *Tatlock*, 2 *Q. B. D.* 157; 46 *L. J. M. C.* 7 (1876);

C. C. R.; it seems not, according to some of the judges; perhaps it was "a security for the payment of money." The prosecutors agreed by writing with the prisoner that he should draw bills and they should accept them, and that he should endeavour to get them discounted, and if he succeeded should pay the prosecutors part of the proceeds, but that if he failed he should return the bills to them. The prosecutors accepted two bills without any drawer's name. They handed these to the prisoner, who filled in his name as drawer and discounted them and kept the proceeds. It was held that these acceptances were "securities for the payment of money" within s. 75. *Bowerman*, (1891) 1 *Q. B.* 112; 60 *L. J. M. C.* 13; *C. C. R.*

See further as to interpretation of terms "property," "valuable security," "document of title," &c., 24–5 V. 96, 1, p. 522.

Persons accused not protected from answering.] By s. 85: "Nothing in any of the last ten preceding sections [as to 75 and 76, see p. 235], of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity [p. 142], or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency, and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved. . . ." The rest is repealed by 53–4 V. 71, 27 (1), of which sub-s. (2) runs: "A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in respect of any of the misdemeanors referred to in" 24–5 V. 96, 85; see pp. 45, 268. See p. 718. The statement of affairs made by a debtor under 46–7 V. 52, 16, and rule 217, is not within this sub-s. (2) and is consequently admissible in evidence against him when charged under 24–5 V. 96, 80, p. 797, with misappropriating trust moneys. *Pike*, 20 *Cox C. C.* 164 (1902), *C. C. R.*

Nature of disclosure which protects.] Under the repealed 5–6 V. 39, 6, the terms of which differed somewhat from those of s. 85, above, as to the nature of the disclosure which would protect a defendant, the following decision took place. The defendants were charged before a magistrate on the 13th of July, under the above section, with having fraudulently transferred for their own benefit a bill of lading, intrusted to them as brokers, and were committed for trial. On the 6th of July preceding they had been adjudged bankrupts, and on the 20th, while the above prosecution was pending against them being examined in the court of bankruptcy at the instance of a creditor, they made a statement to the same effect as that proved against them before the magistrate, and amounting to a confession of guilt. When the trial came on the defendants pleaded not guilty, and after the case for the prosecution had closed, tendered in evidence the depositions made by them in the court of bankruptcy in bar of prosecution under the proviso in s. 6, above. The prisoners were convicted on exactly the same evidence as that before the magistrate; but two points were reserved: first, whether the evidence was admissible under a plea of not guilty; secondly, whether it showed *a disclosure* within the meaning of the proviso, so as to constitute a defence. All the court thought that the evidence was admissible, and also expressed an opinion that it was tendered at the proper time (p. 172), and a majority of nine to five held that the statement in the court of

bankruptcy was not, as it was merely what had been previously proved by evidence before the magistrate, a disclosure within s. 6 entitling the prisoners to protection. *Skeen*, 1 *Bell C. C.* 97; 28 *L. J. M. C.* 91 (1859). See also *Scott*, pp. 45, 680, under 12–13 V. 106, 117 (repealed); *Robinson*, *L. R.* 1 *C. C. R.* 80; 36 *L. J. M. C.* 78 (1867), under 12–13 V. 106, 221, 3 (repealed); *Widdop*, p. 45.

By the word "first" in s. 85, above, all doubt is removed. *Greaves's Crim. Stat.*, p. 92 (1861). See *Gunnell*, 16 *Cox C. C.* 154 (1886), *C. C. R.*, where "disclosure" is analysed.

"*Banker, merchant, broker, attorney, or other agent.*"] Repealed s. 75 (p. 235) was limited to a class. The words "other agent" meant one "whose business or profession it is to receive money, securities, or chattels for safe custody, or other special purpose," and did not include persons "who carry on no such occupation, but who may happen from time to time to undertake some fiduciary position, whether for money or otherwise." *Portugal*, 16 *Q. B. D.* 487; 55 *L. J. Q. B.* 567 (1885); approved, *Kane*, 19 *Cox C. C.* 658 (1900), *C. C. R.*

"*Safe custody.*"] A solicitor who has misappropriated money entrusted by a client to invest is not within (repealed) s. 76, p. 235, unless any specific sum was entrusted, or there were any specific directions as to the custody of it. *Newman*, 8 *Q. B. D.* 706; 51 *L. J. M. C.* 87 (1882); *C. C. R.* But otherwise, where a solicitor was entrusted with the money of his client to keep it safely until a certain day, and then invest it. *Fullager*, 14 *Cox C. C.* 370; 41 *L. T. N. S.* 448 (1879); *C. C. R.*; *Re Bellencontre*, p. 218.

"*Direction in writing.*"] This element is no longer necessary in frauds of this sort since the passing of 1 E. 7, 10 (p. 235), to meet such cases as *Cooper*, *L. R.* 2 *C. C. R.* 123; 43 *L. J. M. C.* 89 (1874). *Re Bellencontre*, above.

The prisoner, a stock and share dealer, was employed by Mrs. S. to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had to pay. Such payments were not made against any particular item, but in cheques for round sums. On one occasion he wrote to her, "I enclose a contract note for £300, J. bonds, at 112, £336"; and the contract note ran, "sold to Mrs. S. £300, J., at 112, £336," and was signed by the prisoner. She wrote in reply, "I have just received your note and contract note for three J. shares, and inclose a cheque for £336 in payment." The prisoner never paid for the bonds, but appropriated to his own use the proceeds of the cheque. It was held that her letter was a direction in writing to apply the proceeds of the cheque to pay for the bonds, if they still had to be paid for, within s. 75 (repealed, p. 235). *Christian*, *L. R.* 2 *C. C. R.* 94; 43 *L. J. M. C.* 25 (1873). A stockbroker who received, with a direction in writing, a cheque to be used as "cover," which he had paid instead into his own account and appropriated, was held to be rightly convicted under s. 75. *Cronmire*, 16 *Cox C. C.* 42 (1886), *C. C. R.*

Misappropriation of moneys received from securities, &c., bought, &c., under the Municipal Corporations Act, 1882.] This offence is within 1 E. 7, 10 (p. 235), by virtue of 45–6 V. 50, 117.

Where triable.] See p. 163.

As to corrupt transactions with agents, see p. 288.

ARSON.

At common law.] The offence of arson, which is a felony at common law, is defined by L. Coke to be the malicious and voluntary burning the house of another, by night or by day. 3 *Inst.* 66; 1 *Hale, C. P.* 566.

The *setting fire* to the house of another, maliciously to burn it, is not at common law a felony, if either "by some accident or timely prevention the fire takes not." 1 *Hale P. C.* 568.

Churches and chapels.] By 24-5 V. 97, 1: "Whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house or other place of divine worship, shall be guilty of felony, and being convicted thereof, shall be liable to be kept in penal servitude for life," or to be imprisoned (see p. 198), "and, if a male under the age of sixteen years, with or without whipping."

Dwelling-house, any person being therein.] So by s. 2, as to "any dwelling-house, any person being therein."

Other buildings.] By s. 3: "Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or fold, or to any farm-building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony," &c., as in s. 1.

Railway stations, ports, docks, harbours, &c.] By s. 4: "Whosoever shall unlawfully and maliciously set fire to any station, engine house, warehouse, or other building belonging or appertaining to any railway, port, dock, or harbour, or to any canal or other navigation, shall be guilty of felony," &c., as in s. 1.

Public buildings.] By s. 5: "Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this Act before mentioned belonging to the Queen, or to any county, riding, division, city, borough poor law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony," &c., as in s. 1.

Other buildings.] So by s. 6, as to "any building other than such as are in this Act before mentioned"; the maximum punishment is penal servitude for fourteen years (see p. 198) *or* imprisonment, as in s. 1.

Goods in buildings.] By s. 7: "Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building under such circumstances that if the building were thereby set fire to, the offence would amount to felony, shall be guilty of felony," &c., as in s. 6.

Attempting to set fire to buildings.] So by s. 8, as to attempting "by any overt act" to set fire to "any building or any matter or thing" mentioned in s. 7.

Crops of corn, woods, plantations, gorse, &c.] By s. 16: "Whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony," &c., as in s. 1. See p. 248.

Stacks of corn, straw, wood, coals, &c.] So by s. 17, as to "any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or any steer of wood or bark." The same punishment as in s. 6.

Attempting to set fire to crops or stacks of corn, &c.] By s. 18: "Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned under such circumstances that if the same were thereby set fire to the offender would be under either of such sections guilty of felony, shall be guilty of felony." The maximum punishment is penal servitude for seven years: imprisonment as in s. 1.

Coal mines.] By s. 26: "Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall be guilty of felony," &c., as in s. 1.

Attempt to set fire to a mine.] By s. 27: "Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony," &c., as in s. 6.

Ships or vessels.] By s. 42: "Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony," &c., as in s. 1. See also p. 651.

Ships or vessels, with intent to prejudice owner or underwriter.] The same by s. 43 as in s. 42, as to "any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten, or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same."

Setting fire to ships of war, &c.] By 12 G. 3, 24, 1: "If any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire or burn, or otherwise destroy, or cause to be set on fire or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning, or otherwise destroying of any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his Majesty's dockyards, or building or repairing by contract in any private yards for the use of his Majesty, or any of His Majesty's arsenals, magazines, dock yards, rope yards, victualling offices, or

any of the buildings erected therein or belonging thereto; or any timber or materials there placed, for building, repairing, or fitting out of ships, or vessels, or any of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places, where any such military, naval, or victualling stores, or other ammunition of war is, are, or shall be kept, placed or deposited; then the person or persons guilty of any such offence, being therefore convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy." Cf. 7–8 G. 4, 28, 6–7: s. 6 abolished "benefit of clergy."

By s. 2: "Any person who shall commit any of the offences before mentioned, in any place out of this realm, may be indicted and tried for the same, either in any shire or county within this realm, in like manner and form as if such offence had been committed within the said shire or county, or in such island, country or place where such offence shall have been actually committed, as his Majesty, his heirs or successors, may deem most expedient for bringing such offender to justice: any law, usage, or custom notwithstanding." Cf. p. 771.

By 29–30 V. 109, 34, persons subject to that Act (Naval Discipline) are liable to death for setting fire to dockyards, ships, &c.

Setting fire to ships, &c., in London.] By s. 104 of 39 G. 3, c. lxix., a local Act for the port of London: "if any person or persons whosoever shall wilfully and maliciously set on fire any of the works to be made by virtue of this Act, or any ship or other vessel lying or being in the said canal [across the Isle of Dogs], or in any of the docks, basons, cuts, or other works to be made by virtue of this Act, every person so offending in any of the said cases shall be adjudged guilty of felony without benefit of clergy. . . ."

Attempts on ships or vessels.] 24–5 V. 97, 44, is framed exactly as s. 27, p. 240, in respect of setting fire to, casting away, or destroying ships, &c.

Malice against owner of property unnecessary.] By s. 58: "Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise."

Offender in possession of the property injured.] By s. 59: "Every provision of this Act not hereinbefore so applied, shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done."

Intent to injure or defraud a particular person need not be stated.] By s. 60: "It shall be sufficient in any indictment for any offence against this Act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act, with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be)." Cf. pp. 21–2.

Proof of the setting fire.] "To constitute arson at common law there must be an actual burning of the house or of some part of it, though it be not

necessary that any part be wholly consumed, or that the fire should have any continuance, but be put out or go out of itself." 2 *East P. C.* 1020; cf. 1 *Hale P. C.* 569. In 9 G. 1, 22 (repealed), the words "set fire to" are used, and East observes, that he is not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law. And he afterwards remarks that the actual burning at common law, and the "setting fire" under the statute, in effect mean the same thing. *Ib.* 1033. The words "set fire to" are used in all the subsequent statutes, so that this passage and the following decisions are still applicable. The prisoner was indicted, under 9 G. 1, 22, for setting fire to an outhouse, commonly called a paper-mill. It appeared that she had set fire to a large quantity of paper, drying in a loft annexed to the mill, but no part of the mill itself was consumed. The judges held that this was not a *setting fire* to the *mill* within the statute. *Taylor*, 2 *East P. C.* 1020; 1 *Leach* 49 (1759). So when a small faggot was set on fire on the boarded floor of a room, and was nearly consumed; the boards of the floor were "scorched black, but not burnt," and no part of the wood of the floor was consumed, Cresswell J. thought *Parker*, below, was the nearest case to the present, but distinguishable, and, after conferring with another judge, held that, as the wood of the floor was scorched, but no part of it consumed, the indictment could not be supported. "We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all." *Russell, C. & M.* 541 (1842). Where the prisoner was indicted under 7 W. 4 & 1 V. 89, 3 (repealed), and it was proved that the floor near the hearth was scorched; that it was charred in a trifling way, and had been at a red heat, though not in a blaze; Parke B. thought that this "would be sufficient," but ultimately this evidence was held "much too slight." *Parker*, 9 *C. & P.* 45 (1839). To constitute a setting on fire, it is not necessary that any flame should be visible. *Stallion*, 1 *Moo. C. C.* 398 (1834), p. 244.

Many of these cases come within the felony created by the 24–5 V. 97, p. 240, namely, that of attempting to set fire to a building, &c. As to verdicts of "guilty of an attempt" without any count for the attempt, see pp. 69, 257.

Proof of whose property set fire to.] The burning of a man's *own house* is no felony at common law, but such burning "in a town, or so near to other houses as to create danger to them, is a great misdemeanor." 2 *East P. C.* 1027; 1 *Hale, P. C.* 568. But it is a felony at common law if a man set fire to his own house with intent to burn that of another, or in such circumstances that the house of another will in all probability be burnt. *East, ib.* 1030; citing a case of *Probert* (1799). Now, however, see the ss., p. 239 and foll.

A misdescription of the property may be amended, p. 176. Still it is necessary to prove the nature of the property set on fire, in order to show that it comes within one or other of the above sections, and which.

Proof of property set fire to—house.] The word *house*, at common law, includes such buildings as burglary may be committed in at common law; but whether in arson, the word would now be held to include all such buildings as burglary may be committed in under 24–5 V. 96, 53 (p. 297), founded on 7–8 G. 4, 29, 13 (repealed), seems to be doubtful. A building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not to be a *house*, *outhouse*, or *barn*, within 9 G. 1, 22, 7 (repealed). *Elsmore* v. *Inhab. Hundred of St. Briavells*, 8 *B. & C.*

461 (1828). An unfinished structure, intended to be used as a dwelling-house when finished, is not a "house"; but it seemed to be doubtful whether it could be properly described as a "building" under s. 6 (p. 239). *Edgell*, 11 *Cox C. C.* 132 (1867). But where the walls and roof of an unfinished house and a considerable part of the flooring were finished, and the internal walls prepared for plastering, it was held to be a "building" within s. 6. *Manning*, *L. R.* 1 *C. C. R.* 338; 41 *L. J. M. C.* 11 (1871). Hannen J. said, "It is very likely that a house can only mean a structure designed and sufficiently advanced for the habitation of man." It has been held that setting fire to a common gaol is arson of a *house*. The entrance to the prison was through the dwelling-house of the gaoler (separated from the prison by a wall), and the prisoners were sometimes allowed to lie in it. All the judges held, that the dwelling-house was to be considered as part of the prison, which was "the house" of the corporation to whom it belonged. *Donnavan*, 2 *East P. C.* 1020; 2 *W. Bl.* 682; 1 *Leach* 69 (1770). But where a constable hired a cellar, as a lock-up house, under a cottage, and the cellar was independent of the cottage in all respects, it was held that the cellar was not properly described (apparently under 9 G. 1, 22, 7) either as the dwelling-house of the constable, or as an outhouse of the cottage. *Anon.* (1828), 1 *Lewin C. C.* 8.

A shed or cabin, though built of stone, roofed, and with low fireplace and window, does not in a case of arson constitute a house within 7 W. 4 & 1 V. 89, 3 (repealed), where the building was erected not for habitation but for workmen to take their meals and dry their clothes in, and where some one had slept with the knowledge but without the permission of the owner. *England*, 1 *C. & K.* 553 (1844).

Proof of property set fire to—outhouse.] Upon the meaning of "outhouse," in 9 G. 1, 22 (repealed), the following cases were decided: The prisoner, who was indicted for setting fire to an outhouse, had set fire to and burnt part of a building, situated in a yard at the back of a dwelling-house. The building was four or five yards distant from the house but not joined to it. The yard was enclosed on all sides, in one part by the dwelling-house, in another by a wall, and in a third by a railing, which separated it from a field, and in the remaining part by a hedge. The buildings in question consisted of a stable and chamber over it, used by the prosecutor as a shop for the keeping and dressing of flax. It was objected, that this was part of the dwelling-house, and therefore not an outhouse; but the judges were of opinion that the conviction was right. It was observed that though, for some purpose, this might be part of the dwelling-house, yet in fact it was still an outhouse. *North* (1795), 2 *East P. C.* 1021. The prisoner was indicted in different counts for setting fire to an outhouse and to a house. The premises burned consisted of a schoolroom, which was situated very near to the house in which the prosecutor lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tiles, reached over part of the roof of the school, which was thatched with straw; and the schoolroom, with a garden and other premises, together with a court which surrounded the whole, was rented of the parish by the prosecutor. There was a continued fence round the premises, and nobody but the prosecutor or his family had a right to come within it. It was objected that the building was neither "a house" nor "an outhouse"; but the judges were of opinion that this building was within the statute. *Winter, Russ. & Ry.* 295 (1815); 2 *Russ. Cri.* 963. In *Ellison*, 1 *Moo. C. C.* 336 (1832), under 7–8 G. 4, 30, 2 (repealed), the place in question stood in an enclosed field, a furlong from the dwelling-house, and not in sight of it. It had been originally divided into stalls, capable of

holding eight beasts, partly open and partly thatched. Of late years it was boarded all round, the stalls taken away and an opening left for cattle to come in of their own accord. There was neither window nor door, and the opening was sixteen feet wide, so that a waggon might be drawn through it. The back part of the roof was supported by posts, to which the side boards were nailed. Part of it internally was boarded and locked up. There was no distinction in the roof between the enclosed and the unenclosed part, and the inhabitants and owners usually called it the cow-stalls. Park J. did not consider this "an outhouse," and six other judges agreed with him; but six were of opinion that this was within the statute. See also *Hiles* v. *Inhabs. of Shrewsbury*, 3 *East* 457 (1803); *Woodward*, 1 *Moody C. C.* 323 (1831).

The prisoner was charged with setting fire to an outhouse. The building in question was in a farmyard, and was three or four poles distant from the dwelling-house, from which it might be seen. The prosecutor kept a cart in it, which he used in his business of a poulterer, and also kept his cows in it at night. It adjoined another range of buildings which did not adjoin the dwelling-house. The dwelling-house and farm formed one side of the farmyard, and the three other sides were formed by a fence inclosing these buildings. The building in question was formed by six upright posts nearly seven feet high, three in the front and three at the back, which supported the roof: there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood, laid wide at the bottom and drawn up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farmyard was entirely open between the posts. The back adjoined a field and was a rail fence, the rails being six inches wide; these came four or five feet from the ground, within two feet of the roof, and this back formed part of the fence before mentioned. One of the witnesses for the prosecution said he should call the building an outhouse. All the judges present but one thought the erection an outhouse within 7–8 G. 4, 30, above, and that the conviction was right. *Stallion*, p. 242.

The prisoner was convicted for setting fire to an outhouse. The building set fire to was a pig-sty, thatched at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor; the back of the pig-sty formed part of the fence between his and the adjoining property. All the judges present were unanimously of opinion that the conviction was right under 7 W. 4 and 1 V. 89, 3 (repealed). *Amos Jones*, 2 *Moody C. C.* 308 (1844); 2 *Russ. Cri.* 964. See also *Haughton*, 5 *C. & P.* 555 (1833).

Proof of property set fire to—shed.] In *Amos*, 2 *Den. C. C. R.* 65; 20 *L. J. M. C.* 103 (1851), it was held that a building twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called "the workshop," used as a storehouse for seasoned timber, as a place for deposit of tools, and for the working up of timber, may be described as "a shed" (and, perhaps, as a "warehouse," or "office," or "shop," or "building used for carrying on a certain trade") under 7–8 V. 62, 1 (repealed).

Proof of property set fire to—stacks.] A stack of flax with seed in it is "grain" within 7 W. 4 and 1 V. 89, 10 (repealed). *Spencer, Dears. & B. C. C.* 131 (1856). In *Reader*, 4 *C. & P.* 245; 1 *Moody C. C.* 239 (1830), the prisoners were indicted under 7–8 G. 4, 30, 17 and 2 (repealed), for setting fire to "a stack of straw." The stack in question was made partly of straw, there being two or three loads at the bottom, and the residue of "haulm" (stubble). The judges held that this was not "a stack of straw"; afterwards

a count for "a stack of straw called haulm" (s. 17) was not considered safe. See *Brown*, 4 *C. & P.* 553 *n.* (1831); *Tottenham*, 7 *C. & P.* 237; 1 *Moo. C. C.* 461 (1835), "haulm" in an indictment is not straw. It was held sufficient under 7-8 G. 4, 30 (above), if the indictment charge the setting fire to a "*stack of barley*"; *Swatkins*, p. 50; or a "*stack of beans*'; *Woodward*, p. 244, the words of s. 17 being "any stack of corn, grain, pulse, straw, hay, or wood." In *Aris*, 6 *C. & P.* 348 (1834), the prisoner was indicted under that s. for setting fire to a "stack of wood"; between the house of the prosecutor and the next house there was an archway under which carts went, and over which a sort of loft was made by means of a temporary floor, where there was a small quantity of straw and a score of faggots: the straw was burnt and some of the faggots, but no part of the building. Park J. was clearly of opinion that this was not a stack of wood within the s. A quantity of straw (22 cwt.) packed on a lorry left in the yard of an inn, on its way to market, is not a stack of straw within s. 17, p. 240. *Satchwell*, *L. R.* 2 *C. C. R.* 21; 42 *L. J. M. C.* 63 (1873).

Proof of property set fire to—wood.] In *Price*, 9 *C. & P.* 729 (1841), under 7-8 G. 4, 30, 17 (repealed), the prisoners were convicted of setting fire to a wood: they set fire to a summer-house which was in the wood, and so to the wood. It was held they were properly convicted. Setting fire to a single tree is not arson within this s. *Davey*, 1 *Cox C. C.* 60 (1844).

Proof of property set fire to—ships and vessels.] A pleasure-boat, eighteen feet long, was thought by Patteson J. to be a vessel within the meaning of 7-8 G. 4, 30, 10 (repealed), and therefore within s. 9, which deals with arson. *Bowyer*, 4 *C. & P.* 559 (1831). Upon an indictment for setting fire to a barge, a judge doubted whether a barge was within the same statute. *Smith*, 4 *C. & P.* 569 (1831).

Setting fire to goods in a house.] See s. 7, p. 239. All that now need be said of *Lyons*, 28 *L. J. M. C.* 33; *Bell C. C.* 38 (1858); *C. C. R.*, p. 159, under 14-15 V. 19, 8 (repealed)—a very difficult case to understand—will be found in *Child*, below, which in effect overruled it. The facts in *John Child* were as follows:—the prisoner, from ill will to a lodger, broke up her chairs, tables, and other furniture, made a pile of them and her clothes on the stone floor of the kitchen of her lodgings, and lit them at the four corners, so as to make a bonfire of them. The building would almost certainly have been burned in consequence, had not some one succeeded in extinguishing the bonfire. Blackburn J. directed the jury that the first count ("maliciously, &c., setting fire to goods in a dwelling-house with intent to injure") was not good in law, s. 7 (p. 239) not making that a felony, *per se*; and that on the second ("under such circumstances that if the building had been thereby set fire to the offence would have amounted to felony"), the ultimate question was if the house had been set fire to, would it have been "malicious" and "with intent to injure" within s. 3 (p. 239), and as to this he told them that if they thought the prisoner, though his object was not to hurt the house or the landlord, yet was aware of what he was doing, and that it would probably set the building on fire, or was at best reckless whether it did or not, they ought to find him guilty of the felony: otherwise not. The jury found him "guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious." It was held that the conviction was bad. Blackburn J. added: "I thought the framers of" s. 7 "intended to include this case. But they have failed to express their intention. . . . 14-15 V. 19, 8, made it felony wilfully and maliciously to set fire to goods 'being in any building the setting fire to which is made felony,' &c. And under those

words the prisoner might have been convicted under both counts," and cites Mr. Greaves's edition of the Consolidation Acts (p. 165) as an authority that s. 7 was advisedly substituted for the repealed s. 8 "in consequence of . . . *Lyons*" and that "the Committee of the Lords were satisfied that the new terms would include every case that could arise." "His opinion is that if you set fire to something under such circumstances that you are likely thereby to set fire to another thing, then if the setting fire to the one is malicious, the setting fire to the other is so too. . . . If that is good law, then the setting fire to the house here, if it had caught fire, would have been felony. But it is not law, and the framers of the Act have failed to express the meaning that they intended to express." (There are discrepancies between the two reports.) *L. R.* 1 *C. C. R.* 307; 40 *L. J. M. C.* 127 (1871). It now seems clear that under s. 7 an intent to fire the house or at least a reckless indifference to such a result is necessary. *Nattrass*, 15 *Cox C. C.* 73; *Harris*, 15 *Cox C. C.* 75 (1882).

When persons are considered as being in the house when set fire to.] A stable which adjoined a dwelling-house was set on fire: the flames communicated to the dwelling-house, in which members of the family had been sleeping; but it did not appear whether the house took fire before they left the house or after. Alderson B. directed the jury to say by their verdict, should they find the prisoner guilty, whether the house took fire before the family left the house or after. If they were of opinion that it was after the family were in the yard, he thought they ought to acquit the prisoner of the capital charge, as to sustain that, in his opinion (though he seems to have doubted), it was necessary that the persons named in the indictment (under 7 W. 4 and 1 V. 89, 2 (repealed), but the essential words are identical with s. 2, p. 239), should be in the house at the very time the fire was communicated to it. *Warren*, 1 *Cox C. C.* 68 (1844). So *Fletcher*, 2 *C. & K.* 215 (1845). So where the prisoner is the only person in the house, *per* L. Coleridge C.J., *Pardoe*, 17 *Cox C. C.* 715 (1894): *sed quære*, and cf. *March*, p. 248.

Possession—how to be described.] The house burned should be described as being in the possession of the person who is in the actual occupation, even though that possession be wrongful. Thus where a labourer in husbandry was permitted to occupy a house as part of his wages, and after being discharged from his master's service, and told to quit the house in a month, remained in it after that period, it was held that in an indictment for setting fire to the house, it was rightly described as being in the possession of the labourer. *Wallis*, 1 *Moody C. C.* 344 (1832). Where the property was laid in no one, a conviction was quashed. *Rickman*, p. 78. It may be laid in "persons unknown." *Ib.* But "under the statute . . . the averment of ownership is immaterial." *Newboult*, p. 247.

Proof of malice and wilfulness.] If the burning be done under a *bonâ fide* belief in the existence of a right to burn, as where a woman set fire to some furze on a common, there is no criminal offence. *Twose*, 14 *Cox C. C.* 327 (1879). It must be a wilful and malicious burning, otherwise it is only a trespass and not a felony. 1 *Hale P. C.* 569. Therefore if A. shoot unlawfully at the poultry or cattle of B., whereby he sets the house of another on fire, it is not felony; for though the act he was doing was unlawful, he had no intention to burn the house. *Ib.* In this case, observes East, "it should seem to be understood that he did not intend to *steal* the poultry, but merely to commit a trespass; for otherwise, the first attempt being felonious, the party must abide all the consequences." 2 *East P. C.* 1019. But cf. *Faulkner*, pp. 22, 590, 618. It is at least very doubtful whether the

proposition laid down by East can now be considered law. See pp. 617-9. If A. has a malicious intent to burn the house of B., and in setting fire to it without intending it burns that of C., it is felony. 1 *Hale P. C.* 569; 2 *East P. C.* 1019. So if A. command B. to burn the house of C., and he do so, and the fire burns also another house, the person so commanding is accessory to the burning of the latter house. *Plowd.* 475; *East, ib.* Cf. p. 154. On an indictment for wilfully setting fire to a rick by firing a gun close to it, evidence was allowed by Maule J. to show that the fire was not accidental, that the day before prisoner was seen near the rick—then also on fire—with a gun in his hand. *Dossett*, 2 *C. & K.* 306 (1846). It was said by Tindal C.J. in his charge to the Bristol grand jury, on the Special Commission in 1832: "Where the statute directs, that to complete the offence it must have been done with intent to injure or defraud some person, there is no occasion that either malice or ill will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and which, in its necessary consequence, must injure his neighbour, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him; nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shewn to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief he committed was wider in its consequences than he originally intended." 5 *C. & P.* 266, *note* to *Pinney* (1832); 3 *St. Tr. N. S.* 8; cf. pp. 20–2.

But where two lads threw a lighted paper into a post-office letter-box, forming part of a house, whereby several letters were burnt, Williams J. said, that no doubt if they intended the fire to do its worst they would be guilty (under ss. 7, 8, pp. 239–40), but if they only set fire to the letters (for "what is vulgarly called a *lark*"), and it was contrary to their intention to burn the house, they would not be guilty, even if the house had been burnt. *Batstone*, 10 *Cox C. C.* 20 (1864).

As to evidence of other fires, see *Gray*, p. 85.

A woman indicted for arson with intent to defraud an insurance office was allowed to give evidence that she was in easy circumstances, and so had no pecuniary motive for the crime. *Grant*, 4 *F. & F.* 322 (1865). See, too, *Harris*, p. 85; and *Dossett*, above. See also 24–5 V. 97, 58, p. 241.

Proof of the intent.] See p. 246, and *Farrington* and *Philp*, p. 21.

By reason of s. 60, p. 241, on an indictment under s. 3, p. 239, the jury can find an intent to defraud an insurance company, though no policy be produced, and to injure the owner, the landlord, though the premises are laid as "of and belonging to" the prisoner, the tenant. Under 7-8 G. 4, 30, 17 (repealed), where "intent to injure" is not necessary, it was held, where a jury found arson of A.'s property in order to injure B. (by throwing suspicion on him), that the conviction was good; *Newill*, 1 *Moo. C. C.* 458 (1836); *Newboult*, *L. R.* 1 *C. C. R.* 344; 41 *L. J. M. C.* 63 (1872); p. 246.

Where the jury found that the prisoner was insane, and they did not believe that he was conscious that the effect of burning a hovel would be to injure any other person, Crompton J. ordered a verdict of not guilty to be entered. *Davies*, 1 *F. & F.* 69 (1858).

It was held, that a wife—living apart—who set fire to her husband's house with intent to injure him was not guilty of felony within 7-8 G. 4, 30, 2 (repealed), the judges thinking that, to constitute that offence, it was essential

that there should be an intent to injure or defraud some third person, not one identified with herself. *March*, 1 *Moody C. C.* 182 (1828); cf. *Pardoe*, p. 246; and see p. 818.

As to defrauding insurers, see *Newboult*, above; compare *Doran*, p. 2. The part-owner of a ship may be convicted of setting fire to it with intent to injure and defraud the other part-owners, although he has insured the whole ship, and promised that the other part-owners shall have the benefit of the insurance. *Philp*, p. 21; cf. *Newill*, above. A person may be convicted, under 7 W. 4 & 1 V. 89, 6 & 11 (repealed), as an accessory before the fact to setting fire to a vessel of which he was at the time part-owner. *Wallace*, *Car. & M.* 200; 2 *Moo. C. C.* 200 (1841).

Attempt to set fire.] It is a sufficient "overt act" to make a person guilty of "attempting to set fire" to a stack under 9-10 V. 25, 7 (repealed), if he go to the stack with the intention of setting fire to it, and light a lucifer match for that purpose, but abandon the attempt because he finds that he is being watched. *Per* Pollock C.B., *Taylor*, 1 *F. & F.* 511 (1859), p. 258.

Summary Jurisdiction.] Some of the offences under s. 16, p. 240 ("wood . . . fern"), are in the same position as embezzlement, p. 376, by 62-3 V. 22, 1, and sched.

ASSAULT.

Impeding a shipwrecked person.] By 24–5 V. 100, 17: "Whosoever shall unlawfully and maliciously prevent or impede any person being on board of, or having quitted, any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person, as in this section first aforesaid, shall be guilty of felony" . . . maximum punishment: penal servitude for life (see p. 198).

Shooting or attempting to shoot, wounding with intent to do grievous bodily harm.] By s. 18: "Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms, at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony" . . . as in s. 17.

Loaded arms.] By s. 19: "Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause."

Inflicting bodily injury with or without weapon.] By s. 20: "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor" . . . maximum punishment: three years' penal servitude (see p. 198). See p. 799.

Attempting to choke, &c.] By s. 21: "Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony" . . . as in s. 17. In addition the court may order the offender, if a male, to be once, twice, or thrice privately whipped, subject to: (1) if he is under sixteen, the number of strokes at each such whipping shall not exceed twenty-five, and the instrument used shall be a birch rod; (2) in any other case the number shall not exceed fifty; (3) the court in its sentence shall specify the number, and the instrument to be used. The whipping must be inflicted within six months after sentence. 26–7 V. 44 (The "Garotting" Act).

Assaults on clergymen.] By s. 36: "Whosoever shall by threats or force obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same, or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."

Assaults on magistrates, &c.] By s. 37: "Whosoever shall assault and strike, or wound any magistrate, officer, or other person whatsoever, lawfully authorised, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to" penal servitude for seven years (see p. 198).

Assault with intent to commit felony, or on peace officer, &c.] By s. 38: "Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for" two years with or without hard labour. See p. 776.

Summary conviction—when a bar to further proceedings.] By ss. 42, 43, power is given to two justices to punish summarily any common assault or battery and larger powers of punishment for aggravated assaults on females and on boys under fourteen; and by s. 44, to dismiss the complaint, and forthwith make out a certificate to that effect; and by s. 45: "If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause;" see p. 255. Cf. pp. 170–1.

Any offence against a child under sixteen, under ss. 42, 43, 52 and 62, is within 4 E. 7, 15 (sched.), p. 329.

Assault occasioning bodily harm—common assault.] By s. 47: "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be kept in penal servitude" (see p. 198); and "whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour."

Indecent assault on females.] By s. 52: "Whosoever shall be convicted of any indecent assault upon any female . . . shall be liable, at the discretion

of the court, to be imprisoned for any term not exceeding two years, with or without hard labour." See on ss. 42–3, above. And by 61–2 V. 36, the husband or wife of a person charged with an offence under this section may be called as a witness either for the prosecution or defence, and without the consent of the person charged; s. 4 and schedule, p. 831.

Indecent assaults on males.] By s. 62: "Whosoever shall attempt to commit the said abominable crime [buggery], or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for" ten years (see p. 198). See on ss. 42–3, above.

Outrages on decency.] See 48–9 V. 69, 11, p. 778.

Assaults on apprentices.] See 24–5 V. 100, 73, p. 517.

Assaults under Children's Dangerous Performances Act, 1879.] See p. 518. An offence within 42–3 V. 34, is within 4 E. 7, 15 (sched.), p. 329.

Costs.] See 24–5 V. 100, 74, 75, pp. 206–7.

Assault with intent to rob.] See 24–5 V. 96, 41, 42, 43, p. 753. A common assault cannot be found under these ss. *Woodhall,* p. 755.

Assaults arising from combination.] See 38–9 V. 86, 7, p. 361.

Judicial separation in cases of assault.] See p. 194.

What amounts to an assault at common law.] All crimes of violence to the person obviously include an assault, and the nature of the crime frequently depends much more on the consequences of the act than any peculiarity of the act itself. In *St. George,* below, under 7 W. 4 and 1 V. 85, 3, 4 (repealed), where the words "or by drawing a trigger or in any other manner" (as in s. 18, p. 249, and s. 14, p. 651), it was held that the only assault that could be found thereunder was that involved in the felony: see *note* to *Dilworth,* p. 252; and *Taylor,* p. 255.

"An assault is any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness; as by striking at him, or even by holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability of using actual violence against his person; as by pointing a weapon at him within the reach of it." 1 *East P. C.* 406. Striking at another with a "hatchet," although without touching him, 2 *Roll. Abr.* 545, *l.* 45 (citing a case in 1349: *Liber Assisarum,* 22 Ed. 3: p. 99, pl. 60); "presenting a gun at him at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him, or by any other such like act done in an angry, threatening manner" is an assault. 2 *Hawk.* Bk. 1, ch. 62, s. 1. It is an assault to point a loaded pistol at any one (provided it is so loaded that it can go off); *James, C. & K.* 530 (1844); and it would seem that it is an assault to present a pistol at another whether loaded or not, unless it is done secretly: for if it is so near that, if it goes off it might do injury, that causes fear or alarm. *St. George,* 9 *C. & P.* 483 (1840), p. 120, above, and pp. 258, 652, *per* Parke B. This dictum still stands, although the decision in *St. George* has been expressly overruled in *Duckworth,* 1892, 2 *Q. B.* 83; 17 *Cox C. C.* 495; *C. C. R.*; where it was held within s. 18, p. 249, to point

a loaded revolver, though an attempt to pull the trigger was frustrated by bystanders. Although for an assault there must be a present ability to inflict an injury, yet if a man is advancing in a threatening attitude to strike another, so that the blow would almost immediately, "within a second or two of time," reach him if he were not stopped, this is an assault. *Stephens* v. *Myers*, 4 *C. & P.* 349 (1830); damages one shilling. See *Halliday* and the other cases, p. 615. So, it has been said, there may be an assault by exposing a child of tender years, under the control and dominion of the defendant, to the inclemency of the weather. *Ridley*, 2 *Camp.* 650 (1811), and, possibly, by *non-feasance*, *e.g.* witholding food. *Ib.* Where the defendants took a newly-born child, put it into a bag, and hung it on to some park palings at the side of a footpath, Tindal C.J. held this to be an assault upon the child. *March*, 1 *C. & K.* 496 (1844), p. 329.

But a mere omission to do an act (unless there be a duty to do it) cannot be construed into an assault. Thus where a man kept an idiot brother, who was bedridden, in a dark room in his house, without sufficient warmth or clothing, Burrough J. ruled, that these facts did not amount to assault or imprisonment; for although there had been negligence, yet mere *non-feasance*, without a duty, would not create an indictable offence. *Smith*, 2 *C. & P.* 449 (1826); cf. *Ridley*, above. See p. 518.

It was held that, if a person puts a deleterious drug (as cantharides) into coffee, in order that another may take it, if it be taken, he is guilty at common law of an assault upon the taker. *Button*, 8 *C. & P.* 660 (1838). But in *Hanson*, 2 *C. & K.* 912 (1849), the contrary was held, *per* Williams and Cresswell JJ.; *Walkden*, 1 *Cox C. C.* 282 (1845), *per* Parke B., and *Dilworth*, 2 *Moo. & R.* 531 (1843), p. 251, *per* Coltman J., are to the same effect. Cf. also *Clarence*, 22 *Q. B. D.* 23; 58 *L. J. M. C.* 10; 16 *Cox C. C.* 571 (1888); *C. C. R.*, p. 728. Nevertheless if death ensue, it would be manslaughter. 1 *Hale P. C.* 431; 1 *East P. C.* 264; Parke B. in *Walkden*, above. See also 48–9 V. 69, 3, p. 722; and 24–5 V. 100, 24, p. 704.

The communication of a venereal disease to a wife by her husband at a time when he was aware, but she was not, of his state and would not have consented to the intercourse if she had known of it, has been held by nine judges to four not to constitute an assault either within s. 20 (p. 249) or s. 47 (p. 250). *Clarence*, above; cf. p. 256.

An unlawful imprisonment is also an assault. 2 *Hawk.* Bk. 1, ch. 60, s. 7; and so is a battery. *Ib.* Bk. 1, ch. 62, s. 1.

It has been frequently said that every imprisonment includes a battery. *B. N. P.* 22, citing *Oxley* v. *Flower* (1800) from *Selw. N. P. Imprisonment*, *I.* But this doctrine was strongly denied. *Emmett* v. *Lyne*, 1 *N. R. Bos. & P.* 255 (1805).

If two persons go out to strike one another, and do so, it is an assault in both, and it is quite immaterial which strikes the first blow. *Lewis*, 1 *C. & K.* 419 (1844). See p. 253, and Index (*Provocation*). "The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and that an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize-fight is clearly an assault; but playing with single sticks or wrestling does not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Orton*," pp. 234, 594. *Per* Cave J. in *Coney*, pp. 158, 234, 253, 595; the whole court agreed that consent was not a defence, and a majority that a spectator, by *merely* being present at a prize-fight, was not guilty (p. 158).

Although it was formerly doubted, it is now clear, that no words,

whatsoever can amount to an assault. 2 *Hawk. P. C.* Bk. 1, ch. 62, s. 1; 1 *Bac. Ab. Assault* (A). But words may sometimes be an important ingredient in ascertaining what is the intention of the party, *e.g.* when a man touches another "in discourse." *Tuberville* v. *Savage*, 8 *Mod.* 3; 2 *Keb.* 545; 1 *Vent.* 256 (1670); and see the cases, p. 614.

Consent.] See above, and p. 727. An attempt is sometimes made to treat that as an assault which is consented to on the part of the assaulted. But on examination it will be found that there is no authority for such a position. Thus in *Nichol*, who was convicted of a common assault, *Russ. & Ry.* 130 (1807)—which is sometimes quoted in support of such a doctrine—where a master took indecent liberties with a female scholar which she did not resist, Graham B. distinctly told the jury that there was some evidence to show that the acts of the prisoner were against the girl's will, as she swore. And in *Day*, 9 *C. & P.* 722 (1841), a similar case, Coleridge J. said, "every *consent* involves a *submission;* but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law": verdict, common assault. So where two boys of eight years were ignorant of the moral nature of the act done to them, it was held that mere submission to an indecent act was not consent to the assault. *Lock*, 42 *L. J. M. C.* 5; *L. R.* 2 *C. C. R.* 10 (1872). It is otherwise if they willingly and intentionally consent. *Wollaston*, 12 *Cox C. C.* 180 (1872), *C. C. R.*, under s. 62, p. 251. See p. 256.

If the consent of the injured person has been obtained by fraud, there is still an assault (though not rape). *Saunders*, 8 *C. & P.* 265 (1838); or an indecent assault under 48–9 V. 69, 4, pp. 723, 728; cf. p. 256; *O'Shay*, 19 *Cox C. C.* 76 (1898), p. 728.

It has also been said, though the law is not so clear upon this point, that where the act is in itself unlawful, it will, though consented to, be punishable as an assault,—see *Lewis* and *Coney*, p. 252, where eleven judges agreed that the consent of the two pugilists did not prevent them or their abettors being guilty of assault,—and even actionable. For according to *B. N. P.* 16, in an action for assault and battery, it was held that it is no defence that the plaintiff and defendant fought by consent, for that the fighting being unlawful, the plaintiff would still be entitled to a verdict for the injury done him; *sed quære.* But in *Christopherson* v. *Bare*, 17 *L. J. Q. B.* 109 (1848), the Queen's Bench held that a plea of leave and licence to an action of assault, amounted to a plea of not guilty. *Knock*, 14 *Cox C. C.* 1 (1877); fighting on a challenge is not fighting in self-defence, p. 320.

As to sport, "any hurt done to another by playing at cudgels, or such like sport by consent," is not an assault, "because the intent of the parties seems no way unlawful, but rather commendable in tending mutually to promote activity and courage." But, it seems, "no consent can make so dangerous a diversion" as fighting with naked swords "lawful." 2 *Hawk.* Bk. 1, ch. 60, s. 26.

Lawful chastisement.] If a parent in a reasonable manner chastise his child, or a master his servant or apprentice, or a schoolmaster his scholar, "or even a husband his wife, as some say" (or a gaoler "his unruly prisoners," *Dalton, Ch.* 121), in such circumstances it is no assault. 2 *Hawk. P. C.* Bk. 1, ch. 60, s. 23; *Com. Dig. Pleader* (3 *M.* 13), under "Due correction": "wife" is included. "Such quaint and absurd dicta as are to be found in the books

as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilised country," *per* L. Halsbury C.: *The Queen* v. *Jackson*, 1891, 1 *Q. B.* 679: "—that a husband has a right to beat his wife. I do not believe this ever was the law," *per* L. Esher M.R., *ib.* 682. In *all* cases of chastisement it must, in order to be justifiable, be reasonable, as in *e.g.* self-defence or arrest; 1 *East P. C.* 406; and children "corrected" must be old enough to be capable of appreciating correction (and not infants only two and a half years old). *Griffin*, 11 *Cox C. C.* 402 (1869), p. 623, *per* Martin B. and Willes J. As to the right of chastisement, see pp. 329, 623.

Self-defence.] As to property, see p. 255. A blow or other violence *necessary* for the defence of a man's person is not a battery. Thus, if A. lift up his stick, and offer to strike B., it is a sufficient assault to justify B. in striking A.; for he need not stay till A. has actually struck him. *B. N. P.* 18. But every assault will not justify every battery; it must be "proportionable to the assault"; an assault may indeed be of such a nature as to justify a *mayhem* ["the deprivation of a member proper for defence in fight," Wharton]; and where it appeared that A. had in a scuffle "ran his finger" towards B.'s eye, it was held a justification ("son assault demesne," *i.e.* his, plaintiff's own original wrong) for B.'s biting off A.'s finger. *Cockroft* v. *Smith*, 2 *Salk.* 641; 1 *L. Raym.* 177 (1704); *B. N. P.* 18. In cases of assault, as in other cases of trespass, the attacked ought not, in the first instance, to beat the assailant, unless the attack is made with such violence as to render the battery necessary. *Weaver* v. *Bush*, 8 *T. R.* 78 (1798). Where a man strikes at another within reaching distance, the latter is justified in using such a degree of force as will prevent a repetition (but no more). *Per* Parke B., *Anon.*, 2 *Lewin, C. C.* 48 (1836). But a blow struck after all danger is past, is an assault. *Driscoll, Car. & M.* 214 (1841), *per* Coleridge J., who said, "It is a common error to suppose that one person has a right to strike another who has struck him, in order to revenge himself," and sentenced the prisoner, for an assault in such circumstances, to fifteen years' transportation. If one use violence more than necessary to repel the assault, he may be convicted of an assault. *Mabel*, 9 *C. & P.* 474 (1840): resisting a policeman.

On a trial for murder of a wife by her husband, evidence that she had on other occasions almost strangled him with his neckerchief, was allowed in order to show the character of the assault he had to *apprehend*. The prisoner was very sensitive about the neck from old abscesses, and the wife on several occasions had twisted his neckerchief round his neck until he became black in the face. *Hopkins*, 10 *Cox C. C.* 229 (1865): verdict, manslaughter. See pp. 603, 626.

Defence of others.] It would seem that a person has no right to commit an assault merely in defence of other persons, unless he stand in a particular relation to the person assaulted. Cf. p. 603. Such reciprocal relations are, husband and wife, *Leward* v. *Basely*, 1 *L. Raym.* 62; *Salk.* 407 (1696), and parent and child. A servant may assault in defence of his master, and, perhaps, *vice versâ*. *Dalton's Justice*, ch. 121; though he treats the last point as doubtful. "Neither can the farmer or tenant justify such an act in defence of his landlord, nor a citizen, &c., in defence of the mayor (or bailiffs) of the city or town corporate where he dwelleth." *Dalton, ib.*, whom *Hawkins*, Bk. 1, ch. 60, ss. 23–4, follows.

Prevention of unlawful acts.] There can be no doubt that any person may interfere to prevent the commission of a felony or any breach of the

peace (p. 222), and that he may use any force which is necessary to effect that object; commencing of course with a request to the offender to desist, then if he refuses gently laying hands on him to restrain him; and if he still resist, then with force compelling him to submit. To this effect, *Hawkins*, above, s. 23. In every case it is a question for the jury whether or not the degree of force actually used was excessive or not; the slightest imposition of hands if not justified is an assault.

Whether the assault may be carried to the extent of depriving the offending party of his life is doubtful. See p. 643 and *Self-defence* in Index.

As to the right to apprehend persons who have committed offences, see pp. 222, 636–7.

A man may justify an assault (without wounding) in defence of his house or other property. 2 *Roll. Abr.* 548–9; *Hawk.* above. And if the trespasser use force (*e.g.* burglary, smashing a door), then the owner may oppose force to force, and "need not request him to be gone . . . for it is but returning violence with violence." *Green* v. *Goddard*, 2 *Salk.* 641 (1706); *Weaver* v. *Bush*, p. 254.

Aggravating circumstances.] Sometimes the consequences are sufficient to subject a prisoner to a more serious punishment, *e.g.* under s. 47 of 24–5 V. 100, p. 250, even though the jury think that "an aggravated assault" was made "without premeditation"; it is still inflicting "grievous bodily harm" within 14–5 V. 19, 4 (repealed). *Sparrow*, 30 *L. J. M. C.* 43 (1860), *C. C. R.*

On an indictment for an assault occasioning actual bodily harm, &c., under that section (4), but not for a common assault, a conviction may be had for a common assault. *Yeadon*, p. 203; cf. pp. 71, 496. So in *Taylor*, *L. R.* 1 *C. C. R.* 194; 38 *L. J. M. C.* 106 (1869), where all the charges were misdemeanors (presumably under 24–5 V. 100, pp. 249–50), and so "the jury may find the prisoner guilty of any lesser misdemeanor that is necessarily included in the offence as charged"; cf. p. 251. See *Guthrie*, p. 731.

As to an indictment under 14–15 V. 19, 5, see p. 799.

Subsequent proceedings after complaint for a common assault.] See *Walker*, p. 171, where the words of 9 G. 4, 31, 27–8, are almost exactly the same as those in ss. 44–5, p. 250, as to a bar of further proceedings. That case was followed in *Elrington*, 31 *L. J. M. C.* 14 (1861); *Q. B.*, which was under 9 G. 4, 31. A discharge by magistrates on giving security to be of good behaviour is a conviction which may be pleaded under ss. 44–5 and at common law on an indictment (there under s. 20, p. 249, and s. 47, p. 250) for the same assault. *Miles*, 24 *Q. B. D.* 423; 59 *L. J. M. C.* 56; 38 *W. R.* 334 (1890); *C. C. R.* See *Blaby*, p. 191. To get the benefit of s. 45 a certificate is necessary, where there has been a dismissal; *per* Hawkins J., *Miles*.

It was also held, on 9 G. 4, 31, that the granting of the certificate by the justices was not discretionary nor a judicial act, but ministerial only, and that it was valid, although not applied for nor drawn up in the presence of the parties—but "forthwith." *Hancock* v. *Somes*, 28 *L. J. M. C.* 196 (1859); *Q. B.* And that the word "forthwith" did not mean "forthwith upon the dismissal," but "forthwith on the application of the party entitled." *Costar* v. *Hetherington*, *ib.* 198. Two judges in *Hancock* v. *Somes*, said that they did not approve of the reasoning in *Robinson*, 10 *L. J. M. C.* 9 (1840); except that forty-two days after the hearing is not "forthwith." The granting of the certificate must, however, be after a hearing "upon the merits" (s. 44), and where the prosecutor did not attend and offered no evidence, it was held that the magistrate had no jurisdiction to grant a

certificate, and such certificate was no bar under s. 45. *Reed* v. *Nutt*, 24 *Q. B. D.* 669; 59 *L. J. Q. B.* 311 (1890), where L. Esher M.R. also thought a county court judge had power to consider the validity of the certificate and the jurisdiction of the magistrate.

Dispute as to lands, &c.] By 24–5, V. 100, 46 justices have no jurisdiction where a question of title to land, &c., arises, and have no power to consider whether the violence (under s. 42) was excessive. *Pearson*, *L. R.* 5 *Q. B.* 237; 39 *L. J. M. C.* 76; 11 *Cox C. C.* 493 (1870). See *French, ex parte Roberts*, 20 *Cox C. C.* 200 (1902): *K. B.*

Assault on peace officer.] The fact that the prisoner did not know that the man whom he assaulted was a peace officer (as he was in plain clothes) in the execution of his duty is no defence under s. 38, p. 250, if in fact he was on duty. *Forbes*, 10 *Cox C. C.* 362 (1865).

In *Prince*, p. 230, Brett J. in commenting on *Forbes*, seems to think that the conviction was wrong unless the prisoners (who certainly had strong ground to suspect, if not to believe, that they were striking a policeman) were taken to know it; but Bramwell B. cited the case with approval, saying, that the act of assaulting a police officer in the execution of his duty was a wrong in itself, and knowledge did not matter. Cf. p. 641.

Indecent assaults.] There is no definition of this offence. By 43–4 V. 45, the consent of a person under thirteen is not a defence to an indecent assault. See also 24–5 V. 100, 52, p. 252, as to females. As to witnesses, see p. 107.

If it appears that the consent of the woman was obtained by fraud, such consent has been held to constitute no defence. See *Case*, 1 *Den. C. C.* 580; 19 *L. J. M. C.* 174 (1850); *Bennett*, 4 *F. & F.* 1105 (1866), venereal disease communicated; and cf. pp. 252, 728.

In charges of indecent assault, the woman may be cross-examined as to connection with other men; but she need not answer. If she does, and in the negative, her answer is conclusive, and no evidence can be given to contradict her. The same rule prevails in cases of rape, notwithstanding several decisions to the contrary. *Holmes*, pp. 89, 730. Otherwise as to previous connection with the prisoner. *Riley*, pp. 89, 730.

On an indictment under 48–9 V. 69, 5, p. 724, for indecent assault, the jury may, if they think fit, find the prisoner guilty of common assault. *Per* Charles J., *Bostock*, 17 *Cox C. C.* 700 (1893).

Age of offender.] If he is too young to be convicted (of rape) under s. 4, p. 723, he may be convicted of indecent assault under s. 9, p. 725. *Williams*, p. 258.

Complaint of indecent assault as part of res gestæ.] A child of six went home and out again without complaining to her mother, but did complain three or four hours later. Held sufficiently soon to be admissible. *Kiddle*, 19 *Cox C. C.* 77 (1898), pp. 24, 327; cf. p. 730.

ATTEMPTS AND INCITEMENTS TO COMMIT OFFENCES.

(For attempt to commit murder, see p. 651.)

At common law.] At common law every attempt to commit a felony or misdemeanor is in itself a misdemeanor. "So long as an act rests in bare intention it is not punishable by our laws; but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done," *per* L. Mansfield, *Scofield, Cald.* 397 (1784). "And the mere *soliciting* another to commit a felony is a sufficient act or attempt to constitute the misdemeanor," 1 *Russ. Cri.* 196. Thus, to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting (and as tending to a breach of the peace, is triable at quarter sessions). *Per* Grose J., *Higgins*, 2 *East* 5 (1801), where it was even suggested that in certain cases incitement to commit a felony may be a felony. "All such acts or attempts as tend to the prejudice of the community are indictable," *ib.* 21. So an *endeavour* to provoke another to send a challenge to fight (especially by sending an insulting letter) has been held to be a misdemeanor. *Philipps*, 6 *East* 464 (1808), p. 320. So to "incite or even solicit another person to commit a felony or *to do any act with intent to induce another person to commit*" a felony is a misdemeanor. *Ransford*, 13 *Cox C. C.* 9 (1874), *C. C. R.*, where the recipient of a letter inciting to crime had not even read it. "Any one unlawful step necessary or useful towards a . . . misdemeanor wilfully taken, is a misdemeanor." *Chapman*, p. 199. See also *Roberts*, p. 259. And it makes no difference whether the offence which is attempted be one which is an offence at common law, or created by statute. *Per* Parke B., *Roderick*, 7 *C. & P.* 795 (1857). As to bribery and perjury, see pp. 281, 695.

As to inciting "an innocent agent," see *Bannen*, p. 343.

Most's case, p. 359, more properly belongs here.

By statute.] Many attempts to commit offences are provided for by statute. Most of them would be offences at common law, but, by statute, severe penalties are attached to them, or they are even made independent felonies: *e.g.* by 24–5 V. 100, 18, 21, 62, pp. 249, 251. As to s. 15; see p. 692.

Various attempts at arson are punished by 24–5 V. 97, 8, 10, 18, 27, 38, 44, some of which are set out, pp. 240–1.

On indictment for principal offence—conviction for attempt.] See 14–15 V. 100, 9, pp. 69, 170. It has been suggested (in a note to *Bain, L. & C.* 129 (1862), which was under 24–5 V. 96, 57, p. 370), that this section only applies to offences created by statutes passed subsequently to that Act, and that a prisoner indicted for one felony cannot be convicted of an attempt at another, or if indicted, at common law, cannot be convicted of the attempt. (If that is so, the prisoner could be separately indicted for the attempt to commit the common law felony.) But the words of the statute are very general, and *Hapgood*, p. 259, is an authority against that view. Cf. p. 303.

What is an attempt?] It is not easy always to decide whether or not an indictable attempt has been committed. In *Carr*, *Russ. & Ry.* 377 (1819), the indictment was for attempting to discharge a loaded blunderbuss with intent to murder; the jury found that the gun was loaded, but not primed when the trigger was drawn; held that the prisoner could not be convicted. So where the touch-hole was plugged, so that it could not be fired. *Harris*, 5 *C. & P.* 159 (1831). So *Lewis*, 9 *C. & P.* 523 (1840). In *Williams*, 1 *Den. C. C.* 39 (1844), the prisoners were indicted under 7 W. 4 & 1 V. 85, 3 (repealed), for attempting to administer poison: they had delivered poison to E., and desired him to put it into Y.'s beer; E. gave up the poison to B. and told him all that had passed; but it was held that on this indictment the conviction was wrong. But this was clearly an incitement indictable at common law; see *Higgins*, p. 257; cf. p. 704. See *Duckworth* and *St. George*, p. 251, and *Taylor*, p. 248, where Pollock C.B. told the jury that, if they thought the prisoner intended to set fire to the stack, and that he would have done so if he had not been interrupted, this was, in his opinion, a sufficient attempt to set fire to the stack within the section (p. 248). "It is clear that every act committed by a person with the view of committing the felonies therein mentioned is not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." It would seem now on the authority of *Brown*, p. 203, which overruled *Collins* (*L. & C.* 471; 10 *L. T. N. S.* 581; 9 *Cox C. C.* 497; 33 *L. J. M. C.* 177; in 1864), where it was held that a pickpocket who put his hand into a woman's pocket, assumed to be empty, could not be convicted of an attempt at larceny, that a person may be convicted of an attempt to commit an offence which, as a matter of fact, he could not have committed. In the case of the pickpocket this was ruled in a case in *Godbolt* (between 1574 and 1638), cited in *Kinnersly*, p. 350. It is not necessary to show that the attempt might have succeeded. *Ring*, 17 *Cox C. C.* 491 (1892), *C. C. R.*, a very similar case to *Collins*. The principle seems to be that if a man intends to commit an offence, and does all that lies in his power towards its committal, he is not excused, because there is some impediment of which he is unaware which would prevent his attempt from being successful. On this principle a man might, it is submitted, be convicted of an attempt to shoot with a gun which as a matter of fact could not be discharged. See *per* L. Coleridge in *Duckworth*, p. 251, and *per* Charles J., *Jackson*, 17 *Cox C. C.* 104 (1890), p. 772, under 24–5 V. 100, 14 (p. 651); cf. s. 19 (p. 249). Whether a boy under fourteen could be convicted of an attempt to commit a rape is a question which is still open, but L. Coleridge thought that he could not, though other judges inclined the other way. See *Waite*, 1892, 2 *Q. B.* 600; *L. J. M. C.* 187; 17 *Cox C. C.* 554; *C. C. R.*, p. 723, where there was a good conviction for assault: *Williams*, 1893, 1 *Q. B.* 321; 62 *L. J. M. C.* 69; *C. C. R.*, p. 727.

The prisoner had procured certain dies for the purpose of making counterfeit Peruvian dollars, but (the jury found) only intended to make a few dollars in England by way of experiment, and then—if it answered—to send the apparatus out to Peru. He had procured some of the necessary "plant" to complete the coining, and had negotiated for more, but was not proved to have actually got much of it. He was convicted for attempting to

make counterfeit foreign coin, and on other counts. The conviction was upheld. The only question argued was, whether the attempt was sufficiently closely connected with the offence to constitute an attempt to commit a felony, and the court held that it was, as the procuring the dies was sufficiently proximate to the offence, and sufficiently showing the clear criminal intent. *Roberts, Dears. & P. C. C.* 539 (1855). "It is difficult and perhaps impossible," said Jervis C.J. " . . . to define what is and what is not such an act done in furtherance of a criminal intent, as will constitute an offence. . . . Many acts, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder, and is seen to walk towards the place of the contemplated scene, that would not be enough"; but here no one could doubt the express purpose of the prisoner. "I quite agree," said Parke B. "with the law . . . in *Eagleton* [p. 324], that an attempt at committing a misdemeanor is not an indictable attempt unless it is an act directly approximating to the commission of an offence, and I think this act is a sufficient approximation." "Every case must be taken with its own peculiar circumstances," *per* Wightman J. In *Eagleton* the last act in the fraud (obtaining money by false pretences) was getting credit in an official's book. The court said if any other act had been required to get the money, they would not have held this "proximate." As it was the last act "dependent on himself," it ought to be considered as an attempt.

The prisoner was servant to a contractor for the supply of meat to a camp; it was the course of business for the contractor to send the meat to the quartermaster-sergeant, who with the assistance of some servant of the contractor weighed the meat with his own weights and scales, and served it out to the different messes: the prisoner removed one of the weights supplied by the quartermaster-sergeant, and substituted for it a short weight of his own. By this means the quantity remaining over, which would in due course have been carried away by the contractor, was about 45 lbs. more than it ought to have been, but the fraud was detected before the weighing was completed. The jury found that he intended to steal the difference. Upon these facts he was convicted of attempting to steal 45 lbs. of meat, the property of his master. The Court for C. C. R. upheld the conviction. Erle C.J. observed, "It is said that the evidence here does not show any such proximate overt act as is sufficient to support the conviction for an attempt to steal the meat. In my opinion there were several overt acts which brought the attempt close to completion. These were the preparation of the false weight, the placing it in the scale, and the keeping back the surplus meat. It is almost the same as if the prisoner had been sent with two articles, and had delivered one of them as if it had been two. To complete the crime of larceny there only needed one thing, the beginning to move away with the property." Blackburn J. observed, "There is no doubt a difference between the preparation antecedent to an offence and the actual attempt, but if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime." *Cheeseman, L. & C.* 140 (1862). Cf. *Ransford*, p. 257.

As to an unsuccessful attempt to cheat in gaming, see p. 492.

Aiding in an attempt.] Where one prisoner was charged with committing a rape and another with aiding and abetting him, and the jury found the former guilty of an attempt to commit a rape and the other of aiding in the attempt, it was held that the latter was within 14-15 V. 100, 9, p. 269. *Hapgood and Wyatt, L. R.* 1 *C. C. R.* 221; 39 *L. J. M. C.* 83 (1870), p. 257.

BANKRUPTS—OFFENCES BY.

Offences against the bankruptcy laws.] The Debtors Act, 1869, 32–3 V. 62, contains provisions with respect to the offences of fraudulent debtors which are very similar to those which were formerly contained in the Bankruptcy Acts. The Bankruptcy Acts, 1883–90, are: 46–7 V. 52; 47–8 V. 9; 48–9 V. 47; 49–50 V. 12; 50–1 V. 66; 51–2 V. 62; 53–4 V. 71. Words and expressions contained in the Debtors Act are (s. 3) to have the same meaning as they have in the Bankruptcy Act, 1869, which was repealed by 46–7 V. 52, by s. 149 (2) of which references to the 1869 Act are replaced by the corresponding provisions of the 1883 Act, and by s. 163 (2), of which the provisions of the Debtors Act, 1869, as to offences by bankrupts are to apply to any person *whether a trader or not*, in respect of whose estate a receiving order has been made. As to the making, &c., of a receiving order, see s. 5, &c., of 1883 Act.

Punishment of fraudulent debtors.] See p. 160. By s. 11 of the Debtors Act, 1869 (amended S. L. R. Act No. 2, 1893): "Any person adjudged bankrupt [see s. 163, 2, above] shall, in each of the cases following, be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that is to say,

Failure to make full discovery.] 1. If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud:

Failure to deliver up property.] 2. If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:

Failure to deliver up books, &c.] 3. If he does not deliver up to such trustee, or as he directs, all books, documents, papers and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud:

Concealment of property or debts (as amended 46–7 V. 52, 163, 1).] 4. If after the presentation of a bankruptcy petition, by or against him, or within four months next before such presentation, he conceals any part of his property to the value of ten pounds [cf. p. 77] or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud:

Removal of property (amended 46–7 V. 52, 163, 1).] 5. If after the presentation of a bankruptcy petition, by or against him, or within four months next before such presentation, he fraudulently removes any part of his property of the value of 10*l.* or upwards:

Omission in statements.] 6. If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud:

False debts.] 7. If knowing or believing that a false debt has been proved by any person under the bankruptcy, he fail for the period of a month to inform such trustee as aforesaid:

Preventing the production of books, &c. (amended 46–7 V. 52, 163, 1).] 8. If after the presentation of a bankruptcy petition, by or against him, he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

Concealment, mutilation, falsification, &c., of books, &c. (amended 46–7 V. 52, 161, 1).] 9. If after the presentation of a bankruptcy petition, by or against him, or within four months next before such presentation, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

[The words "such presentation" here, and below, refer, of course, to the presentation of a petition "by or against" the debtor. *Beck*, 16 *Cox C. C.* 718 (1889); *C. C. R.*]

False entries (amended 46–7 V. 52, 163, 1).] 10. If after the presentation of a bankruptcy petition, by or against him, or within four months next before such presentation, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

Fraudulently parting with, altering books, &c. (amended 46–7 V. 52, 163, 1).] 11. If after the presentation of a bankruptcy petition, by or against him, or within four months next before such presentation, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs.

Fictitious losses (amended 46–7 V. 52, 163, 1).] 12. If after the presentation of a bankruptcy petition by or against him, or at any meeting of his creditors within four months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses:

Obtaining credit by fraud (amended 53–4 V. 71, 26).] 13. If within four months next before the presentation of a bankruptcy petition, by or against him, or in case of a receiving order made under s. 103 of the Bankruptcy Act, 1883, before the date of the order, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same:

Obtaining credit on false pretence of carrying on business (amended 53–4 V. 71, 26).] 14. If within four months next before the presentation of a

bankruptcy petition by or against him or in case of a receiving order made under s. 103 of the Bankruptcy Act, 1883, before the date of the order, he, being a trader [*or not*, p. 260], obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud :

Pledging, &c., property obtained on credit (amended 53–4 V. 71, 26).] 15. If within four months next before the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under s. 103 of the Bankruptcy Act, 1883, before the date of the order, he, being a trader [*or not*, p. 260], pawns, pledges, or disposes of otherwise than in the ordinary way of his trade any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud :

Obtaining consent of creditors by false representation.] 16. If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his bankruptcy."

Penalty for absconding with property (amended 46–7 V. 163, 1).] By s. 12 : "If any person who is adjudged a bankrupt after the presentation of a bankruptcy petition by or against him, or within four months before such presentation quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of 20*l.* or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour."

Where a debtor shortly before his bankruptcy executed a deed of assignment of "all his property" for the benefit of his creditors, having at the time 120*l.* with which he absconded from England a day or two afterwards, he was rightly convicted under this sub-s. as it was "his" property and not the trustee's. *Humphris*, 20 *Cox C. C.* 620 (1904), *C. C. R.*

Penalty on fraudulently obtaining credit, &c.] By s. 13 : "Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour ; that is to say,

(1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud :

(2) If he has, with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of, or any charge on his property :

(3) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him." See *Turner*, p. 263, and *Walford*, p. 85.

A plaintiff in an action for unliquidated damages is not a creditor of the defendant within the meaning of sub-s. 2 until judgment is recovered and signed. *Hopkins*, 1896, 1 *Q. B.* 652 ; 65 *L. J. M. C.* 125 ; *C. C. R.*

False claims by creditor, &c.] By s. 14 : "If any creditor in any bankruptcy, wilfully and with intent to defraud, makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour."

Order by court for prosecution on report of trustee.] By s. 16: "Where a trustee in any bankruptcy reports to any court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of an offence under this Act, the court shall, if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, order the trustee, to prosecute the bankrupt for such offence."

"Trustee" here includes the official receiver; 46–7 V. 52, 164; by which also this s. applies to offences under that Act.

Expenses of prosecution.] By s. 17: "Where the prosecution of the bankrupt under this Act is ordered by any court, then, on the production of the order of the court, the expenses of the prosecution shall be allowed, paid, and borne," as set out, p. 204. Cf. p. 206.

Application of Vexatious Indictments Act.] By s. 18, every misdemeanor under ss. 11–23 shall be deemed to be an offence within and subject to the provisions of the Vexatious Indictments Act, 1859, p. 160; "and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent."

Form of indictment.] By s. 19: "In an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged, in the words of this Act, specifying the offence or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under" the Bankruptcy Act, 1883 (p. 260). See p. 268.

Quarter sessions to have jurisdiction.] By s. 20, jurisdiction over offences against this Act is given to quarter sessions.

Punishments not cumulative.] By s. 23, where any person is liable under any other Act or at common law to any punishment, &c., for any offence made punishable by this Act, he may be proceeded against under that Act or at common law or under this Act, "so that he be not punished twice for the same offence."

N.B. throughout the Debtors Act, s. 163 (2) of the Bankruptcy Act, p. 260.

Undischarged bankrupt obtaining credit to the extent of 20l.] By 46–7 V. 52, 31, where an undischarged bankrupt (under this Act) obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanor, and may be dealt with and punished as if he had been guilty of a misdemeanor under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section. See p. 267, and *Dyson, ib.*

This offence is "analogous" to those under s. 13 of the Debtors Act (p. 262), rather than those under s. 11 (pp. 260–2); punishment, therefore, ought to be under s. 13, as in any case of doubt "the court will choose the lighter." *Turner*, 20 *Cox C. C.* 590; 1904, 1 *K. B.* 181; *C. C. R.*

Power of court to commit for trial.] By s. 165 (1) of 46–7 V. 52: "Where there is, in the opinion of the court, ground to believe that the

bankrupt or any other person has been guilty of any offence which is by statute made a misdemeanor in cases of bankruptcy, the court may commit the bankrupt or such other person for trial; (2) for the purpose of committing the bankrupt or such other person for trial the court shall have all the powers of a stipendiary magistrate as to taking depositions, binding over witnesses to appear, admitting the accused to bail or otherwise."

Public prosecutor to act in certain cases.] By s. 166: "Where the court orders the prosecution of any person for any offence under the Debtors Act, 1869, or Acts amending it, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution."

Criminal liability after discharge or composition.] By s. 167: "Where a debtor has been guilty of any criminal offence he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved." P. 172.

Proof of bankruptcy.] It is necessary to prove the bankruptcy petition and the adjudication.

The following provisions of the Act of 1883, contain all that is now necessary to be proved in order to establish the bankruptcy.

S. 132. (1) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

(2) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.

S. 133. (1) A minute of proceedings at a meeting of creditors under this Act signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

(2) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had.

S. 134. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

S. 136. In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to. [Cf. p. 59.]

S. 137. Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of any such court, in all legal proceedings.

S. 138. A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment. [And of the date of it, for the computation of the month, under s. 11 (7), p. 261; *Beaumont*, 26 *L. T. N. S.* 587 (1872), *C. C. R.*]

S. 140. (1) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act, of the Board of Trade, shall be conclusive evidence of the fact so certified.

If any of the documents put in contain erasures and interlineations they will not thereby be rendered inadmissible in evidence, although no proof be given when they were made; the presumption in such cases being against fraud and misconduct. *Gordon*, p. 267.

Where the copy of the Gazette was not produced, Lush J. admitted an order of adjudication under the seal of the court to prove the fact of the debtor being "adjudged bankrupt" within the meaning of s. 11 of the Act of 1869, and said the provision as to the Gazette is only cumulative, and the bankruptcy may be proved by the Gazette or otherwise. *Thomas*, 11 *Cox C. C.* 535 (1870). A page of the London Gazette cut from that part which contained the advertisement of the notice of the bankruptcy petition, &c., was held to have been wrongly received in evidence, though it came filed with other documents from the Bankruptcy Court. *Lowe*, 52 *L. J. M. C.* 122; 15 *Cox C. C.* 286 (1883); *C. C. R.*

Who may be a bankrupt.] By 45–6 V. 75, 1, 5: "Every married woman carrying on a trade separately from her husband, shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." Cf. 46–7 V. 52, 152; and 56–7 V. 63.

Since 37–8 V. 62, an infant cannot be convicted of appropriating any part of his property "which ought by law to be divided amongst his creditors" where the debts proved against his estate are only trade debts and it does not appear there are any debts for necessaries supplied to him. *Wilson*, 5 *Q. B. D.* 28; 49 *L. J. M. C.* 13 (1879); *C. C. R.* See also *Ex parte Jones*, 18 *Ch. D.* 109; 50 *L. J. Ch.* 673 (1881); *C. A.*, where Jessel M.R. seems to think that even if the infant trader had expressly represented to the petitioning creditor that he was of full age an adjudication could not be made, —although an "equitable liability" would be created.

Failure to disclose, concealment, and fraudulent removal of property.] A disclosure under sub-s. 1, p. 260, is not restricted to property in possession at the commencement of the bankruptcy. See *Michell*, 50 *L. J. M. C.* 76; 14 *Cox C. C.* 490 (1880); *C. C. R.*, where the evidence on which the bankrupt was held to have been rightly convicted related to transactions respecting property disposed of some twelve months previously. With respect to the non-disclosure of his property by the bankrupt (p. 260), in order to bring the prisoner within the statute, it must appear that there was a criminal intent in his refusing to disclose his property. Thus where the prisoner was convicted under 5 G. 2, 30 (repealed 6 G. 4, 16, 1), for not "freely and truly disclosing and discovering," &c., and the evidence was, that on the last day of examination he appeared before the commissioners and was sworn and examined, but as to certain parts of his property refused to give any answer, stating that this was not done to defraud his creditors, but under legal advice

to dispute the validity of the commission, the judges held the conviction wrong. *Page, Russ. & Ry.* 392; 1 *B. & B.* 308 (1819).

If on his examination the bankrupt give up a book, as containing a full and true discovery of his estate and effects, it is incumbent on the prosecution to produce that book, or to account for its non-production; for otherwise it cannot be known whether the effects have been concealed or not. *Evani*, 1 *Moody C. C.* 70 (1825). It is not necessary that the concealment should have been effected by the hands of the prisoner himself, or that he should be shown to have been in the actual possession of the goods concealed, after bankruptcy; it is sufficient if another person, having the possession of the effects as the agent of the prisoner, and holding them subject to his control, conceals them with his privity. *Ibid.* A secreting by a bankrupt of his goods is sufficient to constitute a concealment (under 5–6 V. 122, 32, repealed), although a full disclosure is afterwards made to the commissioners before the bankrupt's last examination. *Courtivron* v. *Meunier*, 6 *Ex.* 74; 20 *L. J. Ex.* 104 (1851) overruling *Walters*, 5 *C. & P.* 138 (1831). But the concealment must be with intent to defraud. *Ib.*

Where the prisoner executed an assignment of the property on his farm to trustees for the benefit of his creditors which was not registered as a bill of sale, and afterwards, remaining in possession as bailiff of the trustees, fraudulently removed stock from the farm to the extent of 10*l.* and then liquidated his affairs by arrangement, and a trustee was accordingly appointed, it was held that he could not properly be convicted under s. 11, 5 (p. 261). The assignment, not having been registered as a bill of sale, was void as against the trustee in liquidation; but was otherwise in force, so that the property in the stock removed was not the prisoner's, within the section, but the (first) trustees' under the assignment. *Creese, L. R.* 2 *C. C. R.* 105; 43 *L. J. M. C.* 51 (1874). It must be borne in mind that by 45–6 V. 43, unregistered bills of sale are now absolutely void.

Obtaining credit.] The expression "credit" has been given a wide meaning by the Court for C. C. R., and it has been held that it does not matter how short the period of credit may be, and that if a man parts with his goods "without insisting on prepayment or interchangeable payment," he gives credit. Where, therefore, the prisoner making no verbal representation of his ability to pay, but being in fact penniless, ordered and consumed a meal at a restaurant, it was held that he was rightly convicted of obtaining credit by fraud on an indictment under s. 13, sub-s. 1, p. 262 (but not of larceny nor of obtaining by false pretences, p. 414). *William Jones*, 1898, 1 *Q. B.* 118; 19 *Cox C. C.* 87; *C. C. R.*

An obtaining goods on approval is not an obtaining of credit within 24–5 V. 134, 221 (repealed). *Lyons*, 9 *Cox C. C.* 299 (1863). Sub-s. 15, p. 262, speaks of disposing "otherwise than in the ordinary way of his trade," and upon these words it was ruled by Lush J., after consulting Martin B., that the disposing by bill of sale of a portion of a trader's goods not paid for was clearly within the section. *Thomas*, p. 265. But where prisoner, within the four months, had disposed of goods obtained on credit, but it was proved that he had always done so in the whole course of his business, Wright J. held that he was not within sub-s. 15. *Juston*, 51 *J. P.* 505 (1897). Where a trader, being in insolvent circumstances, purchased goods on credit, and shipped them to Australia and obtained advances by pledging the bills of lading, it was held that in the absence of any evidence of having obtained the goods on false representations, his conduct did not constitute an offence under s. 11, (13), (14), or (15), pp. 261-2. *Ex parte Brett, In re Hodgson*, 1 *Ch. D.* 151; 45 *L. J. Bank.* 17 (1875); *C. A.*

S. 13, p. 262, applies to "any person" whether bankrupt or not. Where

a judgment had been recovered against a person not a bankrupt, and on the very next night he removed his property from his house in order to defeat the creditor who had obtained the judgment, it was held that he could be brought within sub-s. 3; but, inasmuch as the indictment charged an intent to defraud his "creditors," and there was no proof, beyond the intention to defraud the particular judgment creditor, which was not left to the jury as evidence of an intent to defraud creditors generally, and no evidence to show there were other creditors, the conviction was quashed. *Rowlands*, 8 *Q. B. D.* 530; 15 *Cox C. C.* 31; *L. J. M. C.* 51 (1882); *C. C. R.*

In order to convict an undischarged bankrupt under s. 31, p. 263, it is not necessary that there should be a stipulation to grant credit in the contract between the parties; it is sufficient if a credit in fact is obtained. The prisoner, living in Newcastle-on-Tyne, bought by letter a horse from the prosecutor in Ireland, who by the prisoner's direction delivered the horse on board a steamer; no stipulation was made as to the time or mode of payment, and the prisoner did not disclose the fact that he was an undischarged bankrupt. He paid for the carriage of the horse on its delivery to him, and immediately sold it, and refused to pay the price to the prosecutor. A conviction under s. 31 was upheld. *Peters*, 16 *Q. B. D.* 636; 53 *L. J. M. C.* 173; 16 *Cox C. C.* 36 (1886); *C. C. R.*

The twenty pounds are reckoned on what the bankrupt keeps, not what he orders. *Juby*, 55 *L. T.* 788 (1886), *C. C. R.*, where prisoner having less than that value ordered goods bringing his debt over that amount.

Intent to defraud.] Since s. 11, pp. 260-2, declares, in most instances, that the debtor shall be guilty of a misdemeanor, "unless the jury is satisfied that he had no intent to defraud," &c., it is now, in general, for the prisoner to rebut the presumption of fraud. See *Thomas*, p. 265; *Bolus*, 11 *Cox C. C.* 610 (1870); *Cherry*, 12 *Cox C. C.* 32 (1871). Before bankruptcy, the prisoner called a meeting of his creditors and disclosed to them the disposal of his property, for not disclosing which after bankruptcy he was convicted under sub-ss. (1), (2), (4), (6), pp. 260-1: held, that he was entitled to prove what took place at this meeting to disprove the intent to defraud,—which might or might not have been enough to satisfy the jury. *Wiseman*, 20 *Cox C. C.* 144 (1901). An intent to defraud is not a material ingredient of the offence created by s. 31, p. 263—the obtaining of credit by an undischarged bankrupt. *Dyson*, 1894, 2 *Q. B.* 176; 63 *L. J. M. C.* 124; 18 *Cox C. C.* 1; *C. C. R.*, where Hawkins J. said, "the offences created by" the Debtors Act, 1869, "are created by sections in which the words 'fraudulently' or 'unless the jury is satisfied, &c.,' or equivalent words are used. In framing the Act of 1883, the legislature had the provisions of the Act of 1869 before them, and it is impossible to suppose that they were unaware of the importance of limiting the offence to cases where there has been an intent to defraud and excluding those cases where the jury might think there had been no such intent." The following authorities on earlier statutes have some application to the present law. In *Gordon*, 25 *L. J. M. C.* 19; *Dears. & P. C. C.* 586 (1855), p. 265, an indictment, under 12–13 V. 106, 251 (repealed), for not surrendering, the jury found that there was no evidence that the prisoner had actual knowledge of the adjudication and the summons to surrender, but that the prisoner had left this country before the adjudication, believing that he would be made bankrupt, and stayed abroad with the intent to defraud his creditors, by depriving them of their rights to examine him and make him responsible: it was held that this finding was sufficient to support a conviction. In *Ingham*, 29 *L. J. M. C.* 18; 8 *Cox C. C.* 240 (1859); *C. C. R.*, an indictment for making false entries under s. 252 of that statute, the jury found that the false entries were made by the bankrupt with intent to deceive

his creditors as to the state of his accounts, and to prevent the examination and investigation of them in due course of bankruptcy, and to save him from having to account for a deficiency which appeared in the genuine account; but they also found that it was not done to defraud the creditors of any money or property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him. The conviction was quashed on the ground that, though there might be an intention to deceive, the jury had expressly negatived an intention to defraud. Pollock C.B. said to "defraud" meant to cheat a person out of something. Cf. p. 474. See also *Hughes*, 1 *F. & F.* 726 (1860).

Proof of the value of the effects.] Where the prosecution is on the ground of concealing effects, it must be proved that those effects were of the value of 10*l.*

In *Davison*, 7 *Cox C. C.* 158 (1855), p. 387, Alderson B. doubted exceedingly whether embezzling small sums on different days, not in any one instance amounting to 10*l.*, could be considered within the section.

Examination of bankrupt: "Disclosure."] See pp. 45, 237. The examination of the debtor or of any person capable of giving information may also be conducted under 46–7 V. 52, 99 and 27.

Evidence.] See pp. 45, 237.

Venue.] An indictment, under 5–6 V. 122 (repealed), for not surrendering at a district court cannot be sustained in a different county, that, for instance, in which the bankrupt was a trader, and committed an act of bankruptcy: the offence is committed where the district court is. *Per* Maule J. in *Milner*, 2 *C. & K.* 310 (1846). In *Peters*, p. 267, it was held that the offence was committed in Newcastle-on-Tyne. So where a bankrupt by means of false pretences made verbally in Glasgow, obtained goods and credit for goods delivered in the county of Durham, a conviction under s. 11 (13), p. 261, and s. 13 (1), p. 262, in Durham is good; the offence is committed where the goods for which credit is given are obtained. *Ellis*, 19 *Cox C. C.* 210 (1898), *C. C. R.* In *Dawson*, 16 *Cox C. C.* 556; 53 *J. P.* 280 (1888); *C. C. R.*, an undischarged bankrupt, while in Suffolk, purchased a quantity of fish on credit. Part of the fish he disposed of in Suffolk, and the remainder he sent into the county of Lincoln. Upon an indictment under s. 31, p. 263, laid in the county of Lincoln, it was held that credit was obtained in Suffolk, and the conviction in the county of Lincoln was quashed: p. 425.

Arrest of bankrupt.] By 46–7 V. 52, 25, amended 53–4 V. 71, 7, the court may by warrant arrest a debtor or seize his papers, &c., under certain circumstances. See p. 644.

Indictment.] See p. 263. An indictment under s. 13 (1), p. 267, was held sufficient which charged the prisoner with having obtained credit "*under* false pretences," or "by means of other fraud," without setting out the false pretences by means of which the debt or liability was incurred; "*under*" is here used advisedly instead of "by." *Pierce*, 56 *L. J. M. C.* 85 (1887), *C. C. R.*, following *Watkinson*, 12 *Cox C. C.* 271 (1872), *C. C. R.*, and dissenting from *Bell*, 12 *Cox C. C.* 37 (1871). But where the offence charged is within a section in which the time is material, *e.g.* s. 11 (15), p. 262, that time must be strictly averred in the indictment; it cannot be amended after verdict. *Oliver*, p. 177; cf. *Heymann*, p. 359.

In *Harris*, 1 *Den. C. C. R.* 461; 19 *L. J. M. C.* 11 (1849), an indictment

under 5–6 V. 122, 32 (repealed), charged that the bankrupt, &c., was possessed of a certain real estate, to wit, &c., and that at the time of his examination, and being sworn, he then and there feloniously did not discover when he disposed of, assigned and transferred the said real estate, &c. It was held that the indictment was bad for repugnancy, as it charged the prisoner with not discovering at the time of his examination when he disposed of an estate, which was averred to be in his possession at that time.

BARRATRY.

A BARRATOR* is defined to be "a common mover, exciter, or maintainer of suits or quarrels either in courts or in the country, and it is said not to be material whether the courts . . . be of record or not, or whether such quarrels in the country relate to a disputed title of possessions or not; but that all kinds of disturbances of the peace, and the spreading of false rumours and calumnies, whereby discord and disquiet may grow among neighbours, are as proper instances of barratry as the taking or keeping the possession of lands in controversy. But it hath been holden that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right. However, if such actions be merely groundless and vexatious, without any manner of colour . . . I do not see why a man may not as properly be called a barrator for bringing such actions himself, as for stirring up others to bring them. But it seems that an attorney is in no danger of being judged guilty of an act of barratry in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy." 2 *Hawk. P. C.* Bk. 1, ch. 81, ss. 1–4; 1 *Russ. Cri.* 489.

Barratry is a cumulative offence, and the party must be charged as a *common barrator*. It is, therefore, insufficient to prove the commission of one act only. *Hawk. ib.* s. 5; cf. p. 78. For this reason the prosecutor is bound, before the trial, to give the defendant a note of the particular matters intended to be proved, without which the trial will not be permitted to proceed. *Ib.* s. 13. See especially *per* L. Hardwicke C. (passage partly cited, p. 662). The prosecution will be confined to these particulars. *Goddard* v. *Smith*, 6 *Mod.* 262; Case 374 (1705), p. 176. See *Car. Supp.* 322, p. 163.

The punishment is by fine and imprisonment, and being held to good behaviour, and in persons of "any profession relating to the law, they ought also to be . . . disabled to practise for the future." *Hawk. ib.* s. 14; 34 E. 3, 1, still in force.

By 12 G. 1, 29, 4: "if any person . . . convicted of . . . common barratry shall . . . act or practise as an attorney, or solicitor, or agent, in any suit or action" in "England, the judge or judges of the court where such suit or action . . . shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way in open court; and if it shall appear . . . that the person complained of . . . has offended, shall cause such offender to be transported for seven years." (See p. 198.) This Act was revived and made perpetual by 21 G. 2, 3, which is repealed by the Stat. Law Rev. Act, 1867, which, however, by repealing the last s. of 12 G. 1, 29, keeps this s. alive.

BETTING, OFFENCES CONNECTED WITH.

See *Gaming*, p. 490.

Inciting infants to bet.] See p. 492.

* The word is of doubtful origin; perhaps from Gk. *prattein*, to do, be busy about.

BIGAMY.

Statute.] This offence was originally only of ecclesiastical cognisance, but was made a felony by 1 Jac. 1, 11, repealed by 9 G. 4, 31, 1 (and 74, 125; India).

By 24–5 V. 100, 57: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England, or Ireland, or elsewhere, shall be guilty of felony, and being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years" [see p. 198]; "and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended, or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty; or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time; or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." (As to the old law on the second "marriage," see 1 *Hale P. C.* 692; 1 *East P. C.* 465.)

Proof.] Upon an indictment for bigamy, the prosecutor must prove: 1. The marriage and the second ceremony; 2. The identity of the parties; 3. That the first spouse is alive; and if he or she has been absent for seven years, then, 4. That the prisoner knew he or she was alive.

I. *The two "Marriages."*

Valid marriage—second marriage.] Very considerable difficulty occurs, in some cases, in ascertaining how far either or both marriages must be shown to be valid. So far as relates to the first marriage, see pp. 272 and foll. With regard to the validity of the second marriage, but for the existence of the first marriage, considerable doubt used to exist, for it was thought that it was necessary to prove such a legal marriage as would, but for the first marriage, have been a binding marriage for all purposes. But it was held, that where a woman already married, and having a husband alive, marries with the widower of her deceased sister, she was guilty of bigamy, though by 5–6 W. 4, 54, 2 (repealed in this respect by 7 E. 7, 47), such a marriage is declared to be "null and void to all intents and purposes whatsoever." *Brawn* (and *Webb*), 1 *C. & K.* 144 (1843), p. 275. And in *Allen, L. R.* 1 *C. C. R.* 367; 41 *L. J. M. C.* 97 (1872), where a man in the lifetime of his second wife married a niece of his first, confirming the above decision, and disapproving of *Fanning*, 17 *Ir. C. L.* 289; 10 *Cox C. C.* 411 (1866), it was held that where a person already

bound by an existing marriage goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, that will be a bigamous marriage, although invalid by reason of some legal disability in the parties. If, however, the form of marriage gone through is not proved to be one recognised by the law, it is not a bigamous marriage. *Burt* v. *Burt*, 29 *L. J. P. & M.* 133; 2 *Sw. & Tr.* 88 (1860), where without *formal* proof of the law of Australia the Divorce Court declined to say that a marriage there was valid (though there was no reason to doubt it). This case was not doubted in *Allen*, where Cockburn C.J. said it was one of a form of marriage "unknown to the law."

Where in a marriage before a registrar the prisoner, who had been previously married, gave a false name, whether with or without the knowledge of the woman there was no evidence, it was held that this would not acquit the prisoner of the bigamy. *Rea*, *L. R.* 1 *C. C. R.* 365; 41 *L. J. M. C.* 92 (1872). Kelly C.B. said that as the ss. regulating marriages by registrar, viz. 6–7 W. 4, 85, 4 and 42 (latter partly repealed, 61–2 V. 58, 15), followed those as to banns (see p. 275), they must receive the same construction, and cases under them must be decided on the same principles. Therefore the knowledge of irregularity must be that of both parties; as that was not shown here, "and the presumptions in favour of marriage clearly throw the burden of proof of invalidity upon the party alleging it," the conviction was affirmed. He would not say that even if both parties knew of the misnomer there would have been no bigamy. Cf. *Allen*, and *Wroxton*, p. 275.

Proof of valid first marriage—not presumed.] A marriage in fact must be proved; whereas "general reputation is usually admissible to establish the fact of parties being married," *i.e.* in *civil* cases. *T.* s. 578. "An action for criminal conversation is the only *civil* case where it is necessary to prove an *actual* marriage." L. Mansfield, *Birt* v. *Barlow*, p. 145; cf. *Morris* v. *Miller*, p. 4. *Smith* v. *Huson*, 1 *Phill.* at 313–14 (1811).

It is not sufficient to prove cohabitation and marriage by reputation. *Catherwood* v. *Caslon*, 13 *M. & W.* at 265 (1844); p. 16. Nor (probably) by a copy of the certificate of marriage without evidence of the identity of the parties, although it can be proved that the prisoner cohabited with a person of the same name immediately afterwards. *Simpson*, 15 *Cox C. C.* 323 (1883). See p. 816.

Proof of valid first marriage—prisoner's admission.] In *Newton*, 2 *Moo. & Rob.* 503 (1843), p. 160, Wightman J. held that the prisoner's admissions, deliberately made against his own interest, of a previous marriage in a foreign country are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of that country. (S. C. *Simmonsto*, 1 *C. & K.* 164.) But in *Flaherty*, 2 *C. & K.* 782 (1847), where a man went to a police station and stated that he had committed bigamy, and when and where the real marriage took place, and while in custody signed a statement to the same effect, Pollock C.B. thought this, though *some* evidence, of the marriage, was not sufficient: not guilty.

Proof of valid first marriage—second "spouse" a competent witness.] After proof of the first marriage, the second "wife" or "husband" is a competent witness, for then it appears that the second "marriage" is void. *Bull. N. P.* 287; 1 *East P. C.* 469. The real spouse may be called for the defence. 61–2 V. 36, 1*c.*, p. 830.

Proof of valid first marriage—proof that valid ceremony was performed—marriages in England.] It is clear that unless the first marriage be valid, the

crime of bigamy cannot be committed. Where the marriage has taken place in England, otherwise than by special licence, it may have been celebrated either in (i.) any place licensed by the bishop for divine service (4 G. 4, 76, 13; 5 G. 4, 32), or "a church or chapel in which marriages may be solemnised according to the rites of the Church of England" (6–7 W. 4, 85, 39); or (ii.) "a separate building certified according to law as a place of religious worship" when "registered for solemnising marriages therein" (*ib.* s. 18); or (iii.) a registry office (*ib.* s. 21); or (iv.) any place which is "according to the usages" of Quakers and Jews (*ib.* s. 2, amended 23–4 V. 18, 1).

In all these cases it is sufficient to call a person who was present at the ceremony, and it will be presumed to have been in all respects duly performed; or, without calling any person who was present at the marriage, it will be sufficient, coupled with evidence of the identity of the parties (p. 277) to produce either the register (if any) or an examined copy of the register, or a certified copy of the register from the general registry office, which is made evidence by 6–7 W. 4, 86, 38, p. 145; and see now 14–15 V. 99, 14, p. 136. See as to non-parochial registers, 21–2 V. 25; as to licensing by a bishop, 6–7 W. 4, 85, 26.

The other requisites of a valid marriage must be sought in the Marriage Acts (see *Index*); and see *Geary* on *Marriage*. The effect of 49–50 V. 14 (except as to the marriage usages of Quakers and Jews), is that "it is still felony to solemnise a marriage except between 8 a.m. and 3 p.m. without" a special licence from the Archbishop of Canterbury. *Chitty's Statutes, 5th ed.*, by Lely, "Marriage," p. 62 *x*. See p. 334. The certificate, under s. 38, above, was held to be sufficient *primâ facie* evidence of the marriage having been duly performed in *Hawes*, 1 *Den. C. C.* 270 (1847); though the proof of a person present at the marriage was sufficient *primâ facie* evidence without it; but it has nevertheless been the general practice as to class ii. above, under s. 18, to adduce some evidence both of the presence of the registrar, for which, by 61–2 V. 58, 4, a "duly authorised person" is substituted, and that the chapel was duly registered. In *Manwaring*, *D. & B. C. C.* 132 (1856), p. 136, however, at least four judges out of five were of opinion that oral proof that the marriage was celebrated in a chapel, in presence of the registrar, being aided by the presumption *omnia rite esse acta* (p. 17), was sufficient without proving that the chapel was registered; and this was followed by Willes J., after consulting Pollock C.B. in *Cradock*, 3 *F. & F.* 837 (1863). Cf. 14–15 V. 99, 14, p. 136.

While the parish church was under repair, divine service had been several times performed by a clerk in holy orders in a chamber at a private hall, and the marriage of the prisoner was solemnised there. Though there was no evidence that the chamber was licensed for the performance of divine service or for marriages, it was presumed in favour of the marriage. L. Coleridge C.J. said: "We are of opinion that the marriage service having been performed in a place where divine service was several times performed, the rule 'omnia presumuntur rite esse acta' applies, and that we must assume that the place was properly licensed, and that the clergyman performing the service was not guilty of the grave offence of marrying persons in an unlicensed place." *Cresswell*, 13 *Cox C. C.* 127; 1 *Q. B. D.* 446; 45 *L. J. M. C.* 77 (1876); *C. C. R.*, p. 6.

There seems no reason to doubt that the validity of the ceremony would be presumed upon the production of the certificate of the registrar, under 6–7 W. 4, 86, 35, 37. See *Hawes*, above, and *Geary* on *Marriage*, p. 125 (ch. 3, s. 1*c*); but cf. *Nokes* v. *Milward*, 2 *Add.* at 390 (1824), as to "irregular" marriages. In *Edwards*, p. 276, the second ceremony was proved by prisoner's signature of the register and his written note for the

publication of the banns, but it was also proved that he had acknowledged the "marriage."

If the prisoner sets up a valid subsisting marriage of the person supposed to be his or her "real" spouse at the time of the bigamous marriage charged, *he* or *she* will be allowed to prove that previous marriage by evidence of cohabitation and reputation, although the *prosecutor* is bound to prove the true marriage he sets up strictly, for "the prisoner is in the position of an innocent third party," and "a crime cannot be presumed" in favour of the prosecutor or against the prisoner. *Wilson*, 3 *F.* & *F.* 119 (1862), where A. indicted for bigamy in 1858, showed *in this way*, that when she was "married" in 1848 to B., B. was already married, and his reputed wife was alive in 1851; B.'s marriage before 1848 was only proved by reputation.

Proof of valid marriage—Jews and Quakers.] In a Jewish marriage a written contract being an essential part of the ceremony, such contract must be produced and proved, *Althausen*, 17 *Cox C. C.* 630 (1893), p. 275, where, too, the marriage was in Russia.

55–6 V. 23, consolidates "enactments relating to the marriage of British subjects outside the United Kingdom."

Proof of valid marriage—form of marriage abroad.] The question of validity of such marriages is often very difficult. It is fully treated under Rules 169–70, *Dicey, Conflict of Laws*, ch. 26, and *Westlake, Private International Law*, ch. 4. One *general* rule with regard to marriages contracted in a foreign country, *so far as forms of celebration are concerned*, is, that, if contracted according to a form which would constitute a valid marriage in the place where it is celebrated, it is a valid marriage here.

Another *general* rule is, that a marriage contracted according to a form which would not constitute a valid marriage in the country where it was celebrated is invalid. But *capacity* of the parties to marry or intermarry according to English law can never be lost sight of. See p. 277. A., a member of the Established Church in Ireland, was married by C., a "regularly placed minister" of the Presbyterians, to B., duly according to the religious rites of the Presbyterians, in C.'s house in Ireland, and A. and B. lived together for some time. A. afterwards married X. in England, while B. was alive, and upon a special verdict in Ireland was found not guilty of bigamy, the Q. B. being equally divided as to the validity of the marriage with B., and one judge withdrawing his judgment: on error, the House of Lords was equally divided, and, therefore, that marriage was held invalid, and there was judgment for the defendant. *Millis*, 10 *Cl.* & *F.* 534 (1844). Mr. Dicey, above, at 634 *n.*[1], says the authority of this case is "to a certain extent doubtful. . . . It is, however, clearly binding on English Courts."

Proof of valid marriage—in colonies.] "Colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony." 1 *Black. Com.* 108. From *Lautour* v. *Teasdale*, 8 *Taunt.* 830 (1816), it appears that "the matrimonial law of the colonies is identical with that prevailing in England before the first Marriage Act (L. Hardwicke's, 26 G. 2, 33), except when it has been regulated by enactments or ordinances of their own municipal law, as by Orders in Council, *vide Catterall* v. *Catterall*, 1 *Robert.* 580 [1847]." *Tarring, Law of the Colonies*, 3*rd ed.* (1906), ch. 1—which see—p. 7 *n.*[5]

Proof of valid marriage—in Scotland.] These are subject to the same

general considerations as marriages abroad. Cf. *Dicey*, above, at 68 *n.*[1] But by 19–20 V. 96, 1: "After the 31st day of December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom, or usage, to the contrary notwithstanding."

Proof of valid marriage—in Ireland.] Marriages in Ireland are now regulated by 7–8 V. 81 (to meet the decision in *Millis*, above); 8–9 V. 54, 5; 9–10 V. 72; 19–20 V. 119, 7; 23–4 V. 18; 26–7 V. 27; 26–7 V. 90; 33–4 V. 110, 4, 32–42, sched.; 34–5 V. 49, 2, 21–9, sched.; 35–6 V. 10; 36–7 V. 16, and other statutes, for which see *Index to the Statutes in Force.*

Proof of valid marriage—preliminary ceremonies.] It is a general rule that where a marriage is shown to have been regularly celebrated, the performance of the preliminary conditions will be presumed; and it is for the party who seeks to repudiate the marriage to show that they were not fulfilled. *Althausen*, p. 274.

What marriages are void.] There are many marriages which for civil purposes are *voidable*, but not *void—i.e.* they are valid until some step has been taken to annul them. But many such marriages might be valid for the purposes of bigamy. Whether or not a marriage is void for the purposes of bigamy is sometimes a very difficult question. It is clear that all marriages within the prohibited degrees are invalid (by 5–6 W. 4, 54, 2, but see p. 271). Thus if a man "marry" his deceased wife's sister, and in the latter's lifetime marry another woman, he is not guilty of bigamy (even though one of the sisters is illegitimate). *Chadwick*, 11 *Q. B.* 173 and 205; 17 *L. J. M. C.* 33 (1847). But it appears from *Brawn* and *Allen*, that, if the first marriage be valid, it makes no difference that the second "marriage" was within the prohibited degrees; p. 271.

Although it was formerly held that the marriage of an idiot was valid, yet, according to modern determination, the marriage of a lunatic, not in a lucid interval, is void. 1 *Bl. Com.* 438, 439. And by 51 G. 3, 37, if persons found lunatics "by any inquisition," or committed to the care of trustees by any Act, marry before they are declared of sound mind by the Lord Chancellor, or the majority of such trustees, the marriage shall be totally void.

Void marriages by banns.] By 4 G. 4, 76, 22: "If any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnisation of such marriage by any person not being in holy orders, the marriage of such person shall be null and void."

(1) The real marriage. To render a marriage without due publication of banns void under this s., it must appear that it was contracted with a knowledge by *both* parties that no due publication had taken place. *Wroxton, Inhabs. of*, 4 *B. & Ad.* 640 (1833); where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that fact until after

the solemnisation of the marriage; it was held to be a valid marriage. The prisoner went through the ceremony of marriage with a woman whose surname was Abel. In order to conceal the fact he published her banns in the surname of Anderson, but, except that she signed the register in the name of Anderson, there was no evidence to show that she knew of the misdescription until after the solemnisation of the marriage. In her lifetime he "remarried." To prove the marriage with Abel valid the prosecution was bound to show—affirmatively, as Huddleston B. held—that she was unaware of the want of due publication, though *Wroxton* showed that her signing the register in the false name was no proof of knowledge at the moment of solemnisation: an acquittal was directed. *Kay*, 16 *Cox C. C.* 292 (1877); and see *Wiltshire* v. *Prince*, 3 *Hagg. Ecc. R.* 332 (1830). In the absence of fraud, a reputed name acquired by use (*e.g.* G. S. for A. L., the baptismal name), not only does not avoid the marriage, but may be the proper one, to prevent deception. *Billingshurst, Inhabs. of*, 3 *M. & S.* 250 (1814). Cf. *Burton-on-Trent*, p. 277, both under 26 G. 2, 33, 8, repealed. Cf. *Rea*, p. 272.

(2) The second ceremony. A prisoner cannot take advantage of his own fraud in the second ceremony. Where he procured the banns to be published in a wrong name, he was not allowed to object that the indictment charged the false name he had himself given. *Edwards*, *Russ. & Ry.* 283 (1814), *C. C. R.*; 1 *Russ. Cri.* 690. This principle was followed in *Penson*, 5 *C. & P.* 412 (1832), where the woman was a party to the fraud, Gurney B. saying, "parties cannot be allowed to evade punishment . . . by contracting a concertedly invalid marriage." Where the prisoner and the woman contracted the second "marriage" in the maiden names of their mothers, it was unanimously resolved, on a reference to the judges, that the prisoner had been rightly convicted. *Palmer*, 1827, 1 *Deacon's Dig. C. L.* 147.

Void marriages—civil cases.] Where the banns were published in the name of *William*, the real name being *William Peter*, and that always used being *Peter*, and the suppression was for the purpose of effecting a clandestine marriage with a minor, the marriage was declared null and void. *Pouget* v. *Tomkins*, 1 *Phill.* 499; 2 *Hag. Consist.* 142; 3 *M. & S.* 262 (1812). See also *Fellowes* v. *Stewart*, 2 *Phill.* 257 (1815); *Meddowcroft* v. *Gregory*, *ib.* 365 (1816). So where the wife at the time of her marriage personated another woman in whose name banns had been previously published for an intended marriage with her husband. *Stayte* v. *Farquharson*, 3 *Addams*, 282 (1826), under 26 G. 2, 33 (repealed). See *Midgley* v. *Wood*, 30 *L. J. P. M. & A.* 57 (1860). But where there was a fraudulent misdescription of the woman's surname, etc., to the knowledge of both, the marriage at a registry office was held valid. *In re Rutter: Donaldson* v. *Rutter*, 24 *T. L. R.* 12 (1907).

Void marriages of minors.] The marriage by licence of a minor without the consent of his father, then living, has been held valid under 4 G. 4, 76, 16, that s. being directory only. *Birmingham, Inhabs. of*, 8 *B. & C.* 29; 2 *Man. & Ry.* 230 (1828).

6–7 W. 4, 85, 10, also regulates such consent.

Under (repealed) 1 Jac. 1, 11, a boy under fourteen or a girl under twelve, and so not "within age of consent" (s. 3), were not guilty of bigamy. 1 *Bl. Com.* 436; *Gordon*, *Russ. & Ry.* 48 (1813). Subsequent statutes do not contain this exception. But probably a marriage within that age would be considered as wholly void, the presumption being that the parties are incapable of sexual intercourse.

Void marriages by licence.] The fraud must be on the Marriage Acts. Where the licence was in the man's name of repute in actual use (he having

concealed his real name, as he was a deserter), the marriage was held valid. *Burton-on-Trent, Inhabs. of*, 3 *M. & S.* 537 (1815); see *Billingshurst*, p. 276. See *Bevan* v. *M'Mahon*, 30 *L. J. P. M. & A.* 61 (1861).

Void marriages abroad.] See p. 274. "English courts will, of course, hold invalid a marriage by any person who is prohibited from entering into it by English law." *Dicey, Conflict of Laws*, ch. 26, at 645 *n.*[1], which consult further on this subject. It must be borne in mind that in a trial for bigamy proof of marriage must be strict (though, see *Griffin*, below).

Foreign law—how proved.] See pp. 123, 143. In order to prove the law of France respecting marriage, the French vice-consul in London was called, who produced a copy of the *Cinq Codes*, which, he stated, contained the customary and written laws of France, and was printed under the authority of the French government, though it had not been given to him officially, but he had bought it privately. Abbott C.J. said that the general rule certainly was, that the written law of a foreign country must be proved by an examined copy, before it could be acted on in an English court, but, according to his recollection, printed books on the subject of the law of Spain "were referred to and acted upon" in argument in *Thomas Picton*, 30 *How. St. Tr.* at 510–14 (1806), as evidence of the law of that country, and therefore (though he doubted), he acted on that authority, and received the evidence (the objection being waived). *Lacon* v. *Higgins*, *Dowl. & Ry. N. P. C.* 38; 3 *Stark.* 178 (1822). But this is certainly not the law now. See p. 122. In *Povey*, 1 *Dears. & P. C. C.* 32; 22 *L. J. M. C.* 19 (1852), p. 122, it was held that, in order to prove that a marriage in Scotland was valid, the witness must be one conversant with the law of Scotland as to marriages (though not necessarily a lawyer; *e.g. Dent*, 1 *C. & K.* 97, in 1843). A witness said that she was present at a ceremony performed in a private house in Scotland by a minister "of a congregation, but whether of the Kirk she did not know," that she herself was married in the same way, and that people always married in Scotland in private houses. She was held not to be sufficiently skilled, and a conviction was quashed. In *Griffin*, 14 *Cox C. C.* 308 (1879), a marriage contracted according to the rites of the Roman Catholic Church in Illinois was presumed by four judges of the Irish Court for C. C. R. against two to be good without positive proof of the law of that state: the only witness being the second "wife."

II. *The Identity of the Persons.*

Identity of parties.] The identity of the persons named in the indictment must be proved. It was proved by a person who was present at the prisoner's second "marriage," that a woman was married to him as Hannah Wilkinson, the name in the indictment, but there was no other proof that the woman in question was, in fact, Hannah Wilkinson (the second "wife" apparently not being called). Parke J. held the proof to be insufficient, and directed an acquittal: and expressed "a decided opinion that he was right"; and added, that to make the evidence sufficient, there should have been proof that the prisoner "was then and there married to a certain woman *by the name of, and who called herself, Hannah Wilkinson*," because the indictment undertakes that Hannah Wilkinson was the person, whereas, in fact, there was no proof that she had ever before gone by that name; and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. *Drake*, 1 *Lew. C. C.* 25 (1830).

If there be a discrepancy between the Christian name of the real wife in the indictment, and that stated in the marriage certificate produced, the

prisoner must be acquitted; *unless* that discrepancy can be explained, or it can be shown that she was known by both names. *Gooding, Carr. & M.* 297 (1841). A photograph which had been taken from the prisoner, and which she had said (according to the "second" husband) was that of her husband, was allowed to be shown to a witness present at the real marriage, who said she believed the man was the same, and also to another witness who had known the original of the photograph, in order to prove his identity with the person mentioned in the certificate; but the jury, apparently, were not satisfied with this identification. *Tolson*, 4 *F. & F.* 103 (1864).

III. *Proof that Spouse is Alive.*

Proof that the first spouse is alive.] It is essential to show that the real spouse is alive at the time of the second "marriage." Although the statute (p. 271) sanctions a presumption that a person who has not been heard of during seven years is dead, yet there is no presumption of *law* that when a person has been seen or heard of within the seven years, he or she is alive, he or she must be shown to be alive as a matter of *fact* or inference from the circumstances of the case (*e.g.* that he was alive and well shortly before the date in question). *Lumley, L. R.* 1 *C. C. R.* 196; 38 *L. J. M. C.* 86 (1869), p. 17; *Phené's Trust, L. R.* 5 *Ch. App.* 139; 39 *L. J. Ch.* 316; 22 *L. T.* 111; 18 *W. R.* 303 (1869). The prisoner was convicted of bigamy with D. in 1880. He had previously been convicted of bigamy with B. in 1868—having first married A. in 1864. The question was whether A. was alive in 1879; after 1868 there was no evidence as to this. It was proved that he was married to C. in 1879, and that she was alive in 1880. It was held that this must be presumed (or rather should be inferred by the jury) to be a good marriage. Therefore, in the absence of all evidence, there were two conflicting inferences possible:—1st. That the marriage in 1879 was a good one; 2nd. That it was not a good marriage, as A. might be then still alive. It was held to be a question for the jury which inference should have the greater weight, and as it had not been left to them, the conviction was quashed. It may be observed that there was nothing to show that the 1880 marriage was not valid, as A. may have died after the marriage with C., and before that with D. *Willshire*, 6 *Q. B. D.* 366; 50 *L. J. M. C.* 57 (1881); *C. C. R.* See below.

IV. *Proof after Absence of Seven Years.*

Proof after absence of seven years.] Where the spouses were proved to have separated and been continually absent for seven years, it was upon the prosecution to show not only that the spouse was alive, but that the prisoner knew it at the time of the second "marriage." *Curgerwen, L. R.* 1 *C. C. R.* 1; 35 *L. J. M. C.* 58 (1865). But within the seven years such knowledge need not be proved affirmatively: the jury must be satisfied of it. *Jones*, 11 *Cox C. C.* 358 (1869); *C. C. R.* But where there is no evidence of a separation the presumption is that it has not taken place, and to displace this there must be evidence. *Jones*, 11 *Q. B. D.* 118; 52 *L. J. M. C.* 96 (1883); *C. C. R.* To reconcile *Willshire*, above, with *Curgerwen*, it must be taken that in the former there was no evidence of a separation in or after 1868.

Curgerwen thus disposes of the point left unsettled in *Cullen*, 9 *C. & P.* 681 (1840); *Jones, Carr. & M.* 614 (1842); *Briggs, Dears. & B. C. C.* 98 (1856), all under 4 G. 4, 31 (repealed); viz. whether the prisoner was bound actively to seek information whether the spouse was alive or not.

It was held by nine judges to five a good defence that the prisoner at the time of the second "marriage" honestly and on reasonable grounds believed that the spouse was dead, even within the seven years. *Tolson*, 23 *Q. B. D.* 170; 58 *L. J. M. C.* 97 (1889); *C. C. R.*, under s. 57, p. 271.

Venue.] See 24–5 V. 100, 57, and pp. 217, 271.

It was decided that an indictment (under 9 G. 4, 31, 22, repealed) found in a different county from that where the offence was committed, need not allege that the prisoner was in custody in the former, for that sufficiently appears in the caption. *Whiley*, 1 *C. & K.* 150 (1840); [2 *Moo. C. C.* 186. This report is untrustworthy. *Per* Parke B., *Smythies*, pp. 220, 479.]

A British subject resident in England committed bigamy; both ceremonies took place in Scotland; it was held that he might be indicted and convicted of bigamy in England under that statute. *Topping*, 25 *L. J. M. C.* 72, *C. C. R.* (1856).

Other defences under the exceptions.] The prisoner may prove under the first exception in s. 57, p. 271, that he or she is not a subject of the crown, *and* that the second marriage was not contracted in England or Ireland. But the proviso in s. 57 does not make it necessary that the indictment must allege that the accused is a subject of the crown; it is for him to prove that he is not. *Audley*, (1907) 1 *K. B.* 383; 23 *T. L. R.* 211: *C. C. R.* (and *E. Russell*, p. 217, there cited); for an enactment by proviso is distinct from an exception in the enacting part. Cf. p. 557.

Another exception is, where the person, at the time of the second marriage, has "been divorced from the bond of the first marriage." A divorce *a vinculo matrimonii* must be proved. It is not always sufficient to prove a divorce out of England, where the first marriage was in this country. The prisoner was indicted for bigamy under 1 Jac. 1, 11 (repealed). He had been married in England, and went to Scotland, where his wife procured a divorce *a vinculo matrimonii*, on the ground of adultery, in Scotland, before his second marriage. This, it was insisted, for the prisoner, was a good defence under the third exception in 1 Jac. 1, 11; but the judges were unanimously of opinion that no sentence or act of any foreign country could dissolve an *English* marriage *a vinculo matrimonii*, for ground on which it was not liable to be dissolved *a vinculo matrimonii* in *England*, and that no divorce of an ecclesiastical court (as this was) was within the exception in s. 3 of 1 Jac. 1, 11, "unless it was the divorce of a court within the limits to which 1 Jac. 1 extends." *Lolley, Russ. & Ry.* 237; 2 *Cl. & F.* 568 (1812). On this case Mr. Dicey observes: "In spite . . . of some doubts which have been expressed on the subject, it must be taken now as clearly established that the Scotch courts have as regards, at any rate, any effects in England, no power to dissolve an English marriage, where the parties are not really domiciled in Scotland; and, further, that the same doctrine applies to all foreign courts." *Conflict of Laws*, Rule 84, p. 392, &c. See especially *ib.* note 9, Appendix, p. 758.

Another exception is, where the former marriage has been "declared void by the sentence of any court of competent jurisdiction"; the words in 1 Jac. 1, 11, 3, were, "by sentence in the ecclesiastical court declared to be void"; and under these it was held by all the judges that a sentence of a spiritual court against marriage, in a suit of jactitation of marriage, was not conclusive evidence, so as to stop the crown from proving the marriage, the sentence having decided only "collaterally" and "incidentally" on the validity of the marriage, and this may be impeached at the trial as having been obtained by fraud or collusion, even supposing the sentence to be conclusive on the indictment. *Duchess of Kingston's case*, p. 127. One reason

is that the crown is not a party in the spiritual court. See 2 *Smith, L. C.* 731, 11*th ed.*

Accessory before the fact.] An unmarried person who knowingly goes through a marriage, bigamous in the other party, is clearly within 24–5 V. 100, 67, p. 158, and guilty at common law. *Webb* (and *Brawn*), p. 271.

BORROWING MONEY, INCITING TO.

See p. 492.

BREACH OF OFFICIAL TRUST.

See pp. 674–5.

BRIBERY.

See p. 373.

Nature of the offence.] Bribery is a misdemeanor punishable at common law. "Bribery in strict sense is taken for a great misprision of one in a judicial place, taking any valuable thing whatsoever, except meat and drink of small value, of any one who has to do before him in any way, for doing his office, or by colour of his office, but of the King only. But bribery in a large sense is sometimes taken for the receiving or offering of any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity. . . . Also, bribery sometimes signifies the taking or giving a reward for offices of a public nature." 2 *Hawk, P. C.* Bk. 1, ch. 67, ss. 1–3; and see 52–3 V. 69, p. 302.

An unsuccessful attempt to bribe is a misdemeanor, as where a bribe is offered to a judge, and refused by him. 3 *Inst.* 147. So an attempt to bribe the first lord of the treasury or a privy counsellor, for the purpose of procuring an office, is a misdemeanor. *Vaughan's case*, 4 *Burr.* 2494 (1769), p. 670, where L. Mansfield said, "Wherever it is a crime to take, it is a crime to give." So an attempt to bribe, in the case of an elector in an election to a corporation is punishable. *Plampton's case*, 2 *Ld. Raym.* 1377 (1725). Bribery or promising money (not necessarily to a particular individual) at the election of an assistant overseer is an offence at common law. *Lancaster*, *per* Wills J., 16 *Cox C. C.* 737 (1890). See also 1 *Russ. Cri.* 197, 443.

Bribery, &c., at elections for members of parliament.] By the Corrupt Practices Prevention Act, 1883, 46–7 V. 51, 1 :—

"(1) Any person who corruptly, by himself or by any other person, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing any meat, drink, entertainment or provision to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be guilty of treating.

(2) And every elector who corruptly accepts or takes any such meat, drink, entertainment or provision shall also be guilty of treating.

S. 2. Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall, by abduction, duress, or any fraudulent device or contrivance impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce, or prevail upon any elector either

to give or to refrain from giving his vote at any election, shall be guilty of undue influence.

S. 3. The expression 'corrupt practice,' as used in this Act, means any of the following offences, namely, treating and undue influence as defined by this Act, and bribery and personation, as defined by the enactments set forth in Part III. of the Third Schedule to this Act, and aiding, abetting, counselling, and procuring the commission of the offence of personation, and every offence which is a corrupt practice within the meaning of this Act shall be a corrupt practice within the meaning of the Parliamentary Elections Act, 1868" (31–2 V. 125).

The Acts (other than Scotch) referred to as being contained in Part III. of the Third Schedule are 17–18 V. 102, 2, 3; 30–1 V. 102, 49; and 35–6 V. 33, 24, p. 403. Of these, 17–18 V. 102, 2, runs: The following persons shall be deemed guilty of bribery, and shall be punishable accordingly :—1. Every person who shall, directly, or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter or to or for any other person, in order to induce any voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election; 2. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election; 3. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure or endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election; 4. Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election; 5. Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election.

For punishment, see s. 6, p. 285.

S. 3 is: The following persons shall also be deemed guilty of bribery and shall be punishable accordingly :—1. Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment, for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election; 2. Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting, at any election.

By s. 10, no indictment for bribery or undue influence is triable at quarter sessions. See 46–7 V. 51, 53, p. 284.

Bribery under 30–1 V. 102, 49, is the corrupt payment of rates to enable

the ratepayer to be registered as a voter; the ratepayer, if a party to the transaction, is also guilty.

In *Leatham*, 3 *L. T.* 504 (1860), p. 45, the defendant was indicted for having in 1859 paid to A. money with the intent that it should be applied in bribery at an election. There were several other counts in which the defendant was charged with actual bribery of several voters. The defendant was found guilty generally. Upon a motion for a new trial, it was objected that the alleged offence was committed more than a year before the filing of the information by the attorney-general, against 17–18 V. 102, 14 (repealed). As to this, the Queen's Bench said that, as it was upon the record, advantage could be taken of it in arrest of judgment, or by writ of error, and they would not interfere; but a strong opinion was expressed that s. 14 did not apply to criminal proceedings, but only to the recovery of a penalty or forfeiture in a civil suit. The second objection was that as the defendant was found guilty upon the first count, he could not also be guilty of the offences charged in the other counts, as it appeared that there was but one act, namely, the payment of the money by the prisoner to A. the agent, who actually bribed the different voters without consulting defendant, but the court thought that this objection, if available at all, was only available at the trial by application to compel the prosecutor to elect upon which of the charges, that of advancing money for bribery or that of bribing each individual, he would proceed; and the court said that it was quite possible that one act might produce several distinct offences: [p. 175]. The third objection was, that as the evidence was that the defendant had paid the money to A., and A. had employed subordinates to bribe, the defendant could not be found guilty of having bribed the voters himself. But the court thought that bribing by an agent was bribing by the principal expressly within the Act, and on general principles of law. At a later stage of the proceedings, 3 *L. T.* 777; 30 *L. J. Q. B.* 205, it was held that, because the defendant had, at the inquiry, by the commissioners into the corrupt practices, referred to and stated the substance of two letters, one of which was produced between himself and his agent, these letters were not thereby rendered inadmissible against him on an indictment for bribery, under 15–16 V. 57, 8; one judge remarked that discoveries, *e.g.* of stolen property or a body, caused by statements of confessions or prisoners, were admissible when the statements themselves were not. Cf. pp. 36, 45.

Bribery at elections for members of parliament is also a crime at common law, and it was held that 2 G. 2, 24 (repealed), which imposed a penalty upon such offence, did not affect that, *per* L. Mansfield, *Pitt*, 3 *Burr.* 1339; 1 *W. Bl.* 380 (1762). The following cases were decided on old statutes. Where money is given it is bribery, although the person giving it take a note from the voter, which he promises to deliver up when the elector has voted, and although he votes for the other side. *Sulston* v. *Norton*, 3 *Burr.* 1235; 1 *W. Bl.* 317 (1761). So also a wager with a voter, that he will not vote for a particular person. *Anon.*, *Lofft* 552 (1774); 2 *Hawk. P. C.* Bk. 1, ch. 67, s. 10 *n.*

Where a voter received money *after* an election for having voted for a candidate, but no agreement was made before the election, it was held not to be within 2 G. 2, 24, 7 (repealed). *L. Huntingtower* v. *Gardiner*, 1 *B. & C.* 297 (1823).

The payment of the travelling expenses of voters is now an illegal practice, see 1 *Russ. Cri.* 444, 446, and 46–7 V. 51, 13–23, 48. *Cooper* v. *Slade*, 25 *L. J. Q. B.* 324; 6 *E. & B.* 447 (1856); 6 *H. L. C.* 746; 27 *L. J. Q. B.* 449; 6 *W. R.* 461 (1857–8).

As to the extension of the provisions as to parliamentary to municipal elections, see 47–8 V. 70, &c., p. 285.

Legal proceedings.] 46–7 V. 51, 50 (p. 220), provides for the removal of proceedings at the instance of the attorney-general to the Central Criminal Court.

S. 51.—(1) A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence under the Corrupt Practices Prevention Acts or this Act shall be commenced within one year after the offence was committed, or, if it was committed in reference to an election with respect to which an inquiry is held by election commissioners shall be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed, and the time so limited by this section shall, in the case of any proceeding under the Summary Jurisdiction Acts for any such offence, whether before an election court or otherwise, be substituted for any limitation of time contained in the last-mentioned Acts.

(2) For the purposes of this section the issue of a summons, warrant, writ, or other process shall be deemed to be a commencement of a proceeding, where the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender, but save as aforesaid the service or execution of the same on or against the alleged offender, and not the issue thereof, shall be deemed to be the commencement of the proceeding.

S. 52. Any person charged with a corrupt practice may, if the circumstances warrant such finding, be found guilty of an illegal practice (which offence shall for that purpose be an indictable offence), and any person charged with an illegal practice may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt practice, and a person charged with illegal payment, employment or hiring, may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt or illegal practice. Cf. pp. 70, 170.

S. 53.—(1) Ss. 10, 12, and 13 of the Corrupt Practices Prevention Act, 1854 [as to Costs, and see p. 282], and s. 6 of the Corrupt Practices Prevention Act, 1863 [p. 303], which relate to prosecutions for bribery and other offences under those Acts, shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned, and an order under the said s. 10 may be made on the defendant; but the Director of Public Prosecutions or any person instituting any prosecution in his behalf, or by direction of an election court shall not be deemed to be a private prosecutor, nor required under the said sections to give any security.

(2) On any prosecution under this Act, whether on indictment or summarily, and whether before an election court or otherwise, and in any action for a pecuniary forfeiture under this Act, the person prosecuted or sued, and the husband or wife of such person may, if he or she think fit, be examined as an ordinary witness in the case. Cf. p. 107.

(3) On any such prosecution or action as aforesaid it shall be sufficient to allege that the person charged was guilty of an illegal practice, payment, employment, or hiring within the meaning of this Act, as the case may be, and the certificate of the returning officer at an election, that the election mentioned in the certificate was duly held, and that the person named in the certificate was a candidate at such election, shall be sufficient evidence of the facts therein stated.

S. 55.—(2) The enactments relating to charges before justices against

persons for indictable offences shall, so far as is consistent with the tenor thereof, apply to every case where an election court orders a person to be prosecuted on indictment in like manner as if the court were a justice of the peace. Cf. p. 69.

By s. 56 the jurisdiction of the High Court may be exercised by a judge or master in certain cases.

By s. 57 (1) the duties of the Director of Public Prosecutions are defined. By sub-s. 2, subject to the provisions of this Act, the costs of any prosecution on indictment for any offence under this Act, whether by the Director of Public Prosecutions or his representative, or by any other person, shall so far as they are not paid by the defendant, be paid in like manner as costs in the case of a prosecution for felony are paid: p. 208.

By s. 58 (1) provision is made for costs other than costs of a prosecution on indictment.

(2) Where any costs or other sums are under the order of an election court or otherwise under this Act, to be paid by any person, those costs shall be a simple contract debt due from such person to the person or persons to whom they are to be paid, and if payable to the Treasury shall be a debt to her Majesty, and in either case may be recovered accordingly.

By a proviso to s. 43 (4) in the case of corrupt practices the defendant has an option of being tried by a jury, and by sub-s. (5) he is then and in other cases triable upon indictment.

Bribery, &c., at municipal elections.] By the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47–8 V. 70, 2 (1), corrupt practices are treating, undue influence, bribery and personation, as defined by 17–18 V. 102, 2 and 3, p. 282; 35–6 V. 33, 24, p. 403; 46–7 V. 51, 1, 2, p. 281; and 45–6 V. 50, 77, partly repealed; and "aiding, abetting, counselling and procuring the commission of the offence of personation."

By s. 2 (2), any "person who commits any corrupt practice in reference to a municipal election shall be guilty of the like offence, and shall, on conviction, be liable to the like punishment and subject to the like incapacities as if the corrupt practice had been committed in reference to a parliamentary election."

In s. 28, the powers of the Director of Public Prosecutions are described, and amongst them the power to prosecute before the election court, or *any other* competent court, any person who appears to him to have been guilty of a corrupt or illegal practice. See *Riley* and *Campion*, p. 287. The accused (of corrupt practice) has the option of being tried by a jury. By s. 30, the prosecution of offences is (subject to the provisions of the Act, including additions to this s.) to be the same in all respects as if the offence had been committed in reference to a parliamentary election. And ss. 45–6, 50–7 (pp. 284–5), 59 (p. 125), and 60 of the 1883 Act, are generally to apply.

Punishment.] By 46–7 V. 51, 6: (1) A person who commits any corrupt practice other than personation, or aiding, abetting, counselling, or procuring the commission of the offence of personation, shall be guilty of a misdemeanor, and on conviction on indictment, shall be liable to be imprisoned, with or without hard labour, for a term not exceeding one year, or to be fined any sum not exceeding two hundred pounds.

(2) A person who commits the offence of personation, or of aiding, abetting, counselling, or procuring the commission of that offence, shall be guilty of felony, and any person convicted thereof on indictment [which includes information, s. 64] shall be punished by imprisonment for a term not exceeding two years, together with hard labour.

(3 and 4) Persons so convicted are subject to certain incapacities.

Bribery in other cases.] By 52-3 V. 69, 1: (1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever, as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanor.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor.

S. 2. Any person on conviction for offending as aforesaid shall, at the discretion of the court before which he is convicted—

(*a*) be liable to be imprisoned for any period not exceeding two years, with or without hard labour, or to pay a fine not exceeding five hundred pounds, or to both such imprisonment and such fine; and

(*b*) in addition be liable to be ordered to pay to such body, and in such manner as the court directs, the amount or value of any gift, loan, fee, or reward received by him or any part thereof; and

(*c*) be liable to be adjudged incapable of being elected or appointed to any public office for seven years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction; and

(*d*) in the event of a second conviction for a like offence he shall, in addition to the foregoing penalties, be liable to be adjudged to be for ever incapable of holding any public office, and to be incapable for seven years of being registered as an elector, or voting at an election either of members to serve in parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared by reason of corrupt practices to be incapable of voting shall apply to a person adjudged in pursuance of this section to be incapable of voting; and

(*e*) if such person is an officer or servant in the employ of any public body, upon such conviction he shall, at the discretion of the court, be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.

S. 3.—(1) Where an offence under this Act is also punishable under any other enactment, or at common law, such offence may be prosecuted and punished either under this Act, or under the other enactment, or at common law, but so that no person shall be punished twice for the same offence.

(2) A person shall not be exempt from punishment under this Act by reason of the invalidity of the appointment or election of a person to a public office.

S. 4.—(1) A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General.

(2) In this section the expression "Attorney-General" means the Attorney or Solicitor-General for England, and as respects Scotland means the Lord Advocate, and as respects Ireland means the Attorney or Solicitor-General for Ireland.

S. 5. The expenses of the prosecution of an offence against this Act shall be defrayed in like manner as in the case of a felony.

S. 6. A court of general or quarter sessions shall in England have jurisdiction to inquire of, hear, and determine an offence under this Act.

S. 7. In this Act—

The expression "public body" means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom:

The expression "public office" means any office or employment of a person as a member, officer, or servant of such public body:

The expression "person" includes a body of persons, corporate or unincorporate:

The expression "advantage" includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.

For other kinds of bribery, see pp. 281, 670, and 53–4 V. 21, 10 (inland revenue officers).

Indictment, venue, &c.] By 26–7 V. 29, 6: In any indictment or information for bribery or undue influence, and in any action or proceeding for any penalty for bribery, treating, or undue influence, it shall be sufficient to allege that the defendant was, at the election, at or in connexion with which the offence is intended to be alleged to have been committed, guilty of bribery, treating, or undue influence (as the case may require); and in any criminal or civil proceedings in relation to any such offence the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election or of any person therein named having been a candidate thereat. See p. 284. Cf. p. 144.

See *Reed* v. *Lamb*, 6 *H. & N.* 75 (1860); examined copies of the register, poll-book, writ, return, &c., may be put in; *Vaile*, 6 *Cox C. C.* 470 (1853), indictment for personating a voter at an election, where, as the sheriff could not produce the writ, an acquittal was ordered; and *Clarke*, 1 *F. & F.* 654 (1859); an irregular but proved list of voters held admissible.

An indictment which charged that at an election for members of parliament, the prisoner was "guilty of corrupt practices against the form of the statute in that case made and provided," was held by a large majority of judges to be defective because too general (though cured after the verdict that prisoner had offered money for votes), *Stroulger*, p. 199. A prosecution may be ordered for "a corrupt practice" under s. 28, p. 285, without specifying the particular corrupt practice and an indictment charging any number of the corrupt acts included by the Act (1884), in "a corrupt practice" is good, and it need not aver facts to give the court of trial jurisdiction where the alleged offence to be tried was committed in another jurisdiction. Where a commissioner ordered a trial at Derby Assizes for bribery alleged only at a Nottingham municipal election it was not necessary that the indictment should first be found by a Nottingham grand jury: "Derbyshire to wit" in the margin was sufficient. *Riley* and *Campion*, 17 *Cox C. C.* 120; 59 *L. J. M. C.* 122 (1890); *C. C. R.*, p. 285. Cf. p. 210.

Costs.] By 46–7 V. 51, 53 (1), and 47–8 V. 70, 30, 17–8 V. 102, 12,

applies to municipal elections and therefore a successful defendant in a private prosecution cannot be deprived of his costs from the prosecutor. *Law*, 19 *Cox C. C.* 452 (1900).

Agents—corrupt transactions with.] The Prevention of Corruption Act, 1906 (6 E. 7, 34), runs:—

1.—(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal; he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

(2) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(3) A person serving under the Crown or under any corporation or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

2.—(1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

(2) The Vexatious Indictments Act, 1859, as amended by any subsequent enactment, shall apply to offences under this Act as if they were included among the offences mentioned in section one of that Act [p. 160].

(3) Every information for any offence under this Act shall be upon oath.

(4) The expenses of any prosecution or indictment under this Act shall be defrayed as in cases of indictment for felony.

(5) A court of quarter sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act.

(6) Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sessions.

This unrestricted right, independent of sentence, seems unique.

BRIDGES—PUBLIC NUISANCES IN RESPECT OF.

Cf. generally, *Highways*, pp. 497–575.

"The *trinoda necessitas* to which every man's estate was subject [by our ancient laws], viz. *expeditio contra hostem, arcium constructio, et pontium reparatio* . . . though the reparation of bridges only is expressed, yet that of roads also must be understood." 1 *Black. Comm.* 357. See p. 656.

Indictment for not repairing.] See p. 296. Upon an indictment for a nuisance to a public bridge, whether by obstructing or neglecting to repair it, it must be proved, first, that the bridge is a public bridge; and secondly, that it has been obstructed or allowed to be out of repair; and, in the latter case, that the defendants are liable to repair it.

For forms of Indictment, see 3 *Chitty, Crim. L.*, 2*nd ed.* 594; for pleas, *ib.* v. 4, 564. See also *Saunders* on *Indictments*, under *Nuisance*; and, generally, *Highways*, p. 497.

Proof of the bridge being a public bridge.] "A distinction between a public and a private bridge is taken" in the 2*nd Institute* 701, "and made to consist principally in" a public bridge being built "for the common good of all the subjects," as opposed to a bridge made for private purposes, and though the words "public bridges" do not occur in 22 H. 8, 5 (called the Statute of Bridges), yet as the statute empowers the justices of the peace to inquire of "all manner of annoyances of bridges broken *in the high waies*," and applies to bridges of that description in all its subsequent provisions, it may be inferred that a bridge in *a highway* is a public bridge for all purposes of repair connected with that statute." 1 *Russ. Cri.* 852. Public bridges may safely be defined to be "such bridges as all his Majesty's subjects had used freely and without interruption, as of right, for a period of time competent to protect them, and all who should thereafter use them, from being considered as wrongdoers, in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned." *Per* L. Ellenborough, *Bucks, Inhabs. of*, 12 *East* 204 (1810), p. 211. With regard to bridges newly erected, the general rule (according to Coke, above) was that if a man builds a bridge, and it becomes useful to the county in general, it shall be deemed a public bridge (but see now 43 G. 3, 59, 5, p. 293), and the county shall repair it. See *Lancashire*, p. 290. But where a man builds a bridge for his own private benefit, although the public may occasionally participate with him in the use of it, yet it does not necessarily become part of the highway and so a public bridge. *Bucks*, above. Though it is otherwise if the public have constantly used the bridge, and treated it as a public bridge. *Glamorgan, Inhabs. of*, 2 *East* 356 *n.* (1788), pp. 292, 293. Where a miller, on deepening a ford through which there was a public highway (at times very inconvenient), built a bridge over it which the public used, it was held that the county was bound to repair. *Kent, Inhabs. of*, 2 *M. & S.* 513 (1814). A question has sometimes arisen whether arches adjacent to a bridge, and under which there is passage for water in times of flood, are to be considered either as forming part of the

bridge, or as being themselves independent bridges. Where arches of this kind existed more than 300 feet from a bridge, on an indictment against the county for non-repair of them, and a case reserved, the King's Bench held that the county was not liable. *Oxfordshire, Inhabs. of*, 1 *B. & Ad.* 297 *n.* (1827); *ib.* 289 (1830). The rule laid down by L. Tenterden C.J. in the latter case was, that the inhabitants of a county are bound, by common law, to repair bridges erected over such water only as answers the description of *flumen vel cursus aquæ*, that is, *water flowing in a channel between banks more or less defined*, although such channel may be occasionally dry. But where a structure, called Swarkestone Bridge, was 1,275 yards long; at the eastern end were five arches under which the river Trent flowed; at the western end eight arches, under one of which a stream constantly flowed; the rest of the space consisted of a raised causeway, at different intervals in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood; there was no interval of causeway between the arches of the length of 300 feet and the county of Derby had immemorially repaired the whole structure, on an indictment describing the whole as a bridge, it was held by the Q. B. that it was properly so described, and that the verdict was properly entered for the crown. *Derbyshire, Inhabs. of*, 2 *Gal. & Dav.* 97 (1842). Before 43 G. 3, 59, a bridge had been built over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged two and a half feet. It was a part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments to prevent it from overflowing the adjoining meadows. Cresswell J. left it to the jury, whether this structure was a bridge, for if so, the county was liable under s. 5 (p. 293). If it had been erected for the convenience of the public in passing over the stream of water, it was a county bridge, though the bridge might not have been necessary for the convenience of the public *when it was built*. *Gloucestershire, Inhabs. of, Carr & M.* 506 (1842). In the following case a question arose whether a bridge for foot passengers, which had been built adjoining to an old bridge for carriages, was parcel of the latter. The carriage-bridge had been built before 1119, and certain abbey lands were charged with the repairs. The proprietors of those lands had always repaired the bridge so built. In 1765, the trustees of a turnpike road with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot-bridge along the outside of the parapet of the carriage-bridge, partly connected with it by brickwork and iron pins, and partly resting on the stonework of the bridge. Held by the K. B. that the foot-bridge was not parcel of the old carriage-bridge, but a distinct structure, and that the county was bound to repair it. *Middlesex, Inhabs. of*, 3 *B. & Ad.* 201 (1832).

Where the trustees under a turnpike Act widened a bridge built before 43 G. 3, 59, p. 293, across a stream where a culvert would have been sufficient, yet as the bridge was better for the public, the county could not refuse to repair it on the ground that it was not absolutely necessary; as it was built *before* the statute the county was liable if it was beneficial, and the widening did not alter its identity. *Lancashire, Inhabs. of*, 2 *B. & Ad.* 813 (1831), p. 289. Cf. *Adderbury*, p. 293.

Semble, that an arch of nine feet span without battlements at either end, over a stream usually about three feet deep, is a culvert, and not a bridge to be repaired by the county; and if the parish have pleaded guilty to a former indictment for not repairing the same road, it is strong evidence of liability, but they are not concluded by having so done. The absence of parapets does not prevent it being a county bridge. *Whitney Parish*, 3 *Ad. & E.* 69; 7 *C. & P.* 208, as criticised 4 *N. & M.* 594 (1835), p. 190. Cf. *Riley*, p. 169.

But a foot-bridge formed by three oak planks, about nine or ten feet long, and a handrail, and carrying a public footpath over a small stream, is not such a bridge as the county is bound to repair as a county bridge. *Southampton, Inhabs. of*, 21 *L. J. M. C.* 201 (1852).

The public may enjoy a limited right only of passing over a bridge; as where a bridge was used at all times by the public, on foot, and with horses, but only occasionally with carriages, viz. when the ford below was unsafe to pass, and the bridge was sometimes barred against carriages by means of a post and a chain; it was held that this was a public bridge, with a limited right of passage. *Northampton, Inhabs. of*, 2 *M. & S.* 262 (1814). A bar across a public bridge, locked, except in times of flood, has been ruled to be conclusive evidence that the public have only a limited right to use the bridge at such times, and it is a fatal variance to state that they have a right to use it "at their free will and pleasure." *Marquis of Buckingham*, 4 *Camp.* 189 (1815). But where a bridge passed over a ford, and was only used by the public in times of floods, which rendered the ford impassable, yet, as it was at all times open to the public, Abbott C.J. ruled that the county was bound to repair. *Devon, Inhabs. of, Ry. & Moo.* 144 (1824).

Proof of the bridge being a public bridge—highway at each end.] At common law, declared by 22 H. 8, 5, and subsequent Acts, when the county is bound to repair a public bridge, they are liable also to repair 300 feet of the highway at each end of it. If indicted for the non-repair of such portion of the highway, they can only excuse themselves by pleading specially (p. 295); as in the case of the bridge itself, that some other person is bound to repair by prescription, or by tenure. *West Riding of York, Inhabs. of*, 7 *East* 588; 5 *Taunt.* 284 (1806). The inhabitants of Devon erected a new bridge over a ford in the highway within 300 feet next adjoining to an old bridge in Dorset; which 300 feet Dorset had always repaired. It was held, nevertheless, that Devon was bound to repair the new bridge, which was a distinct bridge, and not to be considered as an appendage to the old bridge. *Devon, Inhabs. of*, 14 *East* 477 (1811).

A person who is liable by prescription to repair a bridge is also presumed in law liable to repair the highway to the extent of 300 feet from each end; and such presumption is not rebutted by proof that he has not been known to repair those ends, and that the only repairs known to have been done thereto have been performed by turnpike commissioners. *City of Lincoln*, 8 *A. & E.* 65; 3 *N. & P.* 273 (1838).

By 5–6 W. 4, 50, 21: "If any bridge shall hereafter [March 20, 1836] be built which bridge shall be liable by law to be repaired by and at the expence of any county, or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike-road, who were by law before the erection of the said bridge bound to repair the said highway; provided, nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county or any part of any county from repairing or keeping in repair the walls, banks or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof."

Dedication of a bridge to the public.] "As there may be a dedication of a road to the public (p. 497), so in the case of a bridge, though it be built by a private individual, in the first instance, for his own convenience, yet, if it is of public utility, it may be dedicated by him to the public, by his suffering them to have the use of it, and by their using it accordingly." 1 *Russ. Cri.* 854. See *West Riding of Yorks*, 5 *Burr.* 2594; 2 *W. Black.* 685 (1770);

Glamorgan, Inhabs. of, pp. 289, 293; *West Riding of Yorks, Inhabs. of*, 2 *East* 342 (1802), p. 293. "And though, where there is such a dedication, it must be absolute," yet it may be limited as to times. *Russ. ib.* See *Northamptonshire, Inhabs. of*, and the other cases cited, p. 291. A canal company may dedicate a bridge to the public; *Grand Surrey Canal* v. *Hall*, 1 *M. & Gr.* 392 (1840), p. 294. It is in each case for the jury whether the utility and the user amount to dedication to and adoption by the county. *Southampton, Inhabs. of*, 56 *L. J. M. C.* 112 (1887); 16 *Cox C. C.* 271; 19 *Q. B. D.* 590; *Q. B.* Cf. *Sutton*, pp. 201, 515.

Repairs, extent of.] The county is only chargeable with *repairs*, and cannot be indicted for not widening or enlarging a public bridge, which has become from its narrowness inconvenient to the public. Not being bound to make a new bridge, the county is not bound to enlarge an old one, "the addition . . . would be, *pro tanto*, a new bridge." *Devon, Inhabs. of*, 4 *B. & C.* 670 (1825).

"Those who are bound to repair such bridges must make them of such height and strength as shall be answerable to the course of the water, whether it continue in the old channel or make a new one." 2 *Hawk. P. C.* Bk. 1, ch. 77, s. 1.

Proof of the liability of the defendants—by the common law.] All public bridges are *primâ facie* repairable, at common law, by the inhabitants of the county, and it lies upon them, if the fact be so, to show that others (against whom they *may* have a remedy, in this case trustees taking a toll) are bound to repair. *Salop, Inhabs. of*, 13 *East* 95 (1810); 2 *Inst.* 700, 701; *Oxfordshire, Inhabs. of*, 4 *B. & C.* 194 (1825).

Where a bridge was locally situated within the limits of a borough which was enlarged by 2–3 W. 4, 64, 35, and 5–6 W. 4, 76, 7 (repealed by 45–6 V. 50), but before the passing of 5–6 W. 4, 76 was situated without the limits of the borough, and in a county which had up to that time always repaired it; it was held that the county was still liable to repair it. *New Sarum, Inhabs. of*, 7 *Q. B.* 941; 15 *L. J. M. C.* 15 (1845); see *Brecon, Inhabs. of*, 15 *Q. B.* 813; 19 *L. J. M. C.* 203 (1849), p. 294; halves of a bridge may be repairable by two different counties.

The maintenance of borough bridges is now provided for by 45–6 V. 50, 119.

Part of a bridge within a franchise "shall be repaired by those of the franchise." 2 *Hawk. P. C.* Bk. 1, ch. 77, s. 1, and see *Ecclesfield, Inhabs. of*, p. 510. The charge may be cast upon a corporation aggregate, either in respect of a special tenure of certain lands, or of a special prescription, and, in the same manner, it may be cast upon an individual *ratione tenuræ*. *Ib.* s. 2. A lord of the manor, as such, is not liable, but where an individual is liable, his tenant for years in possession or his alience is under the same obligation. *Bucknall*, 2 *L. Raym.* 792, 804 (1702). A tenant at will of a house adjoining a public bridge must repair the house enough to prevent danger to the public. *Watson, ib.* 856 (1703). Any particular inhabitant of a county, or any of several tenants of lands charged to such repairs, may be indicted singly for not repairing, and have to pay the whole fine assessed for the default, but shall have contribution from the others (by action), "for the necessity of the case requires the greatest expedition." 2 *Hawk. P. C.* Bk. 1, ch. 77, s. 3 (p. 296); 2 *L. Raym.* 792. The inhabitants of a township cannot be charged to repair a bridge not stated to be in the town, *ratione tenuræ*, because they cannot, being unincorporated, as such, hold lands. *Machynlleth, Inhabs. of*, 2 *B. & C.* 166 (1823), see p. 510. But a parish may be indicted for the not repairing, without stating any other ground of liability

than immemorial usage. *Hendon, Inhabs. of*, 4 *B. & Ad.* 628 (1833), p. 295. The inhabitants of a township had repaired an immemorial bridge in it, but in 1806 they had at their expense widened the roadway of the bridge from nine to sixteen feet: it was held, that whether the added part was repairable (as two judges thought) by the township or not, the identity of the old bridge was not destroyed so as to make the county liable. *Adderbury, Inhabs. of*, 5 *Q. B.* 187 (1843); cf. *Lancashire*, p. 290. Where the inhabitants of a half-hundred had always repaired a bridge out of the hundred rate, it was held that 5–6 W. 4, 50, 5, 21 (p. 291), did not cast the repair upon the parish (as highways), as all public bridges (although repairable by divisions other than the county) are included in the words "county bridges," which are excepted in that Act. *Chart, Inhabs. of, L. R.* 1 *C. C. R.* 237; 39 *L. J. M. C.* 107 (1870).

As to a fund for repairs from tolls, see *Oxfordshire*, p. 292, and cf. p. 295. With regard to highways, it has been decided that tolls are in such cases only an auxiliary fund, and that the parish is primarily liable; p. 506. And as the liability of a county resembles that of a parish, these decisions may be considered as authorities with regard to the former.

Proof of the liability of the defendants—by the common law—new bridges.] Although a private individual cannot by erecting a bridge, the use of which is not beneficial to the public, or, though beneficial, is made primarily for private purposes, interrupting the highway and so making the bridge necessary, throw upon the county the *onus* of repairing it, yet if it "become useful to the county in general, the county shall repair it." *West Riding Case* (1770), p. 292; *Ely, Inhabs. of*, 15 *Q. B.* 827; 19 *L. J. M. C.* 223 (1850). Cf. *Kent*, p. 294. Thus, H. M. being seised of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, erected the bridge, and he and his tenants enjoyed a way over the bridge for their private benefit and advantage, and the business could not be carried on without it, but the public had constantly used the bridge from the time of its being built, L. Kenyon directed a verdict that the county was liable. *Glamorgan, Inhabs. of*, pp. 289, 292.

Where a new bridge is built there must be acquiescence or adoption by the parish to charge it. See generally, p. 507. As to charge the county, the bridge must be made on a highway, and as, while the bridge is making, there must be an obstruction of the highway, the forbearing to prosecute that nuisance is an acquiescence by the county in the building of the bridge. But a parish cannot do this, and so, though in fact the public has used a new bridge for many years, this is not sufficient evidence of a dedication to the public or of the acquiescence of the parish in such dedication. *St. Benedict, Inhabs. of*, 4 *B. & Ald.* 447 (1821), p. 507. The evidence of user of a *bridge* by the public does not amount to adoption, for as a bridge is built on a highway, the public must necessarily use it, but the user is evidence of acquiescence, as showing that the public have not found or treated the bridge as a nuisance. *West Riding of Yorks*, p. 292. Where a bridge is erected under an Act of parliament, it cannot be supposed to be erected for other purposes than the public utility. *Per* Lawrence J., *ib.* at 352. If a bridge be built "in a slight or incommodious manner," *i.e.* without public utility or "colourably," it cannot be imposed at any one's choice as a burthen on the county, but "may be treated altogether as a nuisance, and indicted as such." *Per* L. Ellenborough, *ib.* at 348.

By statute.] By 43 G. 3, 59, 5 (extended 54 G. 3, 90), "no bridge hereafter to be erected or built in any county, by or at the expence of any individual or private person or persons, body politick or corporate, shall be

deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction, or to the satisfaction, of the county surveyor, or person appointed by the justices of the peace, at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions."

These words comprehend every kind of person by whom, or at whose expense, a bridge is built. Trustees appointed under a local turnpike Act are "individuals" or "private persons" within them, and therefore a bridge erected by such trustees after the statute, and not under the direction, &c., of the county surveyor, is not a bridge which the county is bound to repair. *Derbyshire, Inhabs. of*, 3 *B. & Ad.* 147 (1832). A bridge built before the above statute, but widened since, is not a new bridge within the Act. *Lancashire*, p. 290. So where the woodwork of a county bridge was washed away in 1807, leaving the stone abutments, and the parish repaired the bridge, partly with the old wood and partly with new, this was held not to be a bridge "erected or built" within the above words, but an old bridge repaired, and the county was held liable. *Devon, Inhabs. of*, 5 *B. & Ad.* 383; 2 *N. & M.* 212 (1833). "Identity," according to Denman C.J. depended here on the identity of the public right of passage over a bridge at that place.

Proof of the liability of the defendants—public companies.] The Medway Navigation Company were under a local Act empowered "to amend or alter such bridges and highways as might hinder the . . . navigation; *leaving them, or others as convenient, in their room, &c.*" Having, in 1740, deepened and destroyed a ford in the Medway, the company, in 1767, built a bridge in its place, which, being washed away in 1809, they were held bound to rebuild. L. Ellenborough said that the condition to repair was a continuing condition, and that the company, having taken away the ford, were bound to give another passage over the bridge, and to keep it in repair. *Kent, Inhabs. of*, 13 *East* 220 (1811); cf. *Ely*, p. 293. So where the company had made a cut through a highway, and built a bridge over it. *Lindsey, Inhabs. of*, 14 *East* 317 (1811). An Act empowered the commissioners for making navigable the river Waveney, to cut, &c., but was silent as to making bridges. The commissioners having cut through a highway, and rendered it impassable, a bridge was built in 1695 over the cut, solely for the benefit of the public, and was always repaired by the proprietors. The court said that the cut was made, not for public purposes, but for private benefit; and the county could not be called upon to repair, for it was of no advantage to them to have a bridge instead of solid ground. *Kerrison*, 3 *M. & S.* 526 (1815). See also *Somerset, Inhabs. of*, 16 *East* 305 (1812); *Grand Surrey Canal* v. *Hall*, p. 292; *Brecon*, p. 292.

A corporation aggregate, as a railway company, are liable to be indicted in their corporate capacity for the non-repair of bridges, which it is their duty to repair. *Per* Parke B., *Birmingham & Gloucester Ry. Co.*, pp. 172, 511.

Proof of the liability of the defendants—individuals.] "*Ratione tenuræ*" (p. 514) implies immemoriality. 2 *Saund.* by *Wms.* 158 *g* (*n.* 9). And therefore, if it appear that the tenement, on which is the liability, was built within the time of legal memory, the occupier must be acquitted. *Hayman, Moo. & M.* 401 (1829), p. 514, where documents of the time of Henry 8 were put in to show that the mill was not then built. Any act of repairing on the part of an individual is, *primâ facie*, evidence of his liability. Thus, "if a bishop or prior, &c., hath at once or twice of almes repaired a bridge, it bindeth not,

and yet is evidence against him to repair, until he prove the contrary; but if time out of mind they and their predecessors have repaired it of almes, this shall bind them to it." 2 *Inst.* 700.

It was for some time undecided whether reputation was evidence on an indictment against an individual for not repairing a bridge, *ratione tenuræ*; *Wavertree, Inhabs. of*, 2 *Moo. & Rob.* 353 (1855); *Antrobus*, 6 *C. & P.* at 790 (1835) p. 670; *Sutton*, 3 *N. & P.* 569; 8 *A. & E.* 516 (1838); but in the case of *Bedfordshire, Inhabs. of*, 24 *L. J. Q. B.* 81 (1855), the court decided, that on an indictment against a county, to which they pleaded that A. was liable, *ratione tenuræ*, to repair a portion of the bridge, evidence of reputation that A. and his predecessors were liable to do the repairs to that part was admissible (asthe matter was of public and general interest, notwithstanding that a private interest was also involved). Cf. p. 15, and see p. 26. The liability to repair *ratione tenuræ* falls *in the first instance* in every case upon the occupier, and not on the owner. *Cuckfield District Council* v. *Goring*, 1898, 1 *Q. B.* 865; 67 *L. J. Q. B.* 539, p. 512. See *Baker* v. *Greenhill*, 3 *Q. B.* 148 (1842); *Ramsden*, 27 *L. J. M. C.* 296 (1858), p. 509. When a toll is taken, p. 293, see *Nicholl* v. *Allen*, p. 511.

Proof in defence—by counties.] "The inhabitants of a county, upon the plea *not guilty*, cannot throw the *onus* of repairing the bridge upon any other parties; to do this, a special plea is necessary, setting forth the obligation of such other parties specially (*West Riding* (1806), p. 291; *Bucks*, p. 289). Under the general plea the defendants cannot adduce evidence except in denial of one of the points which must be established on the part of the prosecution, viz. 1st, that the bridge is a public one; 2ndly, situate within the county; and, 3rdly, is out of repair." 2 *Stark. Ev.* 191, *2nd ed.* Cf. *Wilts, Inhabs. of*, 1 *Salk.* 359; 6 *Mod.* 191, 307 (1705), p. 296. With a view to the first point, a county may show under *not guilty* that individuals have, in fact, repaired (as "a medium of proof that the bridge is not a public bridge"). *Ib.*; *Northamptonshire*, p. 291. For repairs done by an individual are to be ascribed rather to motives of interest in his own property than to be presumed to be done for the public benefit. *Per* L. Ellenborough, *ib.*

"Upon a special plea by a county, that some smaller district or some individual is liable to the repairs, the evidence on the part of the county to prove the obligation, seems to be the same as upon an indictment against the smaller district or individual." 2 *Stark. Ev.* 192, *2nd ed.*

Proof in defence—by minor districts, or individuals.] Where a parish, or other district, or a corporation, or individual, not chargeable of common right with the repairs of a bridge, is indicted, they may discharge themselves under the general issue (p. 172). *Norwich, Inhabs. of*, 1 *Str.* 177 (1719). For as it lies on the prosecutor specially to state the grounds on which such parties are liable they may negative those parts of the charge under the general issue. 1 *Russ. Cri.* 814, 875, 876; cf. *Hendon, Inhabs. of*, p. 293.

Proof in defence—by corporations.] A corporation may be immemorially bound *by prescription* and not merely by tenure to repair a bridge, though one of their charters within time of legal memory use words implying creation or incorporation, and though the bridge may have been repaired out of the funds of a guild: for such repairs will be taken to have been made in case of the corporation. *Mayor, &c., of Stratford-upon-Avon*, 14 *East* 348 (1811).

Venue and trial.] By 1 Ann. st. 1, 18 (otherwise 12), 5, "all matters concerning the repairing and amending of the bridges and highways hereinbefore

mentioned shall be determined in the county where they lye, and not elsewhere." "It seems that no inhabitant of a county ought to be a juror for the trial of an issue whether the county be bound" to repair or not. 2 *Hawk. P. C.* Bk. 1, ch. 77, s. 6. In such cases, upon a suggestion, the *venire* will be awarded into a neighbouring county. *Wilts* (6 *Mod.*), p. 295. 1 *Russ. Cri.* 877.

Injury to a public bridge.

Maliciously pulling down, &c., public bridges, &c.] By 24–5 V. 97, 33: "Whosoever shall unlawfully and maliciously pull or thrown down, or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct, any highway, railway, or canal shall pass, or do any injury with intent, and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life" [see p. 198], "and, if a male under the age of sixteen years, with or without whipping." See also ss. 58–9, p. 241.

Private bridges are within ss. 51 & 52, p. 590.

Costs.] See p. 514.

New trial.] See p. 514.

Defendants—who are.] "*Indictment.*—When the liability to repair rests upon the county at large, in order to expedite the proceedings, any persons who reside within it may be made defendants." *Chitty, Crim. Law*, 2*nd ed.*, vol. 3, ch. 13 (592), citing *Hawk. P. C.* (s. 3, p. 292). Cf. p. 510.

For the old process against inhabitants of a county, &c., on indictment (p. 289), see *Short and Mellor, Crown Office Practice*, pp. 187, 200 (Indictments). For an instance, see *Haughton, Inhabs. of*, p. 510, where two named persons appeared, but it is not stated how they were selected. Attachments issued against the individuals who appeared, *e.g. New Winsdor, Inhabs. of*, 1 *Smith* 168 (1804); *Pembridge, Inhabs. of*, 3 *Q. B.* 907 (1843), pp. 139, 514.

An urban sanitary authority is not liable to indictment for non-repair under 5–6 W. 4, 50, and 38–9 V. 55, 144. *Poole Corporation*, 19 *Q. B. D.* 602, 683; 56 *L. J. M. C.* 131; 57 *L. T.* 485; 36 *W. R.* 239; 52 *J. P.* 84; 16 *Cox C. C.* 323 (1887), *i.e.* as surveyor, when it is the highway authority, and so a rural district council. *Pratt* on *Highways*, 15*th ed.*, p. 503. It was also held that a parish council could not be indicted. *Shipley Parish Council*, 61 *J. P.* 488; 18 *Cox C. C.* 531 (1897). See these two cases discussed, 2 *Glen's Public Health*, 13*th ed.*, 1773, on 56–7 V. 73, 16.

By 51-2 V. 41, 79 (2): "All duties and liabilities of the inhabitants of a county shall become and be duties and liabilities of the council of such county." This transfers liability and indictment for non-repair of a county bridge to the county council. *Pratt* on *Highways*, and *Macmorran* on this Act, on this sub-s. Cf. pp. 509–10.

In *Wilts* (p. 295), Holt C.J. said, for disobeying a rule of court, "an attachment may go against the inhabitants of the whole county, and catch as many as one can of them."

Indictments and Pleas—forms of.] See p. 515.

Appeal.] See p. 842.

BURGLARY.

The word is, perhaps, derived from O.F. *bourg* (town) and *lere* (robber). See *Kenny, Outlines Crim. Law*, ch. 12.

At common law.] Burglary is a felony at common law, and a burglar is defined by Coke as he "that in the night breaketh and enterth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." 3 *Inst.* 63. And this definition is adopted by Hale. 1 *P. C.* 549; 1 *Hawk. P. C.* Bk. 1, ch. 38, s. 1.

Burglary by breaking out.] By 24–5 V. 96, 51: "Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary." Cf. p. 316. For "night," see p. 313.

Punishment.] By s. 52: "Whosoever shall be convicted of the crime of burglary shall be liable to be kept in penal servitude for life" (see p. 198).

What building to be deemed part of a dwelling-house.] By s. 53: "No building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other." Cf. p. 242, and see pp. 304, 370.

Entering a dwelling-house in the night with intent to commit felony.] By s. 54: "Whosoever shall enter any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years" (see p. 198). This created a new felony for which there might be a conviction on an indictment for burglary with intent to commit a felony (s. 51), if the proof of the breaking fail. *Greaves* on this s.; 2 *Russ. Cri.* p. 50 *n.* It is clearly better to add a count under this s. Cf. p. 170.

Being armed by night, with intent to break into any house, &c.] By s. 58: "Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock, key, crow-jack, bit, or other implement of house-breaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling-house, or other building whatsoever, with intent to commit any felony therein, shall be

guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude" (see p. 198). See p. 316.

By s. 59: "Whosoever shall be convicted of any such misdemeanor, as in the last preceding section mentioned, committed after a previous conviction either for felony or such misdemeanor, shall, on such subsequent conviction, be liable to be kept in penal servitude for any term not exceeding ten years" (see p. 198).

Burglary is made triable at quarter sessions, p. 164.

What is "breaking."] "It seems agreed that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it lie opened or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice et burglariter fregit*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, that if one enter into a house by a door which he finds open, or through a hole which was made there before, and steals goods, &c., or draw anything out of a house through a door or window which was open before, or enter into a house by the doors open in the daytime, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary." 1 *Hawk. P. C.* Bk. 1, ch. 38, ss. 4, 5. But "the breaking a window, taking a pane of glass out by drawing or bending the nails or other fastening, the drawing a latch, where the door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or fastening of a window with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided; are all instances of a breaking." 2 *East P. C.* 487; 2 *Russ. Cri.* 3.

Proof of the breaking—doors.] Entering the house through an open door is not, as just stated, such a breaking as to constitute a burglary. Yet if the offender enters a house in the night-time, through an open door or window, and when within the house turns the key of, or unlatches a chamber door with intent to steal, it is a burglary. 1 *Hale P. C.* 553. So where the prisoner entered the house by a back-door which had been left open, and afterwards broke open an inner door and stole goods out of the room, and then unbolted the street door on the inside and went out; this was held by the judges to be burglary. *Johnson*, 2 *East P. C.* 488 (1786). So where the master lay in one part of the house, and the servants in another, and the stair-foot door of the master's chamber was latched, and the servant in the night unlatched that door and went into his master's chamber with intent to murder him, it was held burglary. *Edmonds*, *Hutt.* 20; *Kel.* 67 (1618); 1 *Hale, P. C.* 554; 2 *East P. C.* 488; the same with intent to commit rape, *Locost*, *Kel.* 30 (1664); *Gray*, 1 *Str.* 481 (1722), p. 313; *East, ib.*

Whether the pushing open the flap or flaps of a trap-door, or door in a floor, which closes by its own weight, is a sufficient breaking, was for some time a matter of doubt. In the following case it was held to be a breaking. Through a mill (within a curtilage) was an open entrance or gateway, capable of admitting waggons, intended for the purpose of loading them with flour through a large aperture communicating with the floor above. This aperture was closed by folding doors with hinges, which fell over it, and remained closed by their own weight, but without any interior fastenings, so that persons without, under the gateway, could push them open at pleasure. In this manner the prisoner entered with intent to steal; and Buller J. held that this was a sufficient breaking to constitute the offence of burglary. *Brown*, 2 *East P. C.* 487 (1799). In another case, upon nearly similar facts,

the judges were equally divided in opinion. The prisoner broke out of a cellar by lifting up a heavy flap, whereby the cellar was closed on the outside next the street. The flap had bolts, but was not bolted. The prisoner being convicted of burglary, upon a case reserved, six of the judges thought that this was a sufficient breaking; because the weight was intended as a security, this not being a common entrance; but the other six judges thought the conviction wrong. *Callan*, *Russ. & Ry.* 157 (1809). The only difference between this and *Brown* seems to be that in the latter there were no internal fastenings, which in *Callan* there were, but they were not used. *Ib.* The authority of *Brown* has been since followed, and that decision may now be considered to be law.

Upon an indictment for burglary, the question was, whether there had been a sufficient breaking. There was a cellar under the house, which communicated with the other parts of it by an inner staircase: the entrance to the cellar from the outside was by means of a flap which let down: the flap was made of two-inch stuff, but reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising the flap-door. It had been from time to time fastened with nails, when the cellar was not wanted. The jury found that it was not nailed down on the night in question. The judges were of opinion that a conviction was right. *Russell*, 1 *Moody C. C.* 377 (1833). Unless a distinction can be drawn between breaking into a house and breaking out of it, this case seems to overrule *Lawrence*, 4 *C. & P.* 231 (1830), where the facts were much the same, but the unlocking and opening of the hall door and running away were held to be a breaking out. In both the flap was kept down by its own weight.

Proof of the breaking—windows.] Where the window is open, and the offender enters the house, this is no breaking; p. 298. And where the prisoner was indicted for *breaking* and entering a dwelling-house and stealing therein, and it appeared that he had effected an entrance by pushing up the lower sash of a window, which was proved to have been about noon on the same day raised about a couple of inches, so as not to afford room for a person to enter the house through that opening (which the jury found *he* did not make), it was said by all the judges that there was no decision under which this could be held to be house *breaking*. *Smith*, 1 *Moody C. C.* 178 (1827). A square of glass in the kitchen window (through which the prisoners entered) had been previously broken by accident, and half of it was out when the offence was committed: the aperture formed by the half-square was sufficient to admit a hand, but not to enable a person to put in his arm, so as to undo the fastening of the casement: one of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and thus removed the fastening of the casement, and entered. The doubt which the judges entertained arose from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing (it not being like a chimney, an aperture necessarily left in the original construction of the house, see below), from enlarging an aperture by lifting up further the sash of the window, as in *Smith*, above; and they doubted whether in both cases there was not a sufficient breaking. All the judges who met were of opinion that there was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window. *Robinson*, 1 *Moody C. C.* 327 (1831). In *Bird*, 9 *C. & P.* 44 (1839), p. 315, the glass, though cut through, remained in its place till the prisoner pushed his hand through: this was held a breaking. Cf. *Crabtree* v. *Robinson*, 15 *Q. B. D.* 312; 54 *L. J. Q. B.* 544 (1885), p. 644.

Where a house was entered through a window upon hinges, which was fastened by two nails which acted as wedges, but notwithstanding these nails

the window would open by pushing, and the prisoner pushed it open, the judges held that the forcing the window in this manner was a sufficient breaking. *Hall, Russ. & Ry.* 335 (1818). So pulling down the upper sash of a window which has no fastening, but which is kept in its place by the pulley weight only, is a breaking, although there is an outer shutter which is not fastened. *Haines, Russ. & Ry.* 451 (1821). So raising a window which is shut down close, but not fastened, though it has a hasp which might be fastened. *Per* Park and Coleridge JJ., *Hyam*, 7 *C. & P.* 441 (1836).

Where a cellar window, which was boarded up, had in it an aperture of considerable size to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and by the assistance of the others thus entered the house, Vaughan B. ruled that this resembled the case of a man having a hole in the wall of his house large enough for a man to enter, and that it was not burglary. *Lewis*, 2 *C. & P.* 628 (1827); cf. *Spriggs*, below. A shutter-box partly projected from a house, and adjoined the side of the shop window, which side was protected by wooden panelling lined with iron; held that the breaking and entering of the shutter-box without getting into the house did not constitute burglary. *Paine*, 7 *C. & P.* 135 (1834).

Proof of the breaking—chimneys.] Hale doubted whether getting into the chimney of a house in the night-time, with intent to commit a felony, was a sufficient breaking. 1 *Hale, P. C.* 552. But it is settled that this is a breaking: for though actually open, it is as much inclosed as the nature of the place will allow. *Ib.*; 1 *Hawk. P. C.* Bk. 1, ch. 38, s. 6; 2 *East P. C.* 485. And it was so held, in *Brice*, by ten of the judges (against two), who were of opinion that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the prisoner, by lowering himself in the chimney (though he got no farther), made an entry into the dwelling-house. *Brice, Russ. & Ry.* 450 (1821), p. 303.

But an entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and requires protection, whereas, if a man chooses to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *Spriggs*, 1 *Moo. & R.* 357 (1834). Cf. *Lewis*, above.

Proof of the breaking—fixtures, cupboards, &c.] The breaking open of a movable chest or box in a dwelling-house, in the night-time, is not a sufficient breaking, for the chest or box is no part of the house. *Foster C. C.* 108-9; 2 *East P. C.* 488. Whether breaking open the door of a cupboard let into the wall of a house be burglary or not, does not appear ever to have been solemnly decided. In 1690, a case in which the point arose was reserved for the opinion of the judges, and they were equally divided upon it. *Ib.* Hale says that such a breaking will not make a burglary *at common law.* 1 *P. C.* 527; but cf. 555. Though, on the authority of *Simpson, Kel.* 31 (1664), he considers it a sufficient breaking within repealed 5–6 E. 6, 9, and 39 Eliz. 15. In the opinion of Foster J. however, *Simpson* does not warrant the position that breaking open a movable chest was within 39 Eliz. *Foster, East, ib.* And 2 *Hale P. C.* 358 *n.* supports this view. Foster J. concludes that such fixtures as merely supply the place of chests and other ordinary utensils of household, should for the purpose be considered in no other light than as mere movables. *Foster, East, ib.*

Proof of the breaking—walls.] Whether breaking a *wall*, part of the curtilage, is a sufficient breaking to constitute burglary, has not been decided. Hale, after citing 22 *Lib. Assis.* 95 (p. 106), which defines burglary to be "to

break houses, churches, *walls*, *courts*, or *gates*, in times of peace,"—says—"by that book it should seem that if a man hath a wall about his house for its safeguard, and a thief in the night break the wall or the gate thereof, and finding the doors of the house open he enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court and found the door of the house open, then it had been no burglary." 1 *P. C.* 559. Upon this passage an annotator observes, "This was antiently understood only of the walls or gates *of the city*; *vide* Spelman, *in verbo Burglaria*. If so, it will not support our author's following conclusion, wherein he applies it to the wall of a private house." East likewise observes, that the distinction between breaking and coming over the wall or gate, "is very refined; for if it be part of the mansion, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or overleapt, and more properly to fall under the same consideration as the case of a chimney. And if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial; in neither case will it amount to burglary." 2 *P. C.* 488.

Proof of the breaking—gates.] Where a gate forms part of the outer fence of the curtilage, and does not open into the house, or into some building parcel of the house, the breaking of it will not constitute burglary. Thus, where large gates opened into a yard in which was situated the dwelling-house and warehouse, the warehouse extending over the gateway, so that when the gates were shut the premises were completely inclosed, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. *Bennett, Russ. & Ry.* 289 (1815). So, where the prisoner opened the area gate of a house with a skeleton key, and entered the house by a door in the area, which did not appear to have been shut, the judges were all of opinion that breaking the area gate was not a breaking of the dwelling-house, as there was no free passage "in time of sleep" from the area into the dwelling-house. *Davis, Russ. & Ry.* 322 (1817).

Proof of constructive breaking—fraud.] It is not essential that force should be employed. There may be a *constructive* breaking by fraud, conspiracy or threats, and if, by such means, an entrance is effected into a dwelling-house in the night-time, with a felonious intent, it is burglary. As if thieves come with a hue and cry, pretending that they be robbed, and require the constable to go with them to search for felons, enter the house, bind the constable and the occupier, and rob the latter. 3 *Inst.* 64. So, where thieves entered a house, pretending that the owner harboured traitors; in both these cases, though the owner himself opened the door at the command of the constable, it was held burglary. 1 *Hale P. C.* 552, 553. The prisoner, knowing the family to be in the country, and meeting the boy who kept the key of the house, desired him to go with her to the house, promising him a pot of ale. The boy accordingly let her in, when she sent him for the ale, robbed the house, and went off. This, being in the night-time, was held by Holt C.J., Tracy J., and Bury B., to be burglary. *Hawkins*, 2 *East P. C.* 485 (1704), p. 310. "By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector [*i.e.* formerly, a fictitious party to a suit], obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein." *Ib.*; *Farre, Kel.* 43 (1665), pp. 309, 542. So, where persons designing to rob a house, took lodgings in it, and then fell on the landlord and robbed him, *Cassey, Kel.* 62–3 (1666); 1 *Hawk. P. C.* Bk. 1, ch. 38, s. 9.

Proof of constructive breaking—conspiracy.] "If A., the servant of B., conspire with C. to let him *in* to rob B., and accordingly A. in the night-time opens the door or window and lets him *in*, this is burglary in C. but larciny in A. . . . *Dalt.* [c. 151, *edn.* 1742] it seems it is burglary in both, for if it be burglary in C., it must needs be so in A., because he is present and aiding C. to commit this burglary." 1 *Hale P. C.* 553. Cornwall was indicted with another person for burglary, and it appeared that he was a servant in the house, and in the night-time opened the street-door and let in the prisoner, who robbed the house, after which Cornwall opened the door and let the other out, but did not go out with him. It was doubted on the trial whether this was a burglary in the servant, he not going out with the other; but afterwards, at a meeting of all the judges, they were unanimously of opinion that it was a burglary in both, "and not to be distinguished from the case . . . in the same page in *Hale* [*Summary*, 81; cf. p. 304] that if one watches at the street end while the others go in, it is burglary in all." *Cornwall*, 2 *Str.* 881 (1731); 4 *Bl. Com.* 227; 2 *East P. C.* 486. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of apprehending him, this is not burglary (in the latter) but larceny, for the door is lawfully open. *Johnson*, *Carr. & M.* 218 (1841). See p. 312.

Proof of constructive breaking—menaces.] "There may also be a breaking in law, where, in consequence of violence commenced or threatened in order to obtain entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it, opens the door, through which the robbers enter. 2 *East P. C.* 486. But if the owner only throw his money out of the house to the thieves who assaulted it, this will not be burglary;" *Ib.*; 1 *Hawk. P. C.* Bk. 1, c. 38, s. 3; "though if the money were taken up in the owner's presence, it would be robbery. In all other cases, where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part or other of the house, though it need not be accompanied with any violence as to the manner of executing it." *East, ib.*; *Hale, Summary*, 80.

Proof of constructive breaking—by one of several.] See on *Cornwall*, above, and 1 *Hale P. C.* 439, 534; 3 *Inst.* 64. So where a room-door was latched, and the prisoner lifted the latch and entered the room, and concealed himself for the purpose of committing a robbery there, which he did, and two other prisoners were present with him at the time he lifted the latch to assist him to enter, and screened him by opening an umbrella, it was held by three judges that the two were, in law, parties to the breaking and entering, having been present at the beginning of the transaction, though perhaps they were not near the spot at the time the robbery was perpetrated. *Jordan*, 7 *C. & P.* 432 (1836), p. 304.

Where the breaking is one night, and the entering the night after, a person present at the breaking, though not present at the entering, is, in law, guilty of the whole offence. *Ib.* Cf. *Smith*, p. 313.

Proof of the entry.] "There must be an *entry* as well as a breaking . . . otherwise it is no burglary." 1 *Hale P. C.* 555. If any part of the body be within the house, hand or foot, this at common law is sufficient. *Foster C. C.* 108; 2 *East P. C.* 490. Thus where the prisoner cut a hole through the window-shutters of a shop, put his hand through the hole, and took out watches, &c., but no other entry was proved, this was held to be burglary. *Gibbons, Foster* 108 (1752). So where the prisoner broke a pane of glass in the upper sash of a window (which was fastened in the usual way by a latch), and introduced his hand within, for the purpose of unfastening the latch, but

while he was cutting a hole in the shutter with a centre-bit, and before he could unfasten the latch, he was seized, the judges held this to be a sufficient entry to constitute a burglary. *Bailey, Russ. & Ry.* 341 (1818). The prosecutor observed the prisoner push his finger against a shop window-pane. The glass fell inside by the force of his finger; the prosecutor saw the fore-part of the prisoner's finger on the shop-side of the glass. The judges ruled this a sufficient entry. *Davis, Russ. & Ry.* 499 (1823).

Where the facts only amount to a breaking and not to an entry, the prisoner may be found guilty of the attempt to commit burglary. *Spanner*, 12 *Cox C. C.* 155 (1872). See p. 257.

Cf. *Brice*, p. 300, where prisoner never got into a room.

Proof of entry—introduction of fire-arms or other instruments.] Where not the least part of the offender's body enters the house, but he introduces an instrument, whether that is sufficient *entry* depends, it seems, upon the object with which the instrument is employed. Thus if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony, it will amount to an entry as where a man "puts in a hook or other engine to reach out goods" or a pistol with intent to kill, through a window, though his hand be not within, this is burglary. 1 *Hale P. C.* 555; 2 *East P. C.* 490. Cf. 1 *Hawk. P. C.* Bk. I, ch. 38, s. 11.

But where the instrument is used, not for the purpose of committing the contemplated felony, but only for the purpose of effecting the entry, the introduction of the instrument will not be sufficient entry. Thus where thieves had bored a hole *through* the door with a *centre-bit*, and part of the chips were found inside the house, by which it was apparent that the end of the *centre-bit* had penetrated into the house; yet, as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, and they had not got in themselves, the entry was ruled to be incomplete. *Hughes*, 2 *East P. C.* 491; 1 *Leach* 406 (1785); 1 *Hawk. P. C.* Bk. 1, ch. 38, s. 12. A glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the latter were about an inch thick; after the sash had been thrown up, a crowbar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found there. The judges were of opinion that this was not burglary, there being no proof that any part of the prisoner's hand was within the window. *Rust*, 1 *Moody C. C.* 183 (1828).

Proof of entry—by firing a gun into the house.] The passage from Hale last cited continues: "But if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary; *quære.*" Hawkins, however, perhaps means that the discharging a loaded gun into a house is sufficient; above, s. 11; and this opinion has been followed by East and Russell. "It seems difficult," says the former, "to make a distinction between this kind of implied entry, and that by means of an instrument introduced within the window or threshold for the purpose of committing a felony, unless it be that the one instrument by which the entry is effected is holden in the hand, and the other is discharged from it. No such distinction, however, is anywhere laid down in terms, nothing further appearing than that the entry must be for the purpose of committing a felony." 2 *East P. C.* 490; 2 *Russ. Cri.* 11. It was ruled by L. Ellenborough, that a man who from the outside of a field discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it. *Pickering* v. *Rudd*, 4 *Camp.* 220; 1 *Stark.* 58 (1815); cf. p. 484.

Proof of constructive entry—by one of several.] There may be a constructive *entry* as well as a constructive *breaking*. "A., B., and C. come in the night by consent to break and enter the house of D. to commit a felony; A. only actually breaks and enters the house; B. stands near the door, but actually enters not; C. stands at the lane's end, or orchard gate, or field-gate, or the like, to watch that no help come to aid the owner or dweller, or to give notice to the others if help comes; this is burglary in them all, tho A. only actually broke and entered the house, and they all in law are principals." 1 *Hale P. C.* 555. So where a man puts a child of tender years in at the window of the house, and the child takes goods and delivers them to A., who carries them away, this is burglary in A., though the child that made the entry be not guilty on account of its infancy. *Ib.* And so if the wife, in the presence of her husband, by his threats or coercion, breaks and enters a house in the night, this is burglary in the husband, though the wife, the immediate actor, is excused by the coercion of the husband. *Ib.* 556; and cf. *Jordan*, p. 302.

Dwelling-house—what is.] It must be proved that the premises broken and entered were either a dwelling-house or parcel of a dwelling-house. "Every house for the dwelling and habitation of man is taken to be a dwelling-house wherein burglary may be committed." 2 *East P. C.* 491; see 3 *Inst.* 64, 65.

A tent or booth erected in a market or fair is not a dwelling-house for the purpose of burglary. 1 *Hale P. C.* 557; "though the owner may lodge therein," 4 *Bl. Com.* 226. But where the building was a *permanent* one of mud and brick on a down, erected only as a booth for the purposes of a fair for a few days in the year, having wooden doors and windows bolted inside, it was held that as the prosecutor and his wife slept there every night of the fair (during one of which it was broken and entered) this was a dwelling-house. *Per* Park J., *Smith*, 1 *Moo. & Rob.* 256 (1833).

Buildings adjoining the dwelling-house.] At common law, in cases where buildings were attached to a dwelling-house, and were more or less connected with it, it was frequently a matter of dispute whether they formed a part of the dwelling-house. The different tests proposed were principally three: (1) whether the building in question was within the same curtilage; (2) whether it was under the same roof; (3) whether it had an internal communication with the principal building. Now the point is settled by 24–5 V. 96, 53, p. 297.

The mere fact of a building in the neighbourhood of a dwelling-house being occupied together with the dwelling-house by the same tenant, will not render the former building a *dwelling-house* in point of law. The prisoner broke and entered an outhouse in the possession of G. S., occupied by him with his dwelling-house but separated from it by an open passage eight feet wide and not connected therewith by any fence inclosing both. The judges held that the prisoner was improperly convicted of burglary. *Garland*, 2 *East P. C.* 493 (1776). So where a manufactory was carried on in the centre building of a great pile, in the wings of which several persons dwelt, but which had no internal communication with these wings, though the roofs of all the buildings were connected, and the entrance to all was out of the same common inclosure: upon the centre building being broken and entered, the judges held that it could not be considered as part of any dwelling-house, but a place for carrying on a variety of trades, and no parcel of the houses adjoining, with none of which it had any internal communication, nor was it to be considered as under the same roof, though the roof had a connection with the roofs of the houses. *Eggington*, 2 *East P. C.* 494

(1801). The house of the prosecutor was one of two or three houses, insulated. At the back of the houses was a public street or passage nine feet wide. Across this passage, opposite to his house, were several rooms, used by the prosecutor for the purposes of his house, viz. a kitchen, a coach-house, a larder and a brewhouse. Over the brewhouse a servant boy always slept, but no one else; and this room was broken into. There was no connection between the dwelling-house and these buildings, except a canopy or awning across the passage, to prevent the rain from falling on victuals, &c. The judges by a great majority were of opinion that the room in question was not parcel of prosecutor's dwelling-house, because it did not adjoin to it, was not under the same roof, and had no common fence: one was of opinion that it was parcel of that house. But all agreed that it was a distinct dwelling-house of the prosecutor, and the conviction was right. *Westwood*, *Russ. & Ry.* 495 (1822).

The prosecutor, a farmer, had a dwelling-house in which he lived, a stable, a cottage, a cow-house, and barn, all in one range of buildings, and under one roof, but they were not inclosed by any yard or wall, and had no internal communication. The offence was committed in the barn, and the judges held this to be a burglary, for the barn, which was under the same roof, was parcel of, and enjoyed with, the dwelling-house. *Brown*, 2 *East P. C.* 493, 497, 501 (1787), pp. 306, 310. Again, workshops broken and entered were not within the same external fence as the dwelling-house, nor had they any internal communication with it, yet they were held to be parcel of it. The prosecutor's dwelling-house was situate at the corner of two streets. A range of workshops adjoining the house at one side, and standing in a line with the end of the house, faced one of the streets. The roof of this range was higher than the roof of the house. At the end of this range, and adjoining to it, was another workshop projecting further into the street, and adjoining to that a stable and coach-house used with the dwelling-house. There was no internal communication between the workshops and the dwelling-house, nor were they surrounded by any external fence; the yard and garden of the dwelling-house lay behind it and the workshops, and into these there was one entrance from the street and one from the yard. *Chalking*, *Russ. & Ry.* 334 (1817); so *Lithgo*, *ib.* 357 (1818). A shop adjoining to and let with living-rooms in a house, though not communicating, is part of it, but would not be if let by itself and no one lived in it. *Gibson*, 1 *Leach* 357 (1785). The prosecutor had a factory adjoining to his dwelling-house. There was no internal communication, the only way from the one to the other (within the common inclosure) being through an open passage in the garden attached into the factory passage, which communicated with a room in the factory, from which there was a staircase which led to the room, where the felony was committed. All the premises were within one circular wall. All the judges held, that the factory was properly described as parcel of the dwelling-house. *Hancock*, *Russ. & Ry.* 170 (1810). In *Clayburn*, *ib.* 360 (1818), a goose-house was held part of the dwelling-house in the yard of which it was.

The following cases have been decided on 7–8 G. 4, 29, 13 (repealed), which is practically the same as s. 53, p. 297. It only applies to buildings not physically part of the dwelling-house. The prosecutor's house consisted of two long rooms, another room used as a cellar and washhouse on the ground floor, and three bedrooms upstairs. There was no internal communication between the washhouse and any of the other rooms of the house, the door of the washhouse opening into the back yard. All the buildings were under the same roof. The prisoner broke into the washhouse. Seven of the judges thought that the washhouse was part of the dwelling-house, and five not. *Burrowes*, 1 *Moody C. C.* 274 (1830), p. 306.

Behind the dwelling-house there was a pantry; to get to the pantry from

the house it was necessary to pass through the kitchen into a passage; at the end of the passage there was a door, on the outside of which, to the left, was the door of the pantry. When the passage door was shut, the pantry door was excluded, and open to the yard; but the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was a "tea-fall," and leaned against the wall of an inner pantry, in which there was a latchet window common to both, and which opened between them; but there was no door of communication. The inside pantry was under the same roof as the dwelling-house. The prisoner entered the outer pantry by a window which looked towards the yard, having first cut away the hair-cloth nailed to the frame. Taunton J. held that the outer pantry was not part of the dwelling-house within the above s., and consequently that no burglary had been committed. *Somerville*, 2 *Lew. C. C.* 113 (1834); see also *Turner*, 6 *C. & P.* 407 (1834); bedroom over a stable in a yard, detached from house.

In *Higgs*, 2 *C. & K.* 322 (1846), it appeared that adjoining to the dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house, and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roof of the dwelling-house, kiln, and dairy were of different heights. Wilde C.J. held that the dairy was not a part of the dwelling-house; he distinguished *Burrowes*, p. 305, where the washhouse was under the same roof as the dwelling-house and part of it.

Dwelling-house—occupation.] It must appear that the dwelling-house was occupied. Therefore, where a house was under repair, and the tenant had not entered into possession, but had (according to one report: the reverse is stated by East) deposited some of his goods there, but no one slept in it, it was held not to be a dwelling-house, and the breaking and entering not burglary. *Lyons*, 1 *Leach* 185 (1778); 2 *East P. C.* 497. Nor will the circumstance of the prosecutor having procured one of his workmen to sleep in a new house (his own family not being in possession) for its protection make any difference. *Fuller*, 1 *Leach* 186 *n.* (1782); following *Lyons*, where it was expressly held, at any rate, by some judges, that even if goods were in the place, that, without domestic habitation, will not make it a dwelling-house. And the habitation must be domestic, for where only two caretakers, who were not servants of the tenant, had slept in the house for six nights, it was held, that as the latter had only in fact taken possession of the house so far as to deposit certain articles of his trade therein, it could not in contemplation of law be called his *dwelling-house*. *Harris*, 2 *Leach* 701; 2 *East P. C.* 498 (1795). So *Hallard* (1792), 2 *Leach* 701 *n.*; *Thompson*, *ib.* 771 (1796). A public-house with furniture left by one tenant who had no intention of residing there (cf. *Murry*, p. 307), and let to another not yet in possession, was only inhabited by a caretaker at night; a conviction for burglary therein was held wrong. *Davies*, 2 *Leach* 876 (1800); 2 *East P. C.* 499. A servant and another person put a bed in a barn and slept there for some nights till the prisoner broke and entered the barn; it was agreed by all the judges that this sleeping in the barn did not make it a dwelling-house. *Brown*; see pp. 305, 310. So a porter lying in a warehouse *to watch goods*, which is only for a particular purpose, does not make it a dwelling-house. *Smith*, 2 *East P. C.* 497 (1717).

Premises consisted of a shop and parlour, with a staircase to a room over. The prosecutor took them in 1804, intending to live there, but did not.

Every morning he went to the shop, transacted his business, dined and entertained his friends, and stayed the whole day there, considering it as his only home. All the judges held, that this was not a dwelling-house, apparently because no one slept there. *Martin, Russ. & Ry.* 108 (1806). Any part of the owner's family, his domestic servants, apparently, sleeping in the house will do. A. died in his house. B., his executor, put servants into it, who lodged in it at board wages, but B. never lodged there himself. Upon an indictment for burglary, the question was, whether this was "the mansion-house" of B. The court inclined to think that it might be, *because the servants lived there. Jones,* 2 *East P. C.* 499 (1689).

Dwelling-house—occupation—temporary absence.] A house is no less a dwelling-house, because at certain times the occupier quits it. "If A.," says Hale, "having a dwelling-house, and upon occasion he and all his family are absent a night or more, and in their absence in the night, a thief breaks and enters the house to commit felony, this is burglary." 1 *Hale P. C.* 556; 3 *Inst.* 64. "So if A. have two mansion-houses, and is sometimes with his family at one, and sometimes at the other, the breach of one of them, in the absence of his family, from thence is burglary." *Ib.;* 4 *Rep.* 40*a.* Again, if A. have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in vacation his chamber is broken open, this is burglary. *Evans, Cro. Car.* 473 (1638); *Hale, ib.; East, ib.* 505. After prosecutor had been absent from his house for a month on a journey, no person being in the house, it was broken open, and robbed. He returned a month after with his family and inhabited there. This was adjudged burglary. *Murry,* 2 *East P. C.* 496 (1698); *Foster C. C.* 77; "but there must be an intention of returning." Cf. *Davies,* p. 306.

The prosecutor had a house at Hackney, which he made use of in the summer. One summer he removed to his town house, bringing away a considerable part of his goods. The following November the house at Hackney was broken open, upon which he removed thence almost everything else. He said in evidence that he had not come to any settled resolution whether to return or not, but was rather inclined totally to quit the house and let it. When the house was again broken into it was held that it could not be deemed his dwelling-house. *Nutbrown, Foster* 77; 2 *East P. C.* 496 (1750). See *Flannagan, Russ. & Ry.* 187 (1810); larceny, p. 311.

Occupation, whose?] It is sometimes doubtful in whose occupation the dwelling-house is; this is a point on which prosecutions for burglary frequently used to fail; but now (see p. 177) it is of much less importance. The following cases have been decided on the subject:—

Occupation of house occupied by several—internal communication.] Whether there be a separate occupation within a building seems to be very much a question of fact, the existence of internal communication being strong evidence that the whole is one dwelling-house. If A. lets a shop, parcel of his dwelling-house [having a different entrance and no communication, 2 *East* 507], to B. for a year, and B. holds it, and works or trades in it, but lodges in his own house at night, and the shop is broken open, it cannot be laid to be the dwelling-house of A., for it was severed by the lease during the term; but if B. or his servants sometimes lodge in the shop, it is the "mansion-house" of B., and burglary may be committed in it. 1 *Hale P. C.* 557; cf. *Sefton,* below. S. and K. were in partnership, and lived next door to each other. The two houses had formerly been one, but had been divided, for the purpose of accommodating the families of both partners respectively, and were now perfectly distinct, there being no communication

from one to the other, without going into the street. The house-keeping, servants' wages, &c., were paid by each partner respectively, but the rent and taxes of both the houses were paid jointly out of the partnership fund. The offence was committed in the house of S. by his servant, but the indictment laid it in the house of S. & K. Two judges were of opinion that the burglary ought to have been laid in the house of S. only, and directed an acquittal of burglary (but conviction of simple larceny). *Jones*, 1 *Leach* 537 (1790); 2 *East P. C.* 504. But it is otherwise were there is an internal communication. Thus where a man let part of his house, including his shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, the prisoner being convicted of a burglary in the shop, laid as the dwelling-house of the father, the conviction was held by the judges to be right, it being under the same roof, part of the same house, and communicating internally. *Sefton*, 2 *Russ. Cri.* 16; *Russ. & Ry.* 203 (1811).

Occupation with internal communication—under different titles.] As to colleges, &c., see p. 307. As to lodgers, see below. Where several parts of a building are let under distinct leases, each is a "distinct house." The owner of a dwelling-house and warehouse which were under the same roof, and communicated internally, let the house to A. (who lived there), and the warehouse to A. and B., who were partners, the demises being distinct. The communication between the house and warehouse was constantly used by A. The offence, committed in the warehouse, was laid to be in the dwelling-house of A.; but the judges were of opinion that this was wrong. *Jenkins*, *Russ. & Ry.* 244 (1813).

Occupation—lodgers.] Where separate apartments are let in a dwelling-house to lodgers, the rule is now, according to the opinion of *Kelyng* 84 (about 1665), "that if the owner, who lets out apartments in his house to other persons, sleep under the same roof, and have but one outer door common to him and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer doors, the apartments so let out are the mansion, for the time being, of each lodger respectively. And accordingly it was so ruled by Holt C.J. in 1701." 2 *East P. C.* 505; 1 *Leach* 90 *n.* Where one of two partners is the lessee of a shop and house, and the other partner occupies a room in the house, he is only regarded as a lodger. M. and G. were partners: M. was the lessee of the whole premises, and paid all the rent and taxes for the same, but got a part thereof from G. G. had an apartment and board in the house, for which he paid M. The burglary was committed in the shop, which was laid to be the dwelling-house of M., and the judges held, rightly. *Parminter*, 1 *Leach*, 537 *n.* (1796), p. 312. The owner let the whole of a house to different lodgers, and inhabited no part of it. One lodger rented the first floor, a shop and a parlour on the ground floor, and a cellar, but the owner took back the cellar to keep lumber in, allowing for it. The entrance was through a passage, by a door from the street, and on the side of the passage one door opened into the shop, and another into the parlour, and beyond the parlour was the staircase, which led to the upper apartments. The shop and parlour doors were broken open, and the judges determined that these rooms were properly laid to be the dwelling-house of the lodger, for it could not be called that of the owner, *as he did not inhabit any part of it.* *Rogers*, 1 *Leach* 89 (1772), cf. 428; 2 *East P. C.* 506, 507; 1 *Hawk. P. C.* Bk. 1, ch. 38, s. 29. This was followed in *Carrell*, 1 *Leach* 237 (1782), cf. 429, where the

house belonged to one N. who did not live in any part of it, but let the whole out in separate lodgings. J. had two rooms, viz. a sleeping-room, and a workshop in the garret, which he rented by the week as tenant at will to N. The workshop was broken and entered by the prisoner. Ten judges were of opinion that as N., the owner, did not inhabit any part of the house, the indictment properly charged it to be the dwelling-house of J. *East, ib.* The prisoner was indicted for breaking and entering the dwelling-house of J. L. The house was let out to three families, who occupied the whole. There was only one outer door, common to all the inmates. J. L. rented a parlour on the ground floor, and a single room up one pair of stairs, where he slept. The judges held the indictment right, and approved of the two preceding cases. *Trapshaw*, 1 *Leach* 427 (1786); *East, ib.* and 780.

"Hence it follows, that if a man lets out part of the house to inmates, and continue to inhabit the rest himself; if he break open the apartments of such inmates, and steal their goods, it is felony only, and not a burglary; for it cannot be burglary to break open his own house." *East, ib.* 506; *Kel.* 84, See p. 312.

Occupation—by wife or family.] The actual occupation of the premises by any part of a family will be evidence of its being their dwelling-house. A wife had for many years lived separate from her husband. When she was about to take a house the lease was prepared in her husband's name; but he refused to execute it, saying he would have nothing to do with it; in consequence of which, she agreed with the landlord and constantly paid the rent herself. Upon an indictment for breaking open the house, it was held to be well laid as the dwelling-house of the husband. *Farre*, p. 301; *French, Russ. & Ry.* 491 (1822), p. 561. So where the owner of a house who had never lived in it, permitted his wife, on their separation, to reside there, and she lived there in adultery with a man (who kept up the house), this was held by the judges to be properly described as the dwelling-house of the husband. *Wilford, Russ. & Ry.* 517 (1823), p. 561; and see *Smyth*, 5 *C. & P.* 201; 1 *Moo. & R.* 156 (1832); pp. 437, 438. Where a prisoner was indicted for breaking into the house of Elizabeth A., whose husband was in prison under sentence for felony at the time, it was held that the house was improperly described as hers, although she continued in possession, but the conviction on the count for larceny of the goods of the Queen was good; p. 559. *Whitehead*, 9 *C. & P.* 429 (1840). "In any case, where the law would adjudge the separate property of the mansion to be in the wife, and she has also the exclusive possession, the burglary ought to be laid against her mansion-house, and not against that of her husband." 2 *East P. C.* 504—a prophecy justified by 20–1 V. 85, 21, 25 (amended 21–2 V. 108, 7–9) and 45–6 V. 75, 12, p. 556.

Occupation—by clerks and agents in public offices, companies, &c.] An agent or clerk employed in a public office, or by persons in trade, is in law their servant, and if he be suffered to reside upon the premises, which belong to the government, or to his employers, the premises cannot be described as his dwelling-house. Three persons were indicted for breaking into the lodgings of Sir H. Hungate, at Whitehall, and the judges were of opinion that it should have been laid to be the *King's* mansion-house at Whitehall. *Williams*, 1 *Hale P. C.* 522, 528 (1639). The prisoner was indicted for "breaking up a chamber" in Somerset-house, and the apartment was laid to be the mansion-house of the person who lodged there; but it was held bad, because the whole house belonged to the Queen-mother, "and all who lodge in it are her servants. . . . So for Whitehall, which is the King's house." *Burgess*, *Kel.* 27 (1674). The prisoner was indicted for stealing a gold watch in the

dwelling-house of W. H. B. The house was the Invalid office. The ground-floor was used by the Paymaster-general, for the government's business. B. occupied the whole of the upper part; but the rent and taxes of the whole were paid by government. The court held that it was not the dwelling-house of B. *Peyton*, 1 *Leach* 324 (1784); 2 *East P. C.* 501. The prisoner was indicted for burglary in the mansion-house of S. S. The house belonged to the African Company, of which S. was an officer, lodging there; but Holt C.J., Tracy J., and Bury B., held this to be the mansion-house of the company, because S. S. and such persons only inhabit as officers. *Hawkins*, p. 301; *Foster C. C.* 38. So with regard to the dwelling-house of the East India Company, inhabited by their servants. *Picket*, *East*, *ib.* (1765). The prisoner was indicted for breaking and entering the house of the master, fellows, and scholars of Bennet College, Cambridge. He broke into the buttery of the college, and there stole some money, and it was agreed by all the judges to be burglary. *Maynard*, *East*, *ib.* (1774). The governor of a workhouse had part of a house for his own occupation; but the guardians, &c., who appointed him, reserved to themselves the use of one room for an office, and of three others for store-rooms. The governor was assessed for the house, with the exception of these rooms. The office being broken open, it was laid to be the dwelling-house of the governor; but the judges held the description wrong. *Wilson*, *Russ. & Ry.* 115 (1806). So a club-house is wrongly described as the dwelling-house of the house-steward, who sleeps there: he only does so as a servant. *Ashley*, 1 *C. & K.* 198 (1843).

The following case conflicts with previous authorities, and it may be doubted whether it is law, unless, as is likely, the premises may equally be described as the house of the owner or the occupier. (Cf. *Jobling*, p. 312; *Rees*, p. 312). S. kept a warehouse, and resided with his family over the warehouse, which was on the ground-floor, communicated with the dwelling-rooms, and consisted of four rooms, one of which was the room broken open. The property therein belonged to a company of manufacturers, who were the lessees, none of whom ever slept in the house. The *whole* rent was paid by the company, whose agent S. was, and his living rent free was part of his salary. Two judges were of opinion that it was rightly charged to be the dwelling-house of S. *Margett*, 2 *Leach* 930 (1801). In the course of this case, it appeared that there had been a prosecution for burglary in a hall of a City Company, where no part of the company resided, but in which their clerk generally lived; and it was stated that the court held it to be the house of the clerk. *Ib.* *Margett*, and the *City Company case* were followed in *Witt*, where the prosecutor was secretary to the Norwich Union Insurance Company, and as secretary lived with his family in the house, part of which, open to the family, was used as the office of the company, who paid the rent and taxes. The burglary was in breaking into a room used for the business of the company. All the judges were of opinion that the house was rightly described as the prosecutor's. It might (they added) have been described as the company's house. *Witt*, 1 *Moody C. C.* 248 (1829).

Occupation—by servants occupying as such.] See pp. 309–10. In *Brown's case*, pp. 305, 306, the servant paid no rent for his cottage, but a deduction from his wages was made for it; this was held to be a mere licence to him to lodge there, and the cottage was part of the master's house. *Brown*, 2 *East P. C.* 501.

The prosecutors were partners as bankers and brewers, and were the owners of the house in question. There were three business rooms on the ground floor, with only one entrance by a door (that broken open) from the street. No one slept in these rooms. But the upper rooms were inhabited by S. a cooper employed in the brewery. He was permitted to have these rooms for

the use of himself and family, and there was a separate entrance from the street to them; the window-tax in respect of S.'s occupation was paid by the partners. There was no communication between the upper and lower floor, except by a trap-door (the key of which was left with him, but which was never locked). It being objected that the room where the burglary was committed was not in the dwelling-house of the prosecutors, eight judges thought that S. was not a tenant, but inhabited only as a servant; four thought the conviction wrong. *Stock and Edwards*, 2 *Leach* 1015; 2 *Taunt.* 339; *Russ. & Ry.* 185 (1809). See *Flannagan*, below.

The prosecutor left a dwelling-house, keeping it only as a warehouse and workshop, without any intention of returning to it. Two women, employed by him in his business (not as domestic servants), slept there to take care of the house, but did not take their meals there or use the house for any other purpose whatever. Upon an indictment for stealing goods in the dwelling-house of the prosecutor, the judges held that this could not be considered his dwelling-house. *Flannagan*, p. 307. It is difficult to distinguish this case from that of *Stock* above, except on the supposition that here there was no dwelling-house at all. Still, though the object of the owner of the house in putting in his servants, be to protect his property only, yet if *they live there* their occupation will be deemed his occupation, and the house may be described as his dwelling-house. The shop broken open was part of a dwelling-house which the prosecutor had inhabited. He had left and never meant to live in it again, but retained the shop and let the other rooms to lodgers; after some time he put a servant and his family into two of the rooms, lest the place should be robbed. The judges thought that putting in a servant and his family *to live*, was very different from putting them in merely to sleep, and that this was still to be deemed the prosecutor's house. *Gibbons* (1821), 2 *Russ. Cri.* 24. J. B. worked for W., who did carpenter's work for a public company, and had put J. B. into the house to take care of it and of some mills adjoining, J. B. receiving no more wages after than before he lived in the house; it was held that the house was not rightly described as the house of J. B. *Rawlins*, 7 *C. & P.* 150 (1838). See *Ashley*, p. 310.

Occupation—by servant and tenant.] Where a servant occupies part of the premises belonging to his master, not in the capacity of *servant*, but as a tenant paying a yearly rent, the premises must be described as his dwelling-house. G. & Co. had a house and warehouse in one enclosure where they carried on their trade. M., their warehouseman, lived with his family in the house, and paid 11*l.* per annum for rent and coals (much less than the value), in consideration of his trustworthiness. G. & Co. paid the rent and taxes. The judges were of opinion that this could not be said to be the dwelling-house of G. & Co.: that as M. stood in the character of tenant (for G. & Co. might have distrained upon him for his rent, and could not arbitrarily have removed him), M.'s occupation could not be deemed theirs. *Jarvis*, 1 *Moody C. C.* 7 (1824).

Nor is it necessary, in order to invest the servant with the character of tenant, that he should pay a rent. G. resided in a cottage built by the owner of the colliery for whom he worked. He received 15*s.* a week as wages, besides the cottage, which was free of rent and taxes. The prisoner being indicted for burglary, in the dwelling-house of G., the opinion of the judges was that the cottage might be described as the dwelling-house of G., for though it was only his so long as he worked for the owner, and because he worked for him, yet his occupation was entirely for his own benefit totally disconnected with his master's business, and though his occupation might "in law, at the master's election" be the master's, yet, as to third persons,

it might be the occupation of either. *Jobling, Russ. & Ry.* 525 (1823). Cf. *Witt*, p. 310. A toll-house was occupied by a person employed at weekly wages as collector, and as such he had the privilege of living in the toll-house. The judges were unanimously of opinion that the toll-house was rightly described as his dwelling-house. *Camfield*, 1 *Moody C. C.* 42 (1824). So where a person who has been servant remains, on the tenant's quitting, upon the premises, not in the capacity of servant, they may be described as his dwelling-house. Lord S. let a house to Mr. S., who underlet it. The sub-lessee failed and quitted, and no one remained in the house but A. P., who had been servant to the sub-lessee. S. paid her 15*s.* a week till he died, after which she received no payment but continued in the house, where the only furniture was hers. At Michaelmas it was given up to Lord S., but A. P. was permitted by the steward to remain in it. Bayley J. thought A. P. might be considered tenant at will, but reserved the point for the opinion of the judges, who held that the house was rightly laid as her dwelling-house, as she was there, not as a servant, but as a tenant at will. *Collett, Russ. & Ry.* 498 (1823). Where a gardener lived in a house of his master, quite separate from the dwelling-house of the latter, and had the entire control of the house he lived in and kept the key, it was held that it might be laid either as his or as his master's house. *Rees*, 7 *C. & P.* 568 (1836). Cf. p. 310.

Occupation—by guests, &c.] "If several persons dwell in one house, as servants, guests, tenants at will, or otherwise, having no fixed and certain interest in any part thereof, and a burglary be committed in any of their apartments, it seems clear that the indictment shall lay the offence in the mansion-house of the proprietor, &c." 1 *Hawk. P. C.* Bk. 1, ch. 38, s. 26. Therefore, where the chamber of a guest at an inn is "broken up burglarily," it shall be laid to be the mansion-house of the innkeeper, because the guest has only the use of it, and not any certain interest. 1 *Hale P. C.* 557. Dalton says that if the host of an inn break the chamber of his guest in the night to rob, this is burglary; ch. 151 (p. 342, *ed.* 1742). "But this may be justly questioned; for that there seems no distinction between this case" and the case put on p. 309. 2 *East P. C.* 502. "If A. be a lodger in an inn . . . and in the night he riseth, openeth his chamber-door, steals goods in the house, and goes away, it may be a question whether this be burglary; it seems not, because he had a kind of special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house, for A. hath a special property in his chamber; but if he had opened the chamber of B., a lodger in the inn, to steal his goods, this had been burglary." 1 *Hale P. C.* 554. It has been observed that the reasoning in the following case is opposed to the distinction taken by Hale, and that the case of a guest at an inn breaking his own door to steal goods in the night, is the same as that of a servant (see p. 302). A pedlar came to the house of one L., a publican, to stay all night, and fastened the door of his chamber. The prisoner pretended to L. that the pedlar had stolen his goods, and under this pretence, with the assistance of L. and others, forced the chamber-door open, and stole the pedlar's goods. The judges thought that though the pedlar had for that night a special interest in the bedchamber, yet it was merely for a particular purpose, viz. to sleep there that night as travelling guest, and not as a regular lodger; that he had no certain and permanent interest in the room itself, but both the property and possession of the room remained in the landlord; and, therefore, the indictment was wrong in alleging the house of the *pedlar*. *Prosser*, 2 *East P. C.* 502 (1768).

Occupation—partners.] See *Parminter*, p. 308. But where the house is the joint property of the firm, and one of the partners and the persons

employed in the trade live there, it is properly described as the dwelling-house of the firm (and not as that of the resident partner). *Athea*, 1 *Moody C. C.* 329 (1832).

"*Night.*"] By 24–5 V. 96, 1: "For the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the succeeding day."

It must be proved that both the breaking and entering took place in the night-time, but it is not necessary that both should take place on the same night. It is said by Hale, that if thieves break a hole in the house one night, to the intent to enter another night and commit felony and do so through that hole, this seems to be burglary; "for the breaking and entring were both *noctanter*, tho not the same night; and it shall be supposed that they brake and entred the night they entred, for the breaking makes not the burglary till the entry." 1 *P. C.* 551. This point was decided in the following case: During the night of Friday, the side-door of a house, which opened into a public passage, had all the glass taken out by the prisoner, with intent to enter, and on the Sunday night, the prisoner entered through the hole thus made. The judges were of opinion, that the offence amounted to a burglary, the breaking and entry being both by night, and the breaking being originally with intent to enter. *Smith*, *Russ. & Ry.* 417 (1820). See also *Jordan*, p. 302.

"If the breaking of the house were in the day-time, and the entring in the night, or the breaking in the night and entring in the day, this will not be burglary, for both make the offense, and both must be *noctanter; vide Crompt.* 33 *a*, *ex* 8 E. 4." [*Sic*: the correct reference is 8 E. 2: *Fitzherbert's L'Office de Justices, &c.*, edited by *Crompton* (1606), p. 33*a*, 36.] 1 *Hale P. C.* 551. Upon this, an annotator observes, "this case does not fully prove the point it is brought for, for the resolution there was only, that if thieves enter in by night at an hole in the wall which was there before, it is not burglary; but it does not appear who made the hole." Obviously Hale's "reasoning [in the first passage above], if applied to a breaking in the day-time, and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entry a burglary," which contradicts the second passage (551) above. 2 *Russ. Cri.* 38: and see 2 *East P. C.* 509. It may well be doubted whether, in such a case, the offence would be held to amount to burglary.

Intent to commit felony—at common law, or by statute.] It must be proved that the dwelling-house was broken and entered with intent to commit a felony therein. Evidence that a felony was actually committed is evidence that the house was broken and entered with intent to commit that offence. 1 *Hale P. C.* 560; 2 *East P. C.* 514. Cf. *Powell*, p. 199. It was at one time doubted whether it was not essential that the felony should be a felony at common law. 1 *Hale P. C.* 562; *Crompt. Fitzh.* 32; *Dalt.* c. 151. But it appears to be now settled that it makes no difference whether the offence intended be felony at common law or by statute; "because wherever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law." 1 *Hawk. P. C.* Bk. 1, ch. 38, s. 38; *Gray*, p. 298; 4 *Bl. Com.* 228; 2 *East P. C.* 511; 2 *Russ. Cri.* 41. If it appear that the intent of the party in breaking and entering was merely to commit a trespass, it is not burglary, as where the prisoner enters with intent to beat some person in the house, even though killing or murder may be the consequence of beating, yet, if the primary intention was not to kill, it is still not burglary. 1 *Hale P. C.* 561; 1 *East P. C.* 509. Where a servant embezzled money entrusted to his care, ten guineas of which he deposited in his trunk, and quitted his master's service, but afterwards

returned, broke and entered the house in the night, and took away the ten guineas, this was adjudged no burglary, for he did not enter to commit a felony, but a trespass only. Although it was the master's money *in right*, it was the servant's *in possession*, and the original act was no felony. *Bingley*, 1 *Hawk. P. C.* Bk. 1, ch. 38, s. 37, cited 2 *Leach* 840–1, as *Dingley* (1687); 2 *East P. C.* 510, *S. C.* as *Anon.* Where tea had been seized as contraband by an excise officer, and his house was entered in the night, and the goods taken away, upon an indictment for entering his house, with intent to steal his goods, the jury found that the prisoners broke and entered the house with intent to take the goods on behalf of the person who had smuggled them; and all the judges were of opinion that the indictment was not supported, there being no intent to steal, however outrageous the conduct of the prisoners was in thus endeavouring to get back the goods. *Knight and Roffey*, 2 *East P. C.* 510 (1781), p. 549. If the indictment had been for breaking and entering the house, with intent feloniously to rescue goods seized, that being made a felony by 19 G. 2, 34 (repealed), it would have been burglary. But even in that case some evidence must be given to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid. 2 *East P. C.* 510. The prisoner was indicted for breaking, &c., with intent to kill and destroy a gelding "there being." It appeared that the prisoner, in order to prevent the horse from running a race, cut the sinews of his fore legs, from which he died. Pratt C.J. directed an acquittal, the intent being not to commit felony by killing and destroying the horse, but a trespass only to prevent his running, and therefore it was no burglary. But the prisoner was afterwards indicted for killing the horse, and capitally convicted. *Dobbs*, 2 *East P. C.* 513 (1770), p. 315. Two poachers went to the house of a gamekeeper, who had taken a dog from them, and believing him to be out of the way, broke the door and entered. Being indicted for this as a burglary, and it appearing that their intention was to rescue the dog, and not to commit a felony, Vaughan B. directed an acquittal. *Anon.*, *Matth. Dig. C. L.* 48 (1831). See *Holloway*, 5 *C. & P.* 524 (1833).

Proof of the intent—variance in the statement of.] The intent must be proved as laid. If it is laid that the intent was to commit one sort of felony, and it is proved that the intent was to commit another, it is a fatal variance. 2 *East P. C.* 514. Where the prisoner was indicted for burglary and stealing goods, and it appeared that there were no goods stolen, but only an intent to steal, it was held by Holt C.J. that this ought to have been so laid, and he directed an acquittal. 2 *East P. C.* 514 (1700). The property in the goods which it is alleged were intended to be stolen, must, if stated, be correctly laid. 2 *Russ. Cri.* 42. Cf. p. 802. But see 14–15 V. 100, 1, p. 177. An indictment for burglary charged the prisoner with breaking in the night-time, into the dwelling-house of E. B., "with intent the goods and chattels in the same dwelling-house then and there being feloniously and burglariously to steal, and stealing the goods of E. B." It was proved that it was the house of E. B., but that the goods stolen were the joint property of E. B. and two others. It was held that if it was proved that the prisoner broke into the house of E. B. with intent to steal the goods there *generally*, that would be sufficient to sustain the indictment. *Clarke*, 1 *C. & K.* 421 (1844). A. was charged with breaking into the house of K., and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but that he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it; it was held

that M. was a bailee, and that the goods in the shop might properly be laid as his property. *Bird*, p. 299; see p. 559.

It seems sufficient in all cases where a felony has been actually committed, to allege the commission without any intent; 1 *Hale P. C.* 560; 2 *East P. C.* 514; and in such case no evidence, except that of the commission, will be required. It is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend that particular offence. Yet this, it seems, must be confined to cases where the offence intended is in itself a felony. 2 *East P. C.* 514–15, p. 71, citing *Dobbs*, p. 314.

The intent of the parties will be gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front and at the back. They put a crow-bar and whittle through a window, but the owner resisting them, they went away. They had ample opportunity to enter and plunder, if they wished. Being indicted for burglary with intent to commit a larceny, it was contended that there was no evidence of the intent; but Parke J. said that it was for the jury to say, from all the circumstances, whether the prisoner went with the intent alleged or not. *Anon.*, 1 *Lewin C. C.* 37 (1830).

Minor offence—larceny.] If the prosecutor fail in his attempt to prove the breaking and entry of the dwelling-house, but the indictment charges the prisoner with a larceny committed there, he may be convicted of the larceny. *Withal*, p. 71. In a similar case the verdict was, "not guilty of the burglary, but guilty of stealing above the value of 40*s.* in the dwelling-house," and the entry made by the officer was in the same words. The judges agreed, that if the officer were to draw up the verdict in form, he must do so according to the plain sense and meaning of the jury, which admitted of no doubt; and that the minute was only for the future direction of the officer, and to show that the jury found the prisoner guilty of the larceny only. But many of the judges said, that when it occurred to them they should direct the verdict to be entered, "not guilty of the breaking and entering in the night, but guilty of the stealing," &c., as that was more distinct and correct. "It appeared, upon inquiry, to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, "not guilty of murder, but guilty of manslaughter," or, "not guilty of murder, but guilty of feloniously killing and slaying," and yet murder includes the killing. They added that the whole verdict must be taken together; and the jury must not be made to say that the prisoner is not guilty generally, where they find him expressly guilty of part of the charge." *Hungerford*, 2 *East P. C.* 518 (1790).

It was formerly thought, that if several were jointly indicted for burglary and larceny, one could not be convicted of larceny only and another of burglary. *Turner*, 1 *Sid.* 171 (1675); 2 *East P. C.* 519. But in a later case, where one prisoner pleaded guilty, and the other two were found guilty of the larceny only, the judges came by a majority to the opposite conclusion. *Butterworth, Russ. & Ry.* 520 (1823).

Although a prisoner may be convicted of the larceny only, yet if the larceny was committed on a day *before that* laid in the indictment, he cannot be convicted of such larceny. Where prisoners had previously broken in and made preparations for stealing, but on the day they were caught on the premises had not actually taken anything, it was held they must be acquitted of larceny on that day. The court said: "The charge now proposed to be introduced goes to connect the prisoners with an antecedent felony committed before *three* o'clock, at which time, it is clear, they had not entered the house. . . It is said that they stole the goods on a former day, and that their being

found in the house is evidence of it. But this is surely a distinct transaction; and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present." *Vandercomb*, p. 171, and below.

"*Breaking out.*"] An indictment for burglary which stated in one count that the prisoner "did break to get out," and in another that he "did break *and* get out," was held by two judges insufficient, since 7–8 G. 4, 29, 11 (repealed), uses the words "break out." *Compton*, 7 *C. & P.* 139 (1835).

Where a lodger got up in the night and unbolted the back door, and went away with a jacket which he had stolen, he was convicted of burglary. "It is the purpose for which he undoes the fastening that makes the act unlawful." *Per* Erskine J. *Wheeldon*, 8 *C. & P.* 747 (1839). Cf. p. 297.

Autrefois acquit.] See p. 170. In *Vandercomb*, above, the prisoners having been acquitted both of burglary and of larceny, were indicted again for burglary *with intent*, &c., and for stealing other goods (than those in the earlier indictment): to both indictments they pleaded *autrefois acquit*. Upon demurrer in the Exchequer Chamber, all the judges, *per* Buller J. said: "[The] cases establish the principle that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now to apply the principle of these cases to the present case: The first indictment was for burglariously breaking and entering the house of Miss Nevilles, and *stealing the goods* mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for in fact no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering Miss Neville's house *with intent to steal*, which is the charge in the present indictment, and therefore they have never been in jeopardy for this offence. For this reason the judges are all of opinion that the plea is bad:" the prisoners were then tried and convicted. *Turner, Kel.* 30 (1664), and *Jones and Beaver, ib.* 52 (1665), were thus overruled, 2 *East P. C.* 579. Where a prisoner was indicted for a burglary (without violence) in the house of a person for whose murder he had been acquitted, Parke B. told the jury that in his opinion that acquittal would have been an answer to the allegation of violence, if it had been inserted in the present indictment. *Gould*, 9 *C. & P.* 364 (1840).

Indictment for being found by night armed with intent to break into any house, &c.] Where persons are charged under 24–5 V. 96, 58, p. 297, with being found by night armed with an offensive weapon with intent to break and enter into a building, the particular building must be specified in the indictment, "and, probably, it should also charge an intent to commit a definite felony." *Per* Crompton J., *Jarrald, L. & C.* 301 (1863); and see below.

Being in possession of implements of housebreaking.] This offence consists in mere possession without lawful excuse. It is not necessary to allege or to prove an intent to commit a felony. *Bailey*, 1 *Dears. & P. C. C.* 244; 23 *L. J. M. C.* 13 (1853), under 14–15 V. 19, 1 (repealed), substantially the same as s. 58, p. 297, where the jury found no evidence of intent to commit a felony; conviction affirmed. Where only one is in possession of the implements, the possession by him is possession by all. *Thompson*, 11 *Cox C. C.* 362 (1869).

If a man is armed with any other weapon than one for housebreaking,

there must be proof of an intent to break into some particular house. *Per* Crompton J., in *Jarrald*, above, who seems in some preceding words to differ from *Bailey*, above, to which, however, he was a party.

What are implements of housebreaking.] Keys are implements of housebreaking; for though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking, and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, and with the intention of using them as implements of housebreaking. *Oldham*, 2 *Den. C. C. R.* 472; 21 *L. J. M. C.* 134 (1852). It is clear, as Maule J. pointed out, that a comma must be understood between "picklock" and "key" in 14–15 V. 19, 1 (and now in s. 58, p. 297); otherwise there are no words which make ordinary keys implements of housebreaking. There is not, and there seems never to have been, a word "picklock key."

CATTLE AND OTHER ANIMALS, OFFENCES WITH REGARD TO.

Stealing horses, cows, sheep, &c.] By 24–5 V. 96, 10: "Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years" (see p. 198).

Killing animals with intent to steal the carcase, &c.] By s. 11: "Whosoever shall wilfully kill any animal with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony." As to "asportation" of the live animal in order to steal it dead, see p. 530.

Killing or maiming cattle.] By 24–5 V. 97, 40: "Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years" (see p. 198). By s. 41 the same offences on "any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law or being ordinarily kept in a state of confinement or for any domestic purpose" are punished; cf. p. 369. See *Miles* v. *Hutchings*, 20 *Cox C. C.* 555 (1903).

Ss. 58–9, p. 241, also apply.

What are "cattle."] The word *cattle*, in 24–5 V. 97, 40, would, doubtless, receive the same interpretation as it bore in the repealed 9 G. 1, 22, "under which it was held that an indictment for killing a "mare" (or a *horse* or *colt*) was good, on the ground that this Act was an extension of 22–3 C. 2, 7 (repealed), which speaks (ss. 2, 5) of "horses, sheep, or other cattle." *Paty*, 1 *Leach* 72; 2 *W. Bl.* 721; 2 *East P. C.* 1074 (1770); followed as to "a gelding" in *Mott*, 1 *Leach* 73 *n.* (1783); cf. *Tivey*, 1 *C. & K.* 704 (1844). Pigs were held to be within 9 G. 1, 22. *Chapple*, *Russ. & Ry.* 77 (1804). So also asses. *Whitney*, 1 *Moody C. C.* 3 (1824). It is not sufficient in the indictment to charge the prisoner with maiming, &c., "certain cattle" generally, without naming the species. *Chalkley*, p. 74, which see.

Extent of the injury.] Upon an indictment for maliciously *maiming* or *wounding*, it need not appear either that the animal was killed, or that the wound inflicted a permanent injury. It was proved that the prisoner had maliciously driven a nail into a horse's foot. The horse was thereby rendered useless to the owner, and continued so for some months; but at the trial it was stated that it was likely to be perfectly sound again in a short time. The prisoner being convicted, the judges held the conviction right, as the word "wounding" does not imply a permanent injury. *Haywood*, *Russ. & Ry.* 16; 2 *East P. C.* 1076 (1801). But *maiming*, it seems, does. *East*, *ib.* 1077; *Jeans*, 1 *C. & K.* 539 (1844), under 7–8 G. 4, 30, 16 (repealed).

Where the prisoner was indicted under (repealed) 4 G. 4, 54, 2, for wounding a sheep—he had set a dog at the animal, and the dog, by biting, inflicted several severe wounds—Park J. said, "This is not an offence at common law, and is only made so by a statute; and I am of opinion that injuring a sheep, by setting a dog to worry it, is not a maiming or wounding within the meaning of that statute." *Hughes*, 2 *C. & P.* 420 (1826). The word "wound," in s. 40, p. 318, is to be construed according to its ordinary meaning; and injuries to a horse's tongue, apparently caused by a pull of the hand, were held to be a "wounding." *Bullock*, 37 *L. J. M. C.* 47; *L. R.* 1 *C. C. R.* 115 (1868). The prisoner poured a quantity of nitrous acid into the ear of a mare, some of which getting into the eye produced immediate blindness; the conviction for maiming was held by the judges to be right. *Owens*, 1 *Moody C. C.* 205 (1828), under 7–8 G. 4, above. Where a man was indicted (under that s.) for administering sulphuric acid to eight horses, with intent feloniously to kill them, and it appeared that he had mixed sulphuric acid with the corn, and having done so, gave each horse his feed; Park J. held that this evidence supported a joint administering to all the horses—which alone the indictment alleged. *Mogg*, p. 83. Where the prisoner set fire to a cowhouse, and a cow in it was burned to death, Taunton J. ruled that this was a killing of the cow within the same s. *Haughton*, 5 *C. & P.* 559 (1833).

Malice and intent.] See s. 58, p. 241, and cf. 2 *Russ. Cri.* 978.

Although it is thus rendered unnecessary to give evidence of malice against any particular person, yet an evil intent in the prisoner must appear. Thus, in *Mogg*, above, Park J. left it to the jury to say whether the prisoner had administered the sulphuric acid (there being evidence of a practice of that kind by grooms to improve the appearance of the horses) with that intent or that alleged in the indictment; and that in the former case they ought to acquit him. And where the prisoner caused the death of a mare by inserting the handle of a fork into her vagina, and pushing it into her body, it was held there was sufficient malice to support an indictment under s. 40, p. 318, though there was no evidence that the prisoner was actuated by ill-will towards the owner, or spite towards the mare, or by any motive except the gratification of his own depraved mind. The jury found that the prisoner did not, in fact, intend to maim, wound, or kill the mare, but that knowing what he was doing would or might have that effect, he nevertheless did what he did recklessly and not caring whether the mare was injured or not. *Welch*, 1 *Q. B. D.* 23; 45 *L. J. M. C.* 17 (1875); *C. C. R.*, p. 21.

Cruelty to animals.] Offences under the Cruelty to Animals Act, 39–40 V. 77, passed in order to regulate vivisection, may, by s. 15, where the penalty which can be imposed exceeds five pounds, be prosecuted on indictment at the request of the party accused. Otherwise offences of this nature are punishable summarily.

As to drugging animals, see 39 V. 13.

CHALLENGING TO FIGHT.

What amounts to.] "It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send such a challenge, or to fight; as by dispersing letters to that purpose, full of reflections and insinuating a desire to fight, &c." 2 *Hawk. P. C.* Bk. 1, ch. 63, s. 3; see *Knock*, p. 253. Thus, a letter containing these words, "You have behaved like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make," was held indictable. *Philipps*, p. 257; *Rice*, 3 *East* 581 (1803). No provocation, however great, is a justification on the part of the defendant, although it may weigh with the court in awarding the punishment. *Ib.*

On such an indictment prosecutor must prove *inter alia*, where it does not appear from the writing or words used themselves, the intent to challenge, or to provoke to a challenge.

Intent.] Where the intent does not appear from the writing or words themselves, as where the words are ambiguous, the prosecutor must show the circumstances under which they were uttered. Thus, words of provocation, as "liar," or "knave," though a *mediate* provocation to a breach of the peace, do not tend to it *immediately*, like a challenge to fight, or a threatening to beat another. *King*, 4 *Inst.* 181 (1586). Yet these, or any other words, would, perhaps, be indictable if proved to have been spoken with an intent to provoke the sending of a challenge. 1 *Russ. Cri.* 594.

Venue.] Where a letter challenging to fight is put into the post-office in one county, and delivered to the party in another, the venue may be laid in the former county. If the letter is never delivered, the defendant's offence is the same. "On trials for high treason, intercepted letters are received in evidence as overt acts of treason in the county where they were written." *Per* L. Ellenborough. *Williams*, 2 *Camp.* 506 (1810).

CHAMPERTY.

See p. 588.

CHEATING.

Cheats indictable at common law.] The question, whether or not a fraudulent transaction is indictable as a cheat at common law, has become of less importance than it formerly was, because several cheats are now indictable by various statutes, especially by 24–5 V. 96, 88, and foll., p. 405, which include all that class of offences known as obtaining money and goods by *false pretences.*

The subject of cheats at common law is fully considered in 2 *Russ. Cri.* 454–67. It is strongly insisted on—see especially p. 463—that the definition of a cheat indictable at common law must include the term, that it is one *which affects, or may affect, the public.* This definition, taken from 2 *East P. C.* 818, is obviously imperfect, for all moral wrong *affects the public.* What is, perhaps, intended is such conduct as shows a design of systematic cheating, as the passage cited from L. Mansfield, p. 324 below—"of the kind which in its nature is calculated to defraud numbers"—and some of the cases in this section show. Whether a given fraud affects or may affect sufficient "numbers" or not, and is, therefore, *public* or *private*, naturally depends on the view of individual judges, and hence there is considerable variation in the cases. The courts have always been anxious to maintain the distinction between the civil and the criminal, but the distinction is not scientific, and in Cheats and Frauds it is often difficult to draw the line between them. See Introductory Note I. In *Jones*, 1 *Salk.* 379; 2 *L. Raym.* 1013 (1704), where an indictment for pretending to A. to be sent by B. to get twenty pounds, and getting it, was quashed, the court (Holt) said, "We are not to indict one man for making a fool of another, let him bring his action." But may not this be said of any fraud?

However, as this difficulty—of distinguishing between indictable and non-indictable cheats—has been increasingly felt, legislation has expressly provided for many forms of fraud by declaring them indictable crimes.

The following are the more important frauds at common law.

Cheats affecting the administration of public justice.] All cheats which are levelled against the public justice of the kingdom are indictable at common law. 2 *East P. C.* 821. Some such cheats will be found under the head of *False Personation*, p. 402. As to using false county court process, see p. 471. East cites from *Tremaine's Pleas of the Crown* 101 (where there are many precedents of indictments for cheats), *Blackbourne* (1685), where a married woman was indicted for pretending to be a widow, and as such, executing a bail-bond, and a precedent in the *Crown Circuit Companion* 78 (1738), of an indictment for forging a request for a *nolle prosequi.* By a contract for the purchase of wheat it was provided that any dispute should be referred to arbitrators. Sealed bags of samples of the wheat having been prepared as evidence for the arbitrators, the prisoner removed their contents and placed in them wheat of a different and better character, with intent to deceive the arbitrators and to injure the buyer, and to pass them off as genuine samples. It was held that this was an indictable misdemeanor (though the fraud was not, in fact, practised). *Vreones*, 1891, 1 *Q. B.* 360;

60 *L. J. M. C.* 62; 17 *Cox C. C.* 267; *C. C. R.* But where an overseer was charged with a statutory offence by wilfully falsifying lists of voters and (in another count) with intent thereby to mislead the revising barrister, it was held by Charles J. on a consideration of 6–7 V. 18, 51, and other enactments, that the alleged offence was not indictable, and that as such lists are published, and every facility for correction given, and are not laid by the overseer before the revising barrister at all (but before the town clerk), *Vreones* did not apply. *Hall*, 1891, 1 *Q. B.* 747; 60 *L. J. M. C.* 124; 17 *Cox C. C.* 278, pp. 175, 669.

Selling unwholesome provisions—a public cheat at common law.] The selling unwholesome provisions, 4 *Bl. Com.* 162, or "the giving of any person unwholesome victuals not fit for man to eat, *lucri causâ*, or from malice or deceit, is undoubtedly in itself an indictable offence." 2 *East P. C.* 822. Where the defendant was indicted for deceitfully providing certain French prisoners with unwholesome bread, to the injury of their health, it was objected in arrest of judgment, that the indictment could not be sustained, for it "did not appear that what was done was in breach of any contract *with the public*, or of any moral or civil (*sic*) duty"; but the judges held the conviction right. *Treeves* (1796), *ib.* On a very similar indictment at common law, where it appeared that many of the loaves were strongly impregnated with alum (then prohibited by (repealed) 37 G. 3, 98, 21), the defence was that it had been carefully employed, that a small quantity is not injurious, and that if too much had been put in, it was not with the defendant's knowledge. But L. Ellenborough said, "Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm." *Dixon*, pp. 16, 20, 663. See 38–9 V. 63, p. 663.

False accounting, &c., by public officers.] Fraudulent malversations or cheats by public officers are also indictable at common law: thus, overseers of the poor are indictable for refusing to account within the proper time; *Commings*, 5 *Mod.* 179 (1696); 1 *Bott's Poor Laws*, pl. 370 (p. 357, *6th ed.*); 2 *Russ. Cri.* 458; or for rendering false accounts, *e.g.* by not bringing sums into account. *Martin*, 2 *Camp.* 269 (1809), p. 669; 3 *Chitty, C. L.* 701. Upon an application to the King's Bench, against the minister and churchwardens of a parish, for misapplying monies collected for charity, and returning a smaller sum only as collected, the court, refusing the information, referred the prosecutors to the ordinary remedy by indictment. *Ministers, &c., of St. Botolph*, 1 *W. Bl.* 443 (1763). See *Office-holders*, p. 669.

Again, where two persons were indicted for enabling persons to pass their accounts with the pay-office, in such a way as to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the court decided otherwise, as it related to the public revenue. *Bembridge*, 22 *St. Tr.* 1; 6 *East* 136 (1783), p. 669.

False public tokens, e.g. weights and measures.] Cheating by false weights and measures, "by which the public in general may be imposed upon without any imputation of folly or negligence," or by "any false token having the semblance of public authenticity," is indictable. 2 *East P. C.* 820.

"If a person sell by false weights, though only to one person, it is an indictable offence; but if without false weights he sells to many persons a less quantity than he pretends to do, it is not indictable." *Per* Buller J., *Young*, p. 173, at 104. Thus, if a person has measured corn in a bushel, and put

something in the bushel to fill it up, or has measured it in a bushel short of the statute measure, it may be indictable; but not where he sold a sack falsely affirming it to contain a "Winchester bushel," for this is "no more than telling a lie." *Pinkney* (1733), 2 *East, ib.*, below; cf. 1 *Sess. Ca.* 198. See *Wheatley*, p. 324.

Cheating at or with cards, dice, &c.] This was considered an indictable offence at common law, but now by 8–9 V. 109, 17: "Every person, who shall by any fraud or unlawful device, or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly." See p. 490.

Tossing with coins was held to be a pastime or exercise (if not a game) within this section. *O'Connor*, 15 *Cox C. C.* 3 (1881), *C. C. R.*, p. 490. When the indictment stated that the defendant *won* certain monies from one H. F. B. to (*sic*) a person unknown, but not to whom the money belonged, it was held good, because it followed the words of the statute. *Moss, Dears. & B. C. C.* 104 (1856), pp. 490, 492. A doubt was also raised whether the offence was not completed by *winning*, even if the money was not *obtained*.

Using false tokens.] See above. The question was much considered in *Closs, Dears. & B. C. C.* 460; 27 *L. J. M. C.* 541 (1858), p. 440. There the prisoner was indicted (for obtaining money by false pretences—of which he was acquitted—and) for keeping, and exposing for sale, and for selling a picture, upon which was unlawfully painted the (forged) signature of J. Linnell, intending thereby to denote that the picture was an original picture by J. L. —of which he was convicted. This was held to be a fraud at common law. Cockburn C.J. said, "We have carefully examined the authorities, and the result is, that we think if a person, in the course of his trade openly and publicly carried on, were to put a false mark or token upon an article so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold, and money obtained by means of that false mark or token, that would be a cheat at common law." The count for a common law cheat by means of a forgery was held to fail, and as the other count was held bad for not alleging with sufficient clearness that it was *by means* of the false token, that the defendant passed off the picture as genuine, the conviction was quashed. For forgery at common law, see *Hamilton*, p. 440, which turned on the indictment which did not allege that C. had in fact been defrauded of any money. The definition of 2 *Hawk. P. C.* Bk. 1, ch. 71, s. 1, is there said to be "far too wide." See as to Trade Marks, &c., 50–1 V. 28, 2 (3) and (6), p. 456. An intent to defraud is not an ingredient of the statutory offence. *Starey* v. *Chilworth*, 24 *Q. B. D.* 90; 59 *L. J. M. C.* 13 (1889); *Wood* v. *Burgess*, 24 *Q. B. D.* 162; 59 *L. J. M. C.* 11 (1889); *Thwaites* v. *M'Evilly* (1904), 1 *T. R.* 310; *Langley* v. *Bombay Tea Co.*, 19 *Cox C. C.* 551 (1900); *Star Tea Company* v. *Whitworth*, 20 *Cox C. C.* 658 (1904); *North Eastern Breweries* v. *Gibson: ib.* 706 (1904); *Fowler* v. *Cripps*, 21 *Cox C. C.* 52 (1905).

What cheats are not indictable.] The following cheats have been held not to be indictable at common law; though many of them would now be so by statute. Most of these decisions are considered as resting on the ground that the cheats to which they relate are not of a *public* nature (p. 321).

Where a fraud upon an individual is effected by a bare lie, in a matter not

affecting the public, an indictment is not sustainable. *Pinkney*, above. Thus, where an indictment charged the defendant with selling to a person eight cwt. gum at seven pounds per cwt., falsely affirming that the gum was gum *seneca*, and that it was worth seven pounds, whereas it was not gum *seneca*, and was not worth more than three, &c., it was quashed, because no false token was used. *Lewis, Sayer* 205 (1755). See also *Lara* 2 *East P. C.* 819, 827; 6 *T. R.* 565; 2 *Leach* 647 (1794). But such an offence is punishable as a *false pretence;* p. 405.

So where a brewer was indicted for sending to a publican so many vessels of ale, marked as containing such a measure, and writing a letter, assuring him that they did contain so much, when in fact they did not, but less, &c., the indictment was quashed on motion, as "the prosecutor could not have been imposed on without his own carelessness." *Wilders* (1720) cited *Wheatly*, below; 2 *East P. C.* 819; doubted by Foster J. Upon the same principle, where a miller was indicted for detaining corn sent to him to be ground, the indictment was quashed, it being merely a private matter for which an action would lie. *Channell*, 2 *Str.* 793; 1 *Sess. Ca.* 366; *East, ib.* 818 (1727). So selling sixteen gallons of ale as eighteen; L. Mansfield, as reported by East, said, "It amounts only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered but for his own carelessness in not measuring it: whereas fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights and measures, false tokens, or where there is a conspiracy." *Wheatly*, 2 *Burr.* 1125; 1 *W. Bl.* 273; 2 *East P. C.* 818 (1761). Where a miller was charged with receiving good barley, and delivering meal in return different from the produce of the barley, and musty, &c., this was held not to be an indictable offence. L. Ellenborough said, that if the case had been that the miller had been owner of a soke mill [*i.e.* a monopoly], to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and that he, abusing the confidence of his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it then stood, it seemed to be no more than the case of a common tradesman, who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in *Wheatly* (above), and the other cases, as not being indictable. *Haynes*, 4 *M. & S.* 214 (1815); hence, *Wood*, 1 *Sess. Ca.* 277, no. 217 (1743), is doubted; 2 *Russ. Cri.* 466 *n.* A baker had contracted with the guardians of a parish to deliver loaves of a certain weight to the poor people. The relieving officer gave the poor people tickets, which they were to take to the baker. He was to give them loaves for their tickets which were his weekly vouchers, when he gave a statement of the number of the loaves, to the relieving officer, who would give him credit for the amount. The baker was to be paid by the guardians some months later; and, by a clause in the contract, the guardians had the power, in case of a breach of contract by the baker, of deducting any damages caused thereby from the amount due to him. The baker supplied loaves short of the contract weight. It was held by a very strong court, after several arguments, that this was a mere private fraud, and not indictable at common law. *Eagleton*, 24 *L. J. M. C.* 158; *Dears. & P. C. C.* 515; 6 *Cox C. C.* 559 (1854-5), p. 259; see pp. 415, 419. See also *Glanvill, Holt* 354 (1710).

CHILD—ILL-TREATMENT AND NEGLECT OF.

Ill-treatment and neglect of children.] Cf. p. 227. The governing Act is 4 E. 7, 15 (see p. 326). Many of its sections relate exclusively to summary proceedings before magistrates.

By s. 1.—"(1) If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor; and

(*a*) on conviction on indictment, shall be liable, at the discretion of the court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years. . . .

(2) A person may be convicted of an offence under this section . . . on indictment . . . notwithstanding the death of the child in respect of whom the offence is committed.

(3) Upon the trial of any person over the age of sixteen indicted for the manslaughter of a child under the age of sixteen, of which he has had the custody, charge, or care, it shall be lawful for the jury, if they are satisfied that the accused has been guilty of an offence under this section in respect of such child, to find the accused guilty of such offence.

(4) If it is proved that a person indicted under this section was directly or indirectly interested in any sum of money accruable or payable in the event of the death of the child, and had knowledge that such sum of money was accruing or becoming payable, the court, in its discretion, may

(*a*) increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; or

(*b*) in lieu of awarding any other penalty under this section, sentence the person indicted to penal servitude for any term not exceeding five years.

(5) A person shall be deemed to be directly or indirectly interested in a sum of money under this section if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable." See *Senior*, p. 602.

By s. 4.—(1) Any constable may take into custody, without warrant, any person—

(*a*) who within view of such constable commits an offence under this Act, or any of the offences mentioned in the First Schedule to this Act, where the name and residence of such person are unknown to such constable and cannot be ascertained by such constable; or

(*b*) who has committed or who he has reason to believe has committed any offence of cruelty within the meaning of this Act, or any of the offences mentioned in the First Schedule to this Act, if he has

reasonable ground for believing that such person will abscond, or if the name and address of such person are unknown to and cannot be ascertained by the constable. Cf. p. 225.

By s. 6 (1), If a parent or guardian has been—

(*a*) convicted of committing in respect of such child an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the First Schedule to this Act; or

(*b*) committed for trial for any such offence; or

(*c*) bound over to keep the peace towards such child,

by any court, that court may dispose of the custody of the child until it is sixteen (cf. p. 725); provided that (3) if a person committed for trial is acquitted or discharged (for want of prosecution) any such order is void.

By s. 7, the court may (not before committal for trial, if there is any) compel the parent to contribute (not more than a pound a week) to the maintenance of the child "as if the child were detained under the Industrial Schools Acts."

By s. 11: "Where it appears to the court by or before which any person is convicted of the offence of cruelty within the meaning of this Act, or of any of the offences mentioned in the First Schedule to this Act, that that person is a parent of the child in respect of whom the offence was committed, or is living with the parent of the child, and is an habitual drunkard within the meaning of the Inebriates Acts, 1879 and 1888, the court, in lieu of sentencing such person to imprisonment, may, if it thinks fit, make an order for his detention for any period named in the order not exceeding twelve months in a retreat under the said Acts . . . Provided that—

(*a*) an order for the detention of a person in a retreat shall not be made under this section unless that person, having had such notice as the court deems sufficient of the intention to allege habitual drunkenness, consents to the order being made; and,

(*b*) if the wife or husband of such person, being present at the hearing of the charge, objects to the order being made, the court shall, before making the order, take into consideration any representation made to it by the wife or husband; and,

(*c*) before making the order the court shall, to such extent as it may deem reasonably sufficient, be satisfied that provision will be made for defraying the expenses of such person during detention in a retreat."

By s. 12: "In any proceeding against any person for an offence under this Act or for any of the offences mentioned in the First Schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence." Cf. p. 104.

This s. is identical (with the exception of the word "First" here inserted) with s. 12 of 57–8 V. 41 (repealed by s. 33 and the 2nd sched. of this Act). The combined effect of this s. and 61–2 V. 36, 1, *c*, p. 830, is that the spouse of the accused can only be called as a witness on the latter's application, *i.e.* practically, only for the defence, and only then, if such spouse is willing: for, though on the trial of offences under 57–8 V. 41 the spouse could be called for or against the accused without the latter's consent, expressly by s. 4 (1) of 61–2 V. 36, p. 830, 57–8 V. 41 is now totally repealed, and there is nothing to substitute this (4 E. 7, 15) for it in the schedule to 61–2 V. 36, though in fact this is a re-enactment (with amendments) of 57–8 V. 41. Thus in 1896, before 61–2 V. 36, when s. 12 of 57–8 V. 41 was in force, and the crown proposed under it and the last line of the schedule (repealed, p. 329) to call a husband against his wife, indicted under 24–5 V. 100, 18, p. 249, the sufferer being her child under sixteen, Cave J. ruled that he was not a

competent witness. "The 'other' offences contemplated by the concluding clause of the schedule, p. 329, are offences of which it is an essential part that the person injured is a child under sixteen." *Roberts*, 18 *Cox C. C.* 530 (1896). But the contrary was held in Scotland, *H.M. Advocate* v. *Fraser*, Cases in Ct. of Justiciary, 3 *F.*, *5th series*, 67 (1901), where *Roberts* was cited. The Lord-Justice-General admitted the wife of the "panel" (as a competent but not compellable witness) against him on a (common law) charge of culpable homicide—on the ground that the reasons were the same for admitting such evidence as to "acts which would be criminal whether the victim is above or between the age of sixteen as to acts which are only offences if done to persons under sixteen," and in common law offences as in statutory ones, especially in a remedial statute. But the principle that a remedial Act is to be construed beneficially while a penal one is to be construed strictly "on the ground of a supposed general intention of the legislature" has been severely criticised. *Maxwell* on the *Interpretation of Statutes*, *4th ed.*, p. 478; *Craies* on *Statute Law*, p. 429.

By s. 13.—(1) Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a court of any child would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath. Cf. p. 58.

(2) "The justice taking any such deposition shall transmit the same with his statement—

(*a*) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the court for trial at which the accused person has been committed."

By s. 14: "Where on the trial of any person on indictment" under this Act "the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the Indictable Offences Act, 1848, or the Petty Sessions (Ireland) Act, 1851, or this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child making the deposition."

By s. 15.—(1) "Where, in any proceeding . . . under this Act the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: and the evidence of such child, though not given on oath but otherwise taken and reduced into writing, in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848, or of section fourteen of the Petty Sessions (Ireland) Act, 1851, or of section thirteen of this Act, shall be deemed to be a deposition within the meaning of those sections respectively:

Provided that—

(*a*) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of

the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(*b*) Any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section eleven of the Summary Jurisdiction Act, 1879, in the case of juvenile offenders, or in Ireland by section four of the Summary Jurisdiction over Children (Ireland) Act, 1884, in the case of children." Cf. pp. 24, 98, 723.

S. 11 enables a court to order a boy under 14 years to be whipped, and other offenders to be fined up to ten pounds or to be imprisoned with or without hard labour for three months. S. 11 is amended 62–3 V. 22, 2.

By s. 16, where the court is satisfied that the attendance of the child in respect of whom the charge is made "is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child." This does not mean that in every other case the child must be present in court. "The section was, no doubt, inserted in the interest of the prisoner. If the child's evidence is essential, the child must be called; if the child's evidence is not essential, then it need not be present in court." *Per* L. Alverstone C.J., *Hale*, 20 *Cox C. C.* 739 (1904), *C. C. R.*, under 57–8 V. 41, 16 (repealed; somewhat different to this s.).

By s. 17, the court may presume that the child is under a specified age, for this Act and 3 E. 7, 45, unless the contrary is proved.

Where the child is not produced to the court the fact that it is under sixteen may be proved by any lawful evidence, and it is not necessary to produce a birth certificate. Thus the evidence of persons who had seen the children and stated that in their belief they were under sixteen was admitted in *Cox*, 1898 1 *Q. B.* 179; 77 *L. T.* 534; *C. C. R.*, p. 175. Cf. p. 230.

By s. 18 (3) the indictment need not specify the date of acts constituting a continuous offence.

By s. 20.—(1) "Where a misdemeanor under this Act is tried on indictment, the expenses of the prosecution shall be defrayed in like manner as in the case of felony." Cf. p. 208.

By s. 21, boards of guardians may pay the reasonable costs and expenses of any proceedings which they have directed to be taken under this Act.

By s. 23.—(1) "The provisions of this Act relating to the parent of a child shall apply to the step-parent of the child and to any person cohabiting with the parent of the child, and the expression 'parent' when used in relation to a child includes guardian and every person who is by law liable to maintain the child.

(2) This Act shall apply in the case of a parent who being without means to maintain a child fails to provide for its maintenance under the Acts relating to the relief of the poor, in like manner as if the parent had otherwise neglected the child.

(3) For the purposes of this Act—

Any person who is the parent of a child shall be presumed to have the custody of the child; and

Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and

Any other person having actual possession or control of a child shall be presumed to have the care of the child."

By s. 24: "In any proceedings under this Act a copy of an entry in the wages book of any employer of labour, or, if no wages book be kept, a written statement signed by such employer or by his foreman, shall be *primâ facie* evidence that the wages therein entered, or stated as having been paid to any

person, have in fact been so paid: Provided that such copy or statement has been signed by such employer or his foreman, and that the signature of such employer or foreman has been witnessed by the person producing the said copy or statement." Cf. pp. 144–5.

By s. 25, the Vexatious Indictment Act, &c., p. 160, is to apply. For s. 27, see p. 724.

By s. 28: "Nothing in this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child to administer punishment to such child," p. 254.

The First Schedule is:

"Any offence under ss. 27, 55, or 56 of the Offences against the Person Act, 1861, and any offence against a child under the age of sixteen years under ss. 5, 42, 52, or 62 of that Act, or s. 11 of the Criminal Law Amendment Act, 1885.

Any offence under the Dangerous Performances Acts, 1879 and 1897.

Any other offence involving bodily injury to a child under the age of sixteen years." See *Roberts*, p. 327.

Of the ss. herein mentioned, s. 5 is set out, p. 591, and s. 27, below; ss. 42–3 are summarised on p. 250, s. 52 is set out on pp. 250–1, ss. 55–6 on p. 227, s. 62 on p. 252, and s. 11 on p. 778.

Under the old law it was settled that abandonment alone, without proof that the child's health was thereby injured, was not sufficient. *Cooper*, 1 *Den. C. C.* 459; 18 *L. J. M. C.* 168 (1849); *Hogan*, 2 *Den. C. C.* 277; 20 *L. J. M. C.* 219 (1851); *Phillpot, Dears. & P. C. C.* 179 (1853). The first and second of these were indictments for causing chargeability to the parish by abandonment: in the former it was not alleged that the child was not legally settled there, and the latter was held bad for want of averment that the prisoner had the means of supporting the child. "There is no authority," said Pollock C.B. "for holding a person to be indictable for merely doing an act, the possible consequence of which may be to injure the parish." See *Friend*, p. 518.

By 24–5 V. 100, 27: "Whosoever shall unlawfully abandon or expose any child being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude," p. 198. See p. 494.

Where the mother left the child at the door of its father's house to his knowledge, and he left it there for some hours so that it became cold and stiff, this was held an "abandonment" and an "exposure" by the father. If the child had died, it might have been murder, *per* Blackburn J. See p. 620. *White, L. R.* 1 *C. C. R.* 311; 40 *L. J. M. C.* 135 (1871).

Where the child was carefully packed up in a hamper, labelled "with care," and sent by rail to the father, and the parcel was delivered in less than an hour, a conviction was affirmed. *Falkingham, L. R.* 1 *C. C. R.* 222; 39 *L. J. M. C.* 47 (1870). See also *Ridley, March*, p. 252 and p. 620.

A single woman, the mother of an infant child, was indicted for neglecting to furnish it with sufficient food, she being able and having the means to do so. There was no evidence of the actual possession of means by the mother; but it was proved that she could have applied to the relieving officer, and that she would have been entitled to and would have received proper relief. The prisoner having been convicted, the conviction was quashed. The court said that to show that she might by possibility have obtained the necessary means was not sufficient; that "must be matter of uncertainty." *Chandler, Dears. & P. C. C.* 453 (1855); *Rugg*, 12 *Cox C. C.* 16 (1871); *C. C. R.*, see p. 602. So where a girl, eighteen years of age, was taken in labour in the house of

her stepfather *during his absence*, and her mother omitted to procure the assistance of a midwife in consequence of which the girl died, and there was no evidence that the mother had the means to pay for the midwife, though she could have got one *gratis*, a conviction for manslaughter was quashed. *Shepherd, L. & C.* 147; 31 *L. J. M. C.* 102 (1862), p. 601.

The indictment, however, need not allege the ability to provide; it is sufficient if it uses the word "neglect." See *Ryland, L. R.* 1 *C. C. R.* 99; 37 *L. J. M. C.* 10 (1867).

Other offences against children, as such.] See *Index : Child*, &c. For ill-treatment amounting to murder, see p. 620. See also p. 778.

CHILD—CONCEALING BIRTH OF.

By 24–5 V. 100, 60 : "If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child die before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour : provided, that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence, as if such person had been convicted upon an indictment for the concealment of the birth"; pp. 70, 610.

A dead body must be found and identified. *Williams*, 11 *Cox C. C.* 684 (1871); cf. *Hopkins*, p. 611.

Secret disposition of the body.] What was a sufficient disposal of the body was a matter of doubt under 9 G. 4, 31, 14 (repealed)—"secret burying or otherwise disposing of." Where the evidence was, that the prisoner had been delivered of a child, and had placed it in a drawer, where it was found locked up, the drawer being opened by a key taken from the prisoner's pocket, Maule J. directed an acquittal, being of opinion that the statute contemplated a final disposing of the body, by the *eiusdem generis* rule. *Ash*, 2 *Moo. & R.* 294 (1840); *Bell*, *ib. note* (1841). These cases were overruled by a majority of the judges in *Goldthorpe*, 2 *Moo. C. C. R.* 244 (1841). There the prisoner confessed that the child was between the bed and the mattrass, where it was discovered. The point was again reserved in *Perry*, *Dears. & P. C. C. R.* 471; 24 *L. J. M. C.* 137; 6 *Cox C. C.* 531 (1855), when *Goldthorpe* was upheld, except by Pollock C.B. with whom Martin B. agreed in *Opie*, 8 *Cox C. C.* 332 (1860). There the prisoner placed the body under the bolster, with the intention of endeavouring, as far as she could, to conceal it from the surgeon, but with the intention of removing it elsewhere when an opportunity offered. It seems clear under the present statute that it is immaterial whether the disposition be temporary or permanent, since the words are "*any* secret disposition." 3 *Russ. Cri.* 165. Where the prisoner denied to her mistress that she was in the family way, but told the doctor that she had been confined and the child was in a box in her bedroom, and it was so found, the lid being open, Byles J. left it to the jury to say if they thought this was a secret disposition of the body: "secrecy was the essence of the offence," *i.e.* the place must be one where the body is not likely to be found. *Sleep*, 9 *Cox C. C.* 559 (1864): not guilty Where the prisoner put the dead body of her child over a wall into a field which was quite unfrequented, this was held to be a secret disposition *Brown*, *L. R.* 1 *C. C. R.* 244; 39 *L. J. M. C.* 94 (1870); "secret disposition must depend upon the circumstances of each particular case." Where the

prisoner was stopped going across a yard, in the direction of a privy, with a bundle, which on examination was found to be a cloth sewed up, containing the body; it was held by Gurney B. that the prisoner could not be convicted, the offence not having been completed. *Snell*, 2 *Moo. & R.* 44 (1837). Evidence was given that the prisoner denied her pregnancy, and also, after the birth at first denied that; but she afterwards confessed to a surgeon. The body was, on the same day, found among the soil in the privy. Patteson J. held it to be essential to the commission of the offence, that the prisoner should have done some act of disposal of the body after the child was dead; therefore if she had gone to the privy for another purpose and the child came from her unawares, and fell into the soil, and was suffocated, she must be acquitted of the charge, notwithstanding her denial of the birth of the child. *Turner*, 8 *C. & P.* 755 (1839): acquitted. So *Coxhead*, 1 *C. & K.* 623 (1845).

Frances Douglas and Robert Hall had been living together for some time, and about four in the morning she was delivered of a child, in the presence of Hall, who was the father of it. The man very soon afterwards put the child (which had not been separated from the after-birth) into a pan, carried it downstairs into the cellar, and threw the whole into the privy, the female prisoner remaining in bed upstairs. She was proved to have said she knew it was to be done. The fact of her being with child was, some time before her delivery, known by her mother, who lived at some distance, and was apparent to other women. No female was present at the delivery, though one had been sent for about twelve at night. No provision had been made, but the parties were in a state of the most abject poverty. The jury found her guilty of endeavouring to conceal the birth. The judges were of opinion that the communication made to other persons was only evidence, but no bar under the statute, to the conviction which was good; but they recommended a pardon. *Douglas*, 1 *Moo. C. C.* 480 (1836). So in *Mary Skelton* and *Henry Batting*, 3 *C. & K.* 119 (1850), the judge directed the jury, that if a woman be delivered of a dead child, and a man take the body and secretly bury it, she was indictable for the concealment by secret burying under s. 14, p. 331, and he as an accessory, for aiding and abetting under s. 31 of that Act, if there was a common purpose in both in thus endeavouring to conceal the birth of the child; but that the jury must be satisfied, not only that she wished to conceal the birth, but was a party to the secret burial by the man, in pursuance of a common design between them: if the woman was acquitted, the man must be: both were found guilty. This followed *Bird*, 2 *C. & K.* 817 (1849).

An indictment (under s. 14, repealed) for endeavouring to conceal the birth of a child needed not to state whether the child died "before, at, or after" the birth, for that s. expressly provided that the moment of death need not "be proved." *Coxhead*, above. The same is the case under s. 60, p. 331, though there are no such express words. See *Saunders* on *Indictments*, no. 57.

Perhaps a fœtus not bigger than a man's finger, but having the shape of a child, is "a child" within the statute. *Colmer*, 9 *Cox C. C.* 506 (1864); but in *Hewitt*, 4 *F. & F.* 1101 (1866), Smith J. left a similar point to the jury.

In view of the words "any secret disposition of the dead body" (p. 331) where a woman deposited a child while *alive* in a field, and there left it to die, it was held that she could not be convicted under s. 60. *May*, 10 *Cox C. C.* 448 (1867), *C. C. R.*

Upon an indictment for the murder of a child, *any* person may now be convicted under s. 60 of endeavouring to conceal the birth; p. 331. Formerly, under s. 14, above, no person but the mother could be so convicted. *Wright*, 9 *C. & P.* 754 (1841), p. 611. Where a bill for murder was not found, but the prisoner was tried for murder on the coroner's inquisition, it was held

that she might be found guilty of the concealment, 43 G. 3, 58, 4 (repealed), speaking of "any person *charged* with such murder," the judges holding that the coroner's inquisition was a *charge*. *Maynard*, *Russ. & R.* 240 (1812); *Cole*, 2 *Leach* 1095; 3 *Camp.* 371 (1813). There seems no doubt that a prisoner might in the same way be convicted under s. 60, p. 331, for he or she is "tried for the murder of her child," as much on the inquisition as the indictment. 3 *Russ. Cri.* 168 *n.* Cf. p. 160.

CLERGYMEN—OFFENCES BY, IN SOLEMNISING MATRIMONY.

By 4 G. 4, 76, 21 (as amended by 49–50 V. 14): "If any person shall solemnise matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of *eight in the forenoon and three in the afternoon*, unless by special licence from the Archbishop of Canterbury, or shall solemnise matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same; or if any person falsely pretending to be in holy orders shall solemnise matrimony according to the rites of the Church of England; every person knowingly and willingly so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported for the space of fourteen years . . . provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed." See p. 198, and as to punishment, p. 193.

For a similar prosecution see *per* L. Mansfield in *Northfield*, 2 *Doug.* 661 (1781). It is doubtful whether a clergyman who refuses to marry persons lawfully marriageable *inter se* can be indicted. *James*, 3 *C. & K.* 167 (1850), *C. C. R.* As to this, and other offences cognisable by an ecclesiastical court, see *Millis*, p. 274, at 859–60.

See also pp. 364, 368.

As to the marriage of a foreigner with a British subject in the United Kingdom, see p. 607.

COIN—OFFENCES RELATING TO.

Interpretation of terms.] By 24–5 V. 99, 1: "In the interpretation of and for the purposes of this Act, the expression 'the queen's current gold or silver coin,' shall include any gold or silver coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her Majesty's dominions, whether within the United Kingdom or otherwise; and the expression 'the queen's copper coin,' shall include any copper coin and any coin of bronze or mixed metal coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise, in any part of her Majesty's said dominions; and the expression 'false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin,' shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble, or pass for, any of the queen's current coin of a higher denomination; and the expression 'the queen's current coin,' shall include any coin coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person"; p. 342.

Counterfeiting the gold and silver coin.] By s. 2: "Whosoever shall falsely make or counterfeit any coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin shall, in England and Ireland, be guilty of felony . . . and being convicted thereof shall be liable . . . to be kept in penal servitude for life" (see p. 198).

Colouring coin or metal with intent to make it pass as gold or silver coin.] By s. 3: "Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever wash, case over, or colour any coin whatsoever resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin; or shall gild or silver, or shall with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever wash, case over, or colour any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, or by any means whatsoever, wash, case over,

or colour any of the queen's current silver coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold coin; or shall gild or silver, or shall with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever wash, case over, or colour any of the queen's current copper coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold or silver coin, shall, in England or Ireland, be guilty of felony," &c., as in s. 2, p. 335.

Impairing or lightening gold or silver coin, &c.] By s. 4: "Whosoever shall impair, diminish, or lighten any of the queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened, may pass for the queen's current gold or silver coin, shall, in England or Ireland, be guilty of felony . . . and, being convicted thereof shall be liable" to penal servitude for fourteen years (see p. 198).

Possession of filings or clippings of gold or silver coin.] By s. 5: "Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing or lightening any of the queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall," &c., as in s. 4, but maximum term of penal servitude is seven years (see p. 198).

Buying or selling, &c., counterfeit gold or silver coin.] By s. 6: "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall," &c., exactly as in s. 2, p. 335, "and in any indictment for any such offence as in this section aforesaid, it shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off the false or counterfeit coin at or for a lower rate or value than the same imports, or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off."

Importing counterfeit coin.] By s. 7: "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall import or receive into the United Kingdom from beyond the seas, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall," &c., exactly as in s. 2, p. 335.

Exporting counterfeit coin.] By s. 8: "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall export, or put on board any ship, vessel, or boat, for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current coin, knowing the same to be false or counterfeit, shall, in England or Ireland, be guilty of a misdemeanor . . . and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . ."

Uttering counterfeit gold or silver coin.] By s. 9: "Whosoever shall

tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall," &c., as in s. 8, but maximum term is one year, pp. 340–1.

Uttering accompanied by possession of other counterfeit coin, &c.] By s. 10: "Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin,

Uttering twice within ten days] or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall," &c., exactly as in s. 8, above, p. 341.

Having possession of three or more counterfeit gold or silver coins, &c.] By s. 11: "Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England or Ireland, be guilty of a misdemeanor . . . and being convicted thereof, shall be liable . . . to be kept in penal servitude" (see p. 198).

Uttering, &c., after a previous conviction.] By s. 12: "Whosoever, having been convicted, either before or after the passing of this Act, of any such misdemeanor or crime and offence, as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former Act relating to the coin, shall afterwards commit any of the misdemeanors in any of the said sections mentioned, shall be guilty of felony," &c., exactly as in s. 2, p. 335.

As to the meaning of "convicted" in this section, see *Blaby*, p. 191. See p. 342 and *Thomas*, p. 71.

Uttering foreign coins, medals, &c., as current, with intent, &c.] By s. 13: "Whosoever shall with intent to defraud, tender, utter, or put off as or for any of the queen's current gold or silver coin any coin not being such current gold or silver coin, or any medal or piece of metal, or mixed metals resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal, or mixed metals so tendered, uttered, or put off, being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall," &c., exactly as in s. 9, pp. 336, 340.

Counterfeiting copper coin and other offences in relation thereto.] By s. 14: "Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin; and whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, o rhave in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting

any of the queen's current copper coin; or shall buy, sell, receive, pay or put off, or offer to buy, sell, receive, pay or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall be," &c., exactly as in s. 5, p. 336.

By s. 1, p. 335, "copper coin" includes bronze or mixed metal.

Uttering base copper coin.] By s. 15: "Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall," &c., exactly as in s. 9, pp. 336, 341.

Defacing coin.] By s. 16: "Whosoever shall deface any of the queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened shall," &c., exactly as in s. 9, p. 336.

Counterfeiting foreign gold and silver coin.] By s. 18: "Whosoever shall make or counterfeit any kind of coin not being the queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall," &c., exactly as in s. 5, p. 336.

Importing foreign counterfeit gold and silver coin.] By s. 19: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit shall be guilty of felony," &c., exactly as in s. 5, p. 336. See also 52–3 V. 42, 2.

Uttering foreign counterfeit gold and silver coin.] By s. 20: "Whosoever shall tender, utter, or put off any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall be guilty," &c., as in s. 8, p. 336, but maximum term is six months.

Second offence of uttering foreign counterfeit coin.] By s. 21: "Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England or Ireland, be guilty of a misdemeanor . . . and being convicted thereof, shall be liable at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement," p. 198.

Third offence.] "And whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall," &c., exactly as in s. 2, p. 335.

Counterfeiting foreign other than gold or silver coin.] By s. 22: "Whosoever shall falsely make or counterfeit any kind of coin not being the queen's

current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin, of any foreign prince, state, or country, shall, in England or Ireland, be guilty of a misdemeanor . . . and being convicted thereof, shall be liable . . . for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years . . ." (see p. 198).

Making, mending, or having in possession, &c., coining tools.] By s. 24: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or any part or parts of both or either of such sides; or shall make or mend or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging, or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges, with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin, as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal, or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for, or in order to the false making or counterfeiting of any such coin as in this section aforesaid, shall," &c., exactly as in s. 2, p. 335. The only "lawful authority" seems to be that of the mint officials, *per* Tindal C.J., *Bannen*, p. 343.

Conveying coining tools, &c., out of the Mint.] By s. 25: "Whosoever, without lawful authority or excuse (the proof whereof shall lie upon the party accused), shall knowingly convey out of any of her Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging, or other tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall," &c., exactly as in s. 2, p. 335.

Venue.] By s. 28: "Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this Act, every such offender may be dealt with, indicted, tried and punished, and the offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction."

As to s. 36, see p. 216.

Proof of coin being counterfeit.] By s. 29: "Where, upon the trial of any person charged with any offence against this Act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of her Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."

When the offence of counterfeiting is complete.] By s. 30: "Every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off any false or counterfeit coin against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

For s. 31, see p. 222.

Principals in the second degree, and accessories.] By s. 35: "In the case of every felony punishable under the Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour."

Counterfeit medals.] By 46–7 V. 45, the Counterfeit Medal Act, s. 2: "If any person, without due authority or excuse (the proof whereof shall lie on the person accused), makes or has in his possession for sale, or offers for sale, or sells, any medal, cast, coin, or other like thing, made wholly or partially of metal or any metallic combination and resembling in size, figure and colour any of the queen's current gold or silver coin, or having thereon a device resembling any device on any of the queen's current gold or silver coin, or being so formed that it can by gilding, silvering, colouring, washing, or other like process be so dealt with as to resemble any of the queen's current gold and silver coin, he shall," &c., as in s. 9, p. 336. See p. 341.

Proof of counterfeiting.] It is apprehended that, notwithstanding the provision in s. 30, above, there must still be a substantial making or counterfeiting proved, and that it will not be sufficient merely to show that steps have been taken towards a counterfeiting. The clause appears to have been intended to provide against such cases as that of *Harris*, 1 *Lea.* 135 (1776), where, the metal requiring a process of beating, filing, and immersing in *aqua fortis*, to render the coin passable, the judges held, that the prisoner could not be convicted of counterfeiting under 25 E. 3, St. 5, c. 2 (repealed). See also *Varley*, 1 *Leach* 76; *W. Black.* 682; 1 *East P. C.* 164 (1771).

The question whether the alleged counterfeit coin does, in fact, resemble or is apparently intended to resemble current gold or silver coin, is one of fact for the jury. Thus, as genuine coin is often worn smooth, an unstamped counterfeit bearing no impression is indictable; for it may deceive the more readily for bearing no impression, "and in the deception the offence consists." *Welsh*, 1 *East P. C.* 87, 164: 1 *Leach* 364 (1785); *Wilson*, 1 *Leach* 285 (1783). Nor will a variation, not sufficient to prevent the deception, render the coin less a counterfeit. Thus, it is said by Hale, that counterfeiting the lawful coin of the kingdom, "yet with some small variation in the inscription,

effigies, or arms, to the intent thereby to evade the statute," is criminal. 1 *P. C.* 215. In *Hermann*, 4 *Q. B. D.* 284; 48 *L. J. M. C.* 106 (1879); *C. C. R.*, the court were divided whether a genuine sovereign which had been fraudulently filed at the edges to such an extent as to reduce its weight by one twenty-fourth part, and a new milling added to restore the appearance of the coin, was false and counterfeit within s. 9, p. 336; it was held by three to two that it was.

On an indictment under s. 13, p. 337, for uttering a medal resembling a half-sovereign in size, figure, and colour, it was shown that the medal was of the same diameter, and similar in colour; that the knurling [=milling: *guerling* is a mistake] was round and not square; that the stamp of the head of the queen was similar to that on a half-sovereign; but that the legend was different. No evidence was given as to the reverse of the medal, the medal being dropped and lost by a witness (see p. 9) during his examination; it was held that there was evidence that the medal resembled a half-sovereign in "size, figure, and colour." *Robinson, L. & C.* 604; 34 *L. J. M. C.* 176 (1865). It was to meet such cases that 46–7 V. 45, p. 340, was passed.

What is current coin of this kingdom is a question of fact and may be proved by evidence of common usage, reputation, &c., "though no proclamation of it extant." 1 *Hale P. C.* 213.]

Proof of uttering.] Cf. p. 472. Upon an indictment for uttering [= "to pass or attempt to pass off as genuine," *Sweet, Law Dict.*; "to offer, whether it be taken or not," *per* Jervis C.J., *Welch*, 20 *L. J. M. C.* 101 (1851), *C. C. R.*; a form of the word *out*], it must be proved that the money was counterfeit, and that the prisoner knew it to be such. The trick of "ringing the changes" was held to be an "uttering" under the repealed 15 G. 2, 28; *Franks*, 2 *Leach* 644 (1794); and it is so likewise under ss. 9 and 15, pp. 336, 338. The coin must be proved to be counterfeit.

The law as to uttering in concert has been stated in *Soares, Davis, &c.*, p. 151: see p. 473 and p. 478 for the analogous law in *Forgery*, and *Completion of Crimes* in Index.

If two utterers of counterfeit coin, though with a general community of purpose, go different ways and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both so as to let in the separate utterings on a joint indictment. *Manners* and *Mills*, 7 *C. & P.* 801 (1837). But the reverse was held by Erskine J. in a very similar case: *Hurse* and *Dunn*, 2 *Moo. & R.* 360 (1841). See *Greenwood*, p. 151, and *Skerrit*, p. 342.

The giving a counterfeit coin in charity was held not an uttering within 2–3 W. 4, 34, 7 (repealed), although the giver might know it to be counterfeit, for there must be some intention to defraud. *Page*, 8 *C. & P.* 122 (1837). See 1 *Russ. Cri.* 240 *n.*, where the correctness of this decision is doubted, as it was by two judges who held that if a person gave a counterfeit coin to a woman as payment for immorality, it was an uttering within that s. *Anon.* 1 *Cox C. C.* 250 (1845).

As to a joint uttering by a husband and wife, see p. 817.

As to uttering in forgery, see p. 472.

Knowledge of coin being counterfeit—possession—intent to utter.] The following cases have been decided on this point. Having a large quantity of counterfeit coin (viz. 13 half-crowns and 14 shillings) in possession, all of each sort being of the same date and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is evidence that the possessor knew that the coin was counterfeit and intended to utter it. *Jarvis*, 25 *L. J. M. C.* 30

(1855), *C. C. R.* Two persons were convicted of the joint uttering of a counterfeit shilling, having other counterfeit shillings in their possession, although the latter coins were found only on one of them. One of them went into a shop and purchased a loaf, for which she tendered a shilling. She was secured, but no more counterfeit money was found upon her. The other prisoner who had come with her, and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen bad shillings were found upon her, wrapped in gauze paper. It was objected, that the complete offence stated in the indictment (under 15 G. 2, 28, p. 341) was not proved against either of the prisoners, but Garrow B. was of opinion, that the prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering, and that it was for the jury to say whether the possession of the remaining pieces of bad money was not joint; it was not necessary to identify the particular counterfeit coin uttered. *Skerrit*, 2 *C. & P.* 427 (1826). *Rogers*, 2 *Moo. C. C.* 85; 2 *Lewin C. C.* 119, 297 (1838); *Gerrish and Brown*, 2 *Moo. & R.* 219 (1839); *Williams*, *Carr. & M.* 259 (1842) -all under 2 W. 4, 34, 7 or 8 (repealed)—dealt with the same point and made the possession of one accomplice the possession of the other. The point is now settled by s. 1, p. 335.

Proceedings for twice uttering.] If it is intended to punish the prisoner for *twice uttering*, under s. 10, p. 337, he must be specially indicted; for upon the corresponding 2 W. 4, 34, 7 (above), where a prisoner was convicted of two single utterings contained in two counts of the same indictment, the judges held that one judgment (for two years' imprisonment) was bad, and that "there should have been consecutive judgments of one year's imprisonment each," and the conviction was quashed. *Robinson*, 1 *Moo. C. C.* 413 (1834).

Proceedings after a previous conviction.] By 24–5 V. 99, 37: "Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act, committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon an indictment for committing any offence after a previous conviction or convictions shall be as follows: (that is to say) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly; but if he deny that he had

been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided that if upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence." See pp. 87, 190.

The above section applies to indictments under s. 12, p. 337, though it is the previous conviction which makes the offence *felony*. *Martin*, p. 162. See also *Blaby*, p. 191. See further as to s. 12, *Thomas*, p. 71.

Offences relating to coining tools.] The prisoner employed a die-sinker to make, for whist counters, as he pretended, dies, calculated to make shillings; the die-sinker suspecting fraud, informed the commissioners of the Mint, and under their directions made dies for the purpose of detecting the prisoner. His counsel having argued that no felony had been committed and that, at most, prisoner was guilty of the misdemeanor of inciting to commit a felony, it was held that the die-sinker was an innocent agent (see that title in Index), and that the prisoner was rightly convicted as a principal, under 2 W. 4, 34, 10 (repealed: practically the same as s. 24, p. 339). *Bannen*, 2 *Moody C. C. R.* 309; 1 *C. & K.* 295 (1844); cf. pp. 154, 257; cf. *Harvey*, *L. R.* 1 *C. C. R.* 284; 40 *L. J. M. C.* 63 (1871), p. 344. The particular tool specified must be proved. With regard to all the tools mentioned in that s. (10), they are here for the first time described to be such as will impress "any *part* or *parts* of both or either of the sides" of current gold or silver coin. There is also there a distinction between instruments, &c., (1) upon which there shall be "made or impressed," and (2) those "which will make and impress" the figure, &c. Both these points are reproduced in s. 24, p. 339. The prisoner was indicted under 8–9 W. 3, 26, repealed but on this point the same as s. 24, p. 339, for having in his possession a mould upon which there was made and impressed, &c., the figure of the "head" side shilling. The mould bore the resemblance of a shilling inverted, viz. the *convex* parts were *concave* in the mould and *vice versâ*; and it was objected that it should have been described as an instrument which *would make or impress*, &c., and not as one on which *was made and impressed*, &c.; but a great majority of the judges were of opinion that the evidence maintained the indictment, "because the stamp of the current coin was certainly impressed on the mould in order to form the cavities thereof." They agreed, however, that it would have been more accurate had the instrument been described as one "which would make or impress." *Lennard*, 1 *Leach* 90 (1772); 1 *East P. C.* 170.

To convict a prisoner under 2 W. 4, 34, 10, above, of having in his possession "one mould upon which was impressed the figure and apparent resemblance" of the obverse side of a shilling, Patteson J. held that the jury must be satisfied that, at the time the prisoner had it in his possession, the *whole* of either the obverse or the reverse of a shilling was impressed on the mould, and not only a part. *Foster*, *C. & P.* 494 (1836). But on a second indictment, for making a mould "intended to make and impress the figure and apparent resemblance" of the obverse side of a shilling, the same judge ruled that it was sufficient to prove that the prisoner made the mould, and a part of the impression, though he had not entirely completed them.

Ibid. 495. An indictment under that s. alleging that the prisoner had in his possession a mould, upon which "was made and impressed the figure," &c., of a sixpence, was held bad on demurrer; as not sufficiently showing that the impression was on the mould *at the time* it was in the prisoner's possession. A fresh indictment, with the words "then and there" was held good. *Richmond*, 1 *C. & K.* 240 (1843).

It was held that a collar marking the edge, by having the coin forced through it by machinery, is an instrument within 8-9 W. 3, 26, above, though this device is of modern invention. *Moore*, 1 *Moody C. C.* 122 (1826).

The words "figure, stamp, resemblance, or similitude," in that Act do not mean an exact figure; "but if the instrument impress a resemblance in fact such as will impose upon the world, it is sufficient whether the letters are apparent on the puncheon or not." *Ridgelay*, 1 *East P. C.* 171; 1 *Leach* 189 (1778). See *Richmond*, above, as to how the indictment should be framed, where a mould is made and impressed to resemble the obverse of a coin which is partly defaced by wear.

An indictment under s. 24, p. 339, must negative the "authority or excuse," although the burden of proof is cast upon the accused, but the word "excuse" includes "authority." *Harvey*, p. 343.

The prisoner's intention as to the use of dies of current coin need not be inquired into; "there is nothing in the Act to make the intent any part of the offence . . . under 'feloniously,' a guilty knowledge must be shown; that is to say, that the accused must have knowingly done that which is made an offence by the Act." *Per* Bovill C.J. *ib.*

COMPOUNDING OFFENCES, &c.

Compounding felonies.] Though "the bare taking of one's own goods again which have been stolen" (without favour shown to the thief) is no offence, 2 *Hawk. P. C.* Bk. 1, ch. 59, s. 7, yet where a man either takes back his goods, or receives "other amends," on condition of not prosecuting, this is misprision of felony, punishable by fine and imprisonment. *Ib.* s. 5. And so in any other felony an agreement not to prosecute an indictment for reward is punishable as a misdemeanor; though nearly all the precedents of indictments for this species of offence seem to be confined to *theft-bote*, or that compounding of felony which has reference to the recovery of property of which the owner has been deprived. Cf. *Coke*, 3 *Inst.* 134 and 139. But, on the other hand, it has been pointed out that none of the old writers expressly say that the offence cannot be committed by a person who is not the owner. See *Burgess*, 16 *Q. B. D.* 141; 55 *L. J. M. C.* 97 (1885); *C. C. R.*; where it was held by the Court for C. C. R. that the offence of compounding a larceny may be committed by a person other than the owner of the goods stolen, or a material witness for the prosecution. Where, in an indictment for compounding a felony, it was averred that the defendant did desist, and from that time hitherto had desisted from all further prosecution, and it appeared that after the alleged compounding he prosecuted the offender to conviction, Bosanquet J. directed an acquittal. *Stone*, 4 *C. & P.* 379 (1838). It is not necessary, however, to allege in the indictment that the defendant desisted from prosecuting the felon; the offence consists in the corrupt agreement not to prosecute. *Burgess*, above.

Compounding misdemeanors.] Whether, at common law, the compounding of misdemeanor is in any case a misdemeanor, is perhaps doubtful. Such agreements, when not made with the permission of a court of justice, are clearly, in many cases, illegal. *Collins* v. *Blantern*, 2 *Wils.* 341 (1767); 4 *Bl. Comm.* 363; *Beeley* v. *Wingfield*, 11 *East* 46 (1809); *Hardey*, 14 *Q. B.* 529 (1850). And in some cases even when made with the permission of the court. *Keir* v. *Leeman*, 9 *Q. B.* 371.

Compounding informations on penal statutes.] By 18 Eliz. 5, 4 (otherwise 3: amended 42–3 V. 59), no informer or plaintiff under any penal statute shall compound with defendant until after answer nor without leave of the court; and by s. 5 (otherwise 4), if any informer, "by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward," without the order or consent of the court, he shall stand two hours in the pillory, be for ever disabled to sue on any "popular" [*i.e.* a statute permitting an informer to sue] or penal statute, and shall forfeit ten pounds. This statute does not extend to proceedings only cognisable by justices. *Crisp*, 1 *B. & Ald.* 282 (1818). But it is not necessary, to bring the case within the statute, that there should be an action or other proceeding pending. *Gotley*, *Russ. & Ry.* 84 (1805). A mere threat to set a public officer in motion to prosecute for the recovery of penalties, not

amounting to an indictable offence at common law, is yet, it seems, within this statute. *Southerton*, 6 *East* 126 (1805). A person may be convicted, under this statute, of taking money, though no offence liable to a penalty has been committed by the person from whom the money is taken. *Best*, 2 *Moo. C. C.* 124; 9 *C. & P.* 868 (1840).

Misprision of felony.] Misprision of felony is the concealment or procuring the concealment of felony, whether the felony be at common law or by statute. 2 *Hawk. P. C.* Bk. 1, ch. 59, s. 2. Silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision. *Ib.* (*n.*); cf. 1 *Hale P. C.* 448. If to the knowledge of the felony there be added assent to it, the assenter is either principal or an accessory. 4 *Bl. Comm.* 121.

Rewards for recovery of stolen goods, &c.] Similar to the offence of compounding a felony is that of taking a reward for the return of stolen property, and advertising a reward for the same purpose. By 24–5 V. 96, 101, "Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence, or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of as in this Act before mentioned, shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years [see p. 198] . . . or to be imprisoned . . . and, if a male under the age of eighteen years, with or without whipping." Upon an indictment under 7–8 G. 4, 29, 58 (repealed), it was not necessary to show that the prisoner was in any way a party to the previous felony; it is sufficient if the prisoner had some corrupt and improper design when he received the money, and did not *bonâ fide* intend to use such means as he could for the detection and punishment of the offender. *King*, 1 *Cox C. C.* 36 (1844). Where A. was charged, under s. 58, with corruptly and feloniously receiving from B. money under pretence of helping B. to recover goods stolen from B., and with not causing the thieves to be apprehended, three questions were left for the jury: 1. Did A. mean to screen the guilty parties, or to share the money with them? Ans.: No. 2. Did A. know the thieves, and intend to assist them in getting rid of the property by procuring B. to buy it? Ans.: No. 3. Did A. know the thieves, and assist B., as her agent, and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice? Ans.: Yes. It was held that the receipt of the money was "corrupt" within the section. *Pascoe*, 1 *Den. C. C. R.* 456; 18 *L. J. M. C.* 186 (1849).

By s. 102, any person advertising a reward for the return of property stolen or lost, and using any words purporting that no questions will be asked, or that a reward will be given for property stolen or lost "without seizing or making any inquiry after the person producing such property," or promising to return to any pawnbroker or other person who may have bought or advanced money upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or any person printing or publishing such advertisement, shall forfeit fifty pounds to any person suing.

CONCEALMENT OF DEEDS AND INCUMBRANCES.

By 22–3 V. 35, 24: "Any seller or mortgagor of land or of any chattels, real or personal, or choses in action conveyed or assigned to a purchaser [or mortgagee—23–4 V. 38, 8], or the solicitor or agent of any such seller or mortgagor who shall, after the passing of this Act, conceal any settlement, deed, will, or other instrument material to the title, or any incumbrance, from the purchaser [or mortgagee—23–4 V. 38, 8], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases, to defraud, shall be guilty of a misdemeanor, and, being found guilty, shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any term not exceeding two years, with or without hard labour, or by both, as the court shall award," &c. Cf. p. 801.

By 38–9 V. 87, 99: "If in any course of any proceedings before the registrar or the court in pursuance of this Act any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, attempts to suppress, or is privy to the suppression of any document or of any fact, the person so suppressing, attempting to suppress, or privy to suppression, shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour, or to be fined such sum, not exceeding five hundred pounds, as the court before which he is tried may award." Cf. p. 401.

CONSPIRACY.

Indictment.] Conspiracy is within the Vexatious Indictments Act, p. 877. See p. 160. And see also 30–1 V. 35, 1, p. 826.

Nature of the crime.] The earliest mention of this crime is to be found in the statute *Ordinacio de Conspiratoribus*, 33 E. 1 (1305). In modern books numerous definitions of conspiracy occur: see *Vincent*, &c., 9 *C. & P.* 91 (1839), p. 752; *Seward*, 1 *A. & E.* 706; 3 *Nev. & M.* 557 (1834); *Peck*, 9 *A. & E.* 686 (1839), "virtually overruled," *Heymann*, pp. 199, 359; *Jones*, 4 *B. & Ad.* 345 (1832); 1 *Russ. Cri.* 492; *Parnell*, 14 *Cox C. C.* 508 (1881); they all, in effect, amount to this, that a conspiracy is an agreement between two or more persons to do that which is unlawful. It "consists not merely in the *intention* of two or more, but in the *agreement* of two or more to do an unlawful act, or to do a lawful act by unlawful means," *per* Willes J. delivering the opinion of the judges, *Mulcahy* v. *R.*, pp. 181, 351, at 317 (1868). "Thus if two lovers agree to commit suicide together, but promptly think better of it, they nevertheless are liable to an indictment for conspiracy." Kenny, *Outlines Cr. L.* ch. 18. It must be by two at least, and if two be tried together the jury cannot be satisfied of the guilt of either if they are not satisfied of the guilt of both; *Manning* and *Another*, 12 *Q. B. D.* 241 (1883), p. 358; cf. *Plummer*, p. 169; and husband and wife cannot be guilty of the offence of conspiracy, because they are one person at law. 2 *Hawk.* Bk. 1, ch. 72, s. 8. In *Duguid*, p. 229, the prisoner and another were jointly tried; the latter was acquitted on all counts, but on certain counts for conspiracy between them and a third person not on trial the prisoner was convicted. *C. C. R.* It makes no difference whether (*a*) the final object be unlawful, or (*b*) the means be unlawful: in either case the conspiracy is equally indictable. See p. 79.

Definition.] Notwithstanding the high authority on which the definition just cited is founded it is unsatisfactory, inasmuch as the word "unlawful," upon which it turns, is ambiguous, and appears to be used in the definition in a sense in which it is used nowhere else. It does not mean "criminal," for there are many cases in which a combination to do a thing is a crime, although the act itself, if done by an individual, would not be a crime; for instance, it is a crime to conspire to seduce a woman, though seduction itself is not a crime. On the other hand, "unlawful" does not mean "tortious," for there are torts which it is not a crime to conspire to commit. Nor, again, does any case go so far as to decide that a combination to commit a breach of contract is a criminal conspiracy. Hence, the word "unlawful," in the definition of conspiracy, has no precise meaning. Dr. Kenny, who uses the word in his definition (c. 18), says expressly it "is here used in a sense which is unique; and, unhappily, has never yet been defined precisely." It is tempting to rest in the rule laid down by *Hawkins*, "there can be no doubt but that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law." 2 *P. C.* Bk. 1, ch. 72, s. 2. But the same difficulty recurs as to "wrongfully." There are not wanting dicta which adopt this proposition, interpreting "wrongfully" as *immorally*, in a wide sense, and Sir J. F. Stephen points out that "especially in the case of

agreements between more persons than one to carry on purposes which the judges regarded as injurious to the public," where the court thought that the acts in question had "an analogy" to "other acts which had been held to be misdemeanors, although such first-mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them," such acts have been held to be conspiracy. (*Dig. Crim. L.* ch. 16, art. 178, 5*th ed.*) If, then, the test of conspiracy is *ultimately* immorality of a sufficiently heinous sort, it is not surprising that the decisions have varied with individual judges, and while a number of immoral acts have founded conspiracies, "on the other hand" (as Dr. Kenny points out, *ib.*) "it is doubtful whether an agreement to make loud noises for the purpose of disturbing an invalid neighbour would be indictable as a conspiracy" (*Levy*, p. 73). At any rate, Chitty is justified in remarking, "There are, perhaps, few things left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes illegal" (3 *Crim. Law* 1139). For the historical reason for the "vagueness" of the definition, see Kenny, *l.c.*

On comparing the cases referred to, below, the following propositions may be deduced:—

1. A combination to commit any "substantive" crime is an indictable conspiracy. Cf. Kenny, *ib.*

2. A combination to commit a civil injury is an indictable conspiracy in many, though it is impossible to say precisely in what, cases. Kenny says, "any tort that is malicious" (*ib.*), citing *Druitt*, 10 *Cox C. C.* 592 (1867); but the authority of that case is very doubtful (*Gibson* v. *Lawson*, 1891, 2 *Q. B.* 545).

3. Combinations to do acts which the courts regarded as outrages on morality and decency, or as dangerous to the public peace, or injurious to the public interest, called generically "Acts involving public mischief" by Sir J. F. Stephen (cited above), have in many cases been held to be conspiracies.

The vagueness of the second and third of these propositions obviously leaves a broad discretion to the judges; practically, it has been exercised, as has already been hinted, by distinguishing between immorality of a heinous and that of a more trivial sort; theoretically, of course, anything *contra bonos mores* is a public evil, if only because of bad example. The same question as to the distribution of power between judge and jury in these cases has arisen as in those of (criminal) libel, under which, p. 583, see on this point, *Brailsford*. The law of conspiracy as it affects *workmen* has had a peculiar history; see p. 360.

With regard to civil injuries, it may be observed that wherever a combination to commit such an injury has been held to be criminal, the injury has been malicious, that is to say, the parties have not been under a *bonâ fide* mistake as to a matter of fact, which, if true, would have justified their conduct. Thus, a combination to walk over a field, or to pull down fences, would not be a conspiracy, if the object was to try a question as to a right of way, though it certainly would be a combination to commit an act unlawful in the sense of being a tort. On the other hand, a conspiracy to commit a fraud may be indictable though the fraud is not in itself indictable. In *Warburton*, *L. R.* 1 *C. C. R.* 274 (1870), the defendant and another person conspired to defraud the defendant's partner of partnership property in such circumstances that the fraud was (probably) not criminal in itself. Cockburn C.J. in delivering the judgment of the Court for C. C. R., said, "It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i.e.* amount to a civil wrong." The generality of these expressions must probably be limited by reference to the particular class of wrongs under consideration, namely, "civil wrongs by fraud and

false pretences." And where a woman was indicted with others for conspiring to procure her miscarriage by unlawful means, and there was no evidence of her pregnancy, it was held that, although the acts if done by herself alone might not have been criminal, yet she could be rightly convicted of conspiring to commit a felony. *Whitchurch*, 24 *Q. B. D.* 420 (1890), *C. C. R.*

Overt act.] Another remarkable circumstance connected with the law of conspiracy is, that it renders it possible by a sort of fiction to convert an act innocent in itself into a crime by charging it in the indictment as an overt [= open] act of a conspiracy of which there is no other evidence than the act itself. In other words, if the jury choose to impute bad motives to an act *primâ facie* innocent, they can convict those who combine to do it of conspiracy. Upon an indictment of this sort, Rolfe B. made the following observations: "What the prosecutors of this indictment have done is this, they have not proceeded under the statute [6 G. 4, 129, repealed] to indict the parties for the alleged illegal act, but they undertake to show that there was a general combination amongst them all to effect these illegal acts, and for that it is they have indicted them. That is a legal course to pursue, and being legal, I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be, however, much more satisfactory to my mind, if the parties were indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is the proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal." *Selsby*, 5 *Cox C. C.* at 497 (1847). So where persons were indicted for a conspiracy to commit an unnatural offence, upon evidence which, though weak, tended, as far as it went, to show the actual commission of the offence, Cockburn C.J. confirming the passage just cited, said, "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others," &c. *Boulton*, 12 *Cox C. C.* at 93 (1871); cf. the remarks of the same judge at the end of *Gurney*, p. 351, and see p. 363.

Another difficult point is whether there must have been some *overt* act.

The authorities seem to stand thus. In the *Poulterers' Case*, 9 *Co.* 56 *b.* (1611), L. Coke says, "a man shall have a writ of conspiracy, although they do nothing but conspire together, and he shall recover damages, and they may also be indicted thereof . . . these confederacies punishable by law before they are executed, ought to have four incidents. 1. It ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds, or of promises one to the other. 2. It ought to be malicious . . . 3. It ought to be false against an innocent. 4. It ought to be out of court voluntarily." In *Best*, 2 *L. Raym.* 1167; 1 *Salk.* 174 (1705), the marginal note is "an illegal conspiracy is indictable, though nothing is done in pursuance of it." This was so contended by counsel in that case, but from the indictment it does not appear that any such contention was necessary, and the judgment is silent on the point.

In *Kinnersley*, 1 *Str.* 193 (1719), which is frequently referred to as an authority that no overt act need be proved, no such point arose. All that was there decided was that no overt act need be laid in the indictment, as was even then well settled. So also in *Spragg*, 2 *Burr.* 993 (1760), L. Mansfield expressly reserves his opinion, "what degree of weight" the

objection that it was "a bare *unexecuted* conspiracy" might have had, pointing out that it was not necessary for the decision of that case. And in *Mulcahy* v. *R.*, pp. 181, 348, it was laid down that in the agreement of two or more persons "the very plot is an act in itself," though "so long as such a design rests in intention only it is not indictable."

In practice, however, the conspiracy is seldom known except through some overt act.

An overt act committed by any one of the conspirators is sufficient, on the general principles of agency, to make it the act of all.

It was said by L. Ellenborough that a mere agreement to commit a civil trespass would not be the subject of indictment. *Turner*, 13 *East* 228 (1811). But this decision is not at all borne out by the definitions above referred to; and in *Rowlands*, p. 356, L. Campbell had no doubt whatever that it was wrongly decided. In *Turner*, the conspiracy was to go, armed with offensive weapons, and take hares by night in a preserve, to resist, if necessary—specifically a crime under 39–40 G. 3, 50 (repealed). It was held that a conspiracy to hiss an actor or damn a play would be indictable. *Clifford* v. *Brandon*, 2 *Camp.* 358 (1810); cf. a case (1778) cited in 6 *T. R.* 628. So a conspiracy to impoverish A. B., a tailor, and to prevent him carrying on his trade, has been held to be indictable. *Eccles*, 1 *Leach* 274; 3 *Dougl.* 337 (1783), p. 356. In *Carlisle*, *Dears. & P. C. C.* 337; 23 *L. J. M. C.* 109 (1854), S. sold a mare to B. for 39*l.*, and before the price was paid, B. and C. conspired together falsely and fraudulently to represent to S. that the mare was unsound, in order to induce S. to accept 27*l.* instead of 39*l.*; and it was held that this was indictable as a conspiracy. So it is indictable to conspire to raise the price of funds by spreading false reports; *De Berenger*, 3 *M. & S.* 67; 15 *R. R.* 414 (1814), pp. 117, 360; or of any vendible commodity; *Aspinall and others*, below, or to conspire to raise a false claim to property by contracting a marriage; *Robinson*, 1 *Leach* 37 (1746); or to conspire to induce persons to take and pay for shares in a new company, to which was to be transferred the business of an old company known to the conspirators to be hopelessly insolvent and worthless. *Gurney and others*, 11 *Cox C. C.* 439 (1809), p. 350. See p. 356.

An indictment charged the defendants with having conspired to obtain a quotation of shares in the Stock Exchange List, in order to induce persons who should thereafter buy and sell shares to believe that the company was duly formed and constituted, and had complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list. The Queen's Bench held the count was good, although there was no averment that the object sought was to injure persons by inducing them to deal in the shares of the company. Cockburn C.J. and Blackburn J. thought it would have been more prudent to add some such averment, so as to make the offence more distinct, but held that the object of the conspiracy could be sufficiently inferred from the preceding averments. That judgment was affirmed in the Court of Appeal, which further held the insufficiency of the indictment to be cured by the verdict. *Aspinall*, pp. 69, 199.

A conspiracy to charge an innocent person with an offence is indictable; *Best*, p. 350; 1 *Russ. Cri.* 495, and it is immaterial whether a charge be true or false, successful or unsuccessful, if any of the means resorted to be unlawful. 2 *Hawk. P. C.* Bk. 1, ch. 72, ss. 3, 4; *Hollingberry*, 4 *B. & C.* 329 (1825), where the jury found a conspiracy (with a view to extortion) to indict though not falsely; held to be a verdict of guilty. But several persons may combine together to carry on a prosecution in a legal manner. *Hawk. ib.* s. 7; *Murray*, *Matth. Dig. Cr. L.* 90 (1823).

Any conspiracy to pervert the course of justice is indictable, p. 697; 1 *Hawk. P. C.* Bk. 1, ch. 21, s. 15; *Bushel* v. *Barrett*, *Ry. & M.* 434 (1826)

Jolliffe, pp. 57, 168, 698; *Thompson*, 16 *Q. B.* 832; 20 *L. J. M. C.* 183 (1851), p. 358; *Macdaniel*, *Fost. C. C.* 130: 19 *St. Tr.* 808 (Feb. 1756); 1 *Leach* 45 (1759), pp. 153, 697, 756; *Mawbey*, p. 200; *Claridge* v. *Hoare*, 14 *Ves.* (1807) at 65; or by abuse of legal process to enforce payment of money which was known to be not due. *Taylor*, 15 *Cox C. C.* 265 and 268 (1883); *Q. B. D.* See p. 697.

There are numerous instances in the books of conspiracies against morality and public decency held indictable; such as a conspiracy to seduce a young woman; *L. Grey*, pp. 182, 226; or to procure an infant female to have illicit carnal connexion with a man; *Mears*, p. 226; or to procure a girl whether chaste or unchaste, to become a common prostitute; *Howell and Bentley*, p. 226. The procuration of girls or women under twenty-one for immoral purposes is now made a misdemeanor by 48–9 V. 69, 2, p. 722. A conspiracy to take away a young heiress from the custody of her friends, for the purpose of marrying her to one of the conspirators, has been held to be indictable. *Wakefield*, p. 106. Also a conspiracy to prevent the burial of a corpse, though only for the purposes of dissection. *Young*, cited 2 *T. R.* 734 (1788); 2 *Chit. Crim. L.* 36, p. 365.

There has been some discussion about conspiracies to get paupers married. Of course these are indictable if any unlawful means be used. But it has been attempted to go further, and to hold that the conspiracy to persuade paupers to marry by their own consent was itself indictable, as being an injury to the inhabitants of the parish on whom the burden of supporting the woman was thereby thrown. But this notion is now completely exploded. In a case of this kind, Buller J. directed an acquittal, holding it necessary in support of such an indictment, to show that the defendant had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage, without the voluntary consent or inclination of the parties themselves; and that the act of marriage being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means; and this, he said, had been several times ruled by different judges; *Fowler*, 1 *East P. C.* 461 (1788); *Seward*, p. 348. Where it is stated to have been by threats and menaces, it need not be averred that the marriage was against the consent of the parties, though that fact must be proved. *Parkhouse*, 1 *East P. C.* 462 (1792).

As to combinations among workmen, see p. 360.

Proof of the existence of the conspiracy generally.] Acts of some of the conspirers in the absence of others, may be given against any of them. The rule is applied by East as follows: "In this [high treason], as in other cases founded in conspiracy, the conspiracy or agreement among several to act in concert together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." But it may also be done by evidence of the acts of the prisoner, and of any other with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object. 1 *East P. C.* 96; continued p. 354. But it is observed by Starkie that "in some peculiar instances where it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from this [the general] rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity." 2 *Ev.* 234, 2*nd ed.*, where Buller J. is cited as

saying, "there are two things to be considered in an indictment of this sort: first, whether any conspiracy exists; next, what share the prisoner took in the conspiracy." And again, before the evidence [of the conspiracy so proved] can affect the prisoner materially, it is necessary to make out another point, viz. that he consented to the extent and in the sense that the others did. *Hardy* (at 451 and 476), p. 117, where it was also said by Eyre C.J. "In the case of a conspiracy, general evidence of the thing conspired is received, and then the party . . . is to be affected for his share in it" (at 473). Upon a prosecution for a conspiracy to raise the rate of wages, proof was proposed of an association of persons for that purpose, of meetings, of rules, of subscriptions, &c., and L. Kenyon permitted a member of the society to prove these matters, and that he and others acted under them in execution of the conspiracy charged as evidence *introductory* to the proof that they were members of the society, and equally concerned; but added, that it would not be evidence to affect them until they were made parties to the same conspiracy. *Hammond*, 2 *Esp. N. P. C.* 719 (1799). So in many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused have taken. 1 *Russ. Cri.* 535; *Deasy*, 15 *Cox C. C.* 334 (1883). The point may be considered as settled finally in *The Queen's Case*, p. 2, where the following opinion was given by the judges: "We are of opinion that on the prosecution of a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and on that account, we presume, it is permitted. But it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if upon such opening it should appear manifest that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time."

"The rule that one man is not to be affected by the acts and declarations of a stranger, rests on the principles of the purest justice; and although the courts, in cases of conspiracy, have, out of convenience, and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given in evidence, in order to establish the fact of a conspiracy, it is to be remembered, that this is an inversion of the usual order, for the sake of convenience, and that such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved." 2 *Stark. Ev.* 235, *2nd ed.*; continued p. 355.

It has since been held, that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held, that directions given by one of the party on the day of their meeting, as to where they were to go, and for what purpose, were admissible, and the case was said to fall within *Hunt*, p. 4, where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. *Frost*, p. 178, at 149–50 (245 in *St. Tr.*).

"Upon an indictment for a conspiracy the evidence is either direct, of a

meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the case circumstantial." 2 *Stark. Ev.* 232, 2*nd ed.* Thus, upon a trial for conspiracy to take away a man's character by means of a pretended communication with the Cock-lane ghost, L. Mansfield directed the jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances; the judges of the K. B. agreed. *Parsons*, 1 *W. Bl.* 392 (1763). Upon a trial for a conspiracy to ruin Macklin, the actor, in his profession, L. Mansfield overruled the objection that evidence must be given by the prosecution of a *previous* meeting of the accused, for the purpose of confederating to carry out their object. He said, that if a number of persons met together for *different* purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character, of a third party, it was a conspiracy, and it was not necessary to prove any previous "consult" or plan. *Lee*, 2 *M'Nally on Evid.* 634 (1774). A husband, his wife, and their servants were indicted for a conspiracy to ruin a card-maker, and it appeared that each had given money to the apprentices of the prosecutor to put grease into the paste, which spoiled the cards, but no evidence was given of more than one of the defendants being present at the same time; it was objected that this was not a conspiracy, there being no evidence of communication; but Pratt C.J. ruled that as the defendants were all of one family and concerned in making cards, this was evidence of a conspiracy to go to a jury. *Cope*, 1 *Str.* 144 (1719).

If on a charge of conspiracy it appear that two persons by their acts are pursuing the same object, and often by the same means, the one performing part of an act, and the other completing it for the attainment of the object, the jury may draw the conclusion that there is a conspiracy. If a conspiracy be formed, and a person join it afterwards, he is equally guilty with the original conspirers. So, if on a charge of conspiracy to annoy a broker, who distrained for church-rates, it be proved that one of the defendants (the other being present) excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but evidence of what a person, who was at the meeting, said some days after, when he himself was distrained on for church-rates, is not admissible. *Per* Coleridge J., *Murphy*, pp. 1, 114. See also *Blake*, 6 *Q. B.* 126; 13 *L. J. M. C.* 131 (1844), p. 357.

So "evidence of the acts of the prisoner and of any other with whom he is attempted to be so connected concurring together at the same time and to the same purpose or particular object," is admissible. 1 *East P. C.* 97; cf. p. 352.

Declarations of other conspirers.] Cf. p. 46. It is still a question whether the declarations of some of the persons engaged in the conspiracy, may be given in evidence against others, in order to prove its existence; and upon principle such evidence appears to be inadmissible. The opinions of the judges upon this question have been at variance. In *Hardy*, pp. 117, 353, which was an indictment for high treason in conspiring the death of the king, "it was proposed to read a letter written by *Martin* in London, and addressed, but not sent, to *Margarot* in Edinburgh (both being members of the Corresponding Society), on political subjects, calculated to inflame the minds of the people in the North; Eyre C.J. was of opinion that this letter was not admissible . . . against any but the party confessing; two of the judges agreed that a bare relation of facts by a conspirator to a stranger was merely an admission which might affect himself, but which could not affect a [co-] conspirator, since it was not an *act* done in the prosecution of that conspiracy; but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as *an act* to show the nature and tendency of the conspiracy alleged, and which,

therefore, might be proved as the foundation for affecting the prisoner with a share of the conspiracy. Buller J. was of opinion that the evidence of the conversations and declarations by parties to a conspiracy, was in general, and of necessity, evidence to prove the existence of the combination. Grose J. was of the same opinion; but added that he considered the writing *as an act* which showed the extent of the plan." Mr. Starkie remarks, "Upon the last point it is observable that of the five learned judges who gave their opinions, three of them considered the writing of the letter to be an act done; and that three of them declared their opinion that a mere declaration or confession, unconnected with any act, would not have been admissible." 2 *Ev.* 236, *2nd ed.* "In the same case, it was proposed to read a letter written by Thelwall [another conspirator] to a private friend, containing several of the addresses of the society, and three of the judges were of opinion that the evidence was inadmissible, since it was nothing more than a declaration, or mere recital of a fact, and did not amount to any transaction done in the course of the plot for the furtherance of the plot; it was a sort of confession by T., and not like a fact done by him, as in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the judges were of opinion that the evidence was admissible, on the ground that everything said and *a fortiori* everything done by the conspirators was evidence to show what the design was." *Ib.*

The same authority says (cf. p. 353), "It seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy; although consultations for the purpose, and letters written in prosecution of the design, though not sent, are admissible. . . . The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger that a conspiracy existed amongst others to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on principles fully established, would not make the assertion evidence of the fact against strangers." Cf. 1 *Russ. Cri.* 529, and *Murphy*, p. 354.

Proof of acts, &c., done by other conspirers.] After the existence of a conspiracy is established, and the particular defendants have been proved to be parties to it, the acts of other conspirers may, in all cases, be given in evidence against them, if done in furtherance of the common object of the conspiracy; as also may letters written and declarations made by other conspirators, if they are part of the *res gestæ* of the conspiracy, and not mere admissions. See 1 *Phill. Ev.* 157, 10*th ed.*; *Hardy*, p. 117, &c., at 452, 475; *Algernon Sidney*, 9 *How. St. Tr.* (1683), at 841 and 848 (but this case is notoriously of little authority). "It seems to make no difference as to the admissibility" of this sort of evidence, whether the other conspirers "be indicted or not, or tried or not . . ." for the making of them co-defendants "does not make their acts or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted." 2 *Stark. Ev.* 237, *2nd ed.*; see p. 354. Where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a Chartist association, and that Jones was also a member, and that on the 3rd of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the racecourse, where Jones had gone on before with

others; it was held that a direction given by Jones, in the forenoon of the same day, to certain parties to meet on the racecourse, was admissible; and it being further proved that Jones and the persons assembled on the racecourse went thence to the New Inn; it was held, that what Jones said at the New Inn was admissible, as it was all part of the transaction. *Shellard*, p. 58. The letters of one of the defendants to another have been, in certain circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a participator in the fraud. *Whitehead*, 1 *Dow. & Ry. Cases at N. P.* 61 (1823). Where a number of persons were charged with murder committed by blowing up the wall of a prison in the course of a conspiracy to liberate a prisoner there (who, it was apparently suggested, was privy to the conspiracy), it was held, such conspiracy having been proved to exist, that acts of that prisoner within the prison and proof of articles found upon him, were admissible against the accused. *Desmond*, 11 *Cox C. C.* 146 (1868).

Proof of the means used.] Where the act itself, which is the object of the conspiracy, is illegal, it is not necessary to state or prove the means agreed upon or pursued to affect it. *Eccles*, p. 351. But where the indictment charged conspiring "to cheat and defraud the lawful creditors of W. F.," L. Tenterden thought it too general, in not stating what was intended to be done or the persons to be defrauded or any overt act. *Fowle*, 4 *C. & P.* 592 (1831); but see *De Berenger* and *Gurney*, p. 351, where an intent to defraud the general public and not any particular person was ruled by Cockburn C.J. (citing, with approval, *De Berenger*) to be sufficient; and see *ib. Aspinall and others*, but cf. *White* v. *R.*, 13 *Cox C. C.* 318 (1876), *Ir. Q. B.* So where the indictment charged the defendants with a conspiracy "to cheat and defraud the said H. B. of the fruits and advantages" of a verdict, L. Denman C.J. held it bad, as being too general. *Richardson*, 1 *Moo. & R.* 402 (1834). But in *Wright* v. *R.*, 14 *Q. B.* at 168 (1849), the same judge sustained an indictment "where the statement of the means used" was "so interwoven with the charge of conspiracy as to show upon the face of" it "an unlawful conspiracy." Where the indictment charged the defendants with conspiring, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof, it was held, that the *gist* of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and that it was not necessary to set out the specific pretences; Bayley J. said, "When parties have once agreed to cheat a particular person of his money, although they might not then have fixed on any means for that purpose, the offence of conspiracy was complete." *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407 (1818); cf. *Taylor* v. *R.*, 1895, 1 *Q. B.* 25; 18 *Cox C. C.* 45, p. 733. In *Parker*, 3 *Q. B.* 292 (1842), below, Williams J. spoke of *Gill*, as "the case of the greatest laxity." But in *Sydserff* v. *R.*, 11 *Q. B.* 245 (1847), an indictment that the defendants "unlawfully, fraudulently, and deceitfully, did conspire, combine, confederate, and agree together to cheat and defraud" the prosecutor "of his goods and chattels," was held good on writ of error; and the court in giving judgment impliedly, if not expressly, upheld the decision in *Gill*. See upon this point *King* v. *R.*, p. 191; *Rowlands*, 17 *Q. B.* at 686; 2 *Den. C. C. R.* 364; 21 *L. J. M. C.* 81 (1851), p. 357; and *Latham* v. *R.*, p. 192.

An indictment charged that A. and B. conspired by false pretences and subtle means and devices, to obtain from F. divers sums of money, of the moneys of F., and to cheat and defraud him thereof. The means of the conspiracy were not further stated. It was, however, held that this was sufficient, and that the indictment was sustained by proof that A. and B. conspired to make a representation, knowing it to be false, that certain horses

were the property of a private person, and not of a horse dealer, thereby inducing F. to buy them. *Kenrick*, 5 *Q. B.* 49 (1843), pp. 359, 415; 1 *Dav. & M.* 208; 12 *L. J.* (*N. S.*), *M. C.* 135; explaining *Pywell*, 1 *Stark. N. P. C.* 402 (1816). See also *Blake*, p. 354, and *Rowlands*, above.

Where an indictment charged that the defendants conspired by false pretences to obtain from persons named divers goods and merchandise, and to cheat and defraud them thereof, and in pursuance of the conspiracy, did by false pretences (which were stated) obtain from them those goods, and did cheat and defraud them thereof, to the damage of the persons named,—it was held bad in arrest of judgment in not stating whose the goods, &c., were: the goods, said L. Denman C.J. must be described as belonging to some one. *Parker*, above. A. and B. were indicted for conspiring to extort money from C., by charging him with forging a cheque for 178*l.*; the indictment set forth a letter from A. to C., referring to the cheque, and conversations were proved, relating to it. It was, in fact, in existence (in defendants' possession), but it was not produced at the trial, and such production was held to be unnecessary; for the defendants had taken on themselves to treat the cheque as existing, and it might have been that the existence of such a cheque was altogether a fabrication. *Ford*, 1 *Nev. & M.* 776 (1833), p. 9.

Proof of the means used—cumulative instances.] Upon an indictment charging conspiracy to cause themselves to be believed persons of considerable property, for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to a tradesman employed to furnish it as persons of large fortune. A witness was then called to prove that, at a different time, they had made a similar representation to another tradesman. This evidence was objected to, on the ground that the prosecutor could not prove various acts of this kind, but was bound to select and confine himself to one. L. Ellenborough, however, said, "This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence." *Roberts*, 1 *Campb.* 399 (1808). See p. 78.

Proof of the object of the conspiracy—"other persons."] The object of the conspiracy must be proved as laid in the indictment. An indictment against A., B., C., and D. charged that they conspired together to obtain, "viz. to the use of them the said *A.*, *B.*, and *C.* and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. L. Ellenborough said, "The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think as to D. that it is not. He is charged with conspiring to procure this appointment through the medium of C., of whose existence, for aught that appears, he was utterly ignorant. When a conspiracy is charged, it must be charged truly," and he directed D.'s acquittal: he had no doubt that the indictment might have been drawn so as to include D. "Even if the manner in which the money was to be applied was unknown, this might have been stated on the face of the indictment, and then no evidence of its application would have been required." The other defendants were convicted. *Pollman*, 2 *Campb.* 233 (1809).

In an indictment for conspiring to defraud D. *and others*, which charged the obtaining of the goods of D. *and others*, as the word *others* last cited must mean partners of D., it must mean that throughout, and evidence of attempts to defraud persons not the partners of D. is inadmissible. *Steel*, 2 *Moo. C. C.* 246; *Carr. & M.* 337 (1841). A. was indicted for conspiring with

Y. and Z. and "other persons" unknown; the only evidence was against A., Y., and Z., and the jury found that A. conspired either with Y. or Z., but they did not know which; Y. and Z. were then acquitted; it was held that A. must be acquitted, for "other persons" could not mean the co-defendants. *Thompson*, p. 352.

Where a count charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding was held bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. *O'Connell* v. *R.*, p. 173.

Upon a count against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that four of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law and repugnant: inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas by the same finding it appears that the other five were guilty of conspiring to effect only some of the objects. *Ib.*

A count charging defendants with conspiring to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitutions of the realm, is bad; first, because "intimidation" is not a technical word, having a necessary meaning in a bad sense; and secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. *Ib.* Cf. *Manning*, p. 348.

A mother and daughter were indicted for conspiring with G. to defraud various tradesmen. G. obtained various goods on credit, always on the suggestion of the prisoners, never intending to pay for them, and sold them to the prisoners for much less than the value. They gave him a reference when necessary. G. was the chief witness against them; the case against the mother was withdrawn, but the other woman was found guilty, with the concurrence of two judges. *Orman*, 14 *Cox C. C.* 381 (1880). A prisoner indicted for soliciting and inciting a servant to conspire with him to cheat and defraud his master was rightly convicted where it was proved that the prisoner had offered a bribe to the servant to sell the master's goods at less than their proper value. *De Kromme*, 17 *Cox C. C.* 492 (1892), *C. C. R.*

Railway officials were indicted for conspiring with the other defendants to steal and sell to the latter used but uncancelled tickets: they were rightly indicted together, and a verdict that some did and some did not conspire is not upon the face of it bad for repugnance. *Quinn, &c.*, 19 *Cox C. C.* 79 (1898).

Particulars of the conspiracy.] Where the counts of an indictment for conspiracy were framed in a general form, Littledale J. after consulting several other judges, ordered the prosecutor to furnish the defendants with a particular of the charges, and that the particular should give the same information to the defendants that would be given by a special count, specifying the pretences. But he refused to compel the prosecutor to state therein the specific acts with which the defendants were charged, and the times and places of those acts. *Hamilton*, 7 *C. & P.* 448 (1836). See further as to particulars, p. 162, and *Esdaile*, p. 163, &c., and cf. p. 389.

Form of indictment.] It is not uncommon to set out in the indictment the overt acts by which the object of the conspiracy was to be attained.

But an indictment is good which charges a conspiracy to do an unlawful act without alleging any overt acts whatever. *Kinnersley*, pp. 258, 350; *Gill*, p. 356; *Kenrick*, pp. 357, 415.

Where the indictment alleged a conspiracy fraudulently to remove goods, &c., of one H. contrary to the Debtors Act, he being a trader and liable to become a bankrupt; but did not allege that defendants conspired in contemplation of or with a view to a bankruptcy, or that H. was adjudged bankrupt; the court said that, although it was not necessary to prove the adjudication, yet they were not prepared to say that the indictment ought not to have alleged the conspiracy to be in contemplation of or with a view to bankruptcy: but the objection, which might have been good on demurrer, was cured by the verdict. *Heymann* v. *R.*, pp. 199, 268, 348. See also *Aspinall*, p. 351, on the last point. As to joint indictment, see *Plummer*, pp. 169, 203, 169.

As to the number of counts, see pp. 173, 174–5, 363.

Venue.] The *gist* of the offence being the conspiring together, and not the act done in pursuance thereof, the venue in principle ought to be laid in the county in which the conspiracy took place, and not where, in the result, it was put into execution. *Best*, p. 350; 1 *Russ. Cri.* 527; and see *Kohn*, p. 217. But it was said that "there seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried wherever one distinct overt act of conspiracy is in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war." *Brisac*, 4 *East* 164 (1803), *K. B.* So where the conspiracy, as against all the defendants, was proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different counties, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of them in the county where the trial was had, though no proof against all was offered in that county, and, indeed, the acts of some of the individuals were wholly confined to other counties. *Bowes* (1787), cited in *Brisac*.

Conspiring to murder.] By 24–5 V. 100, 4 (p. 610): "All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her Majesty or not, and whether he be within the queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude for any term not more than ten years." See p. 198. The prisoner, who was editor of a London newspaper written in German, was convicted of publishing an article intending, by approving the recent assassination of the Czar of Russia, to encourage, &c., persons to commit murder, and it was held that the conviction was right although the encouragement was not addressed to any person in particular. *Most*, 7 *Q. B. D.* 244; 50 *L. J. M. C.* 113; 14 *Cox C. C.* 583 (1881); *C. C. R.*, pp. 217, 257. But this is more properly a case of incitement to crime.

Gaming.] See *Bailey*, p. 490.

Conspiracy to "pirate" music.] This is indictable. *Willetts*, 70 *J. P.* 127 (1906). See *L. J.* newspaper, Dec. 21, 1907.

CONSPIRACIES IN RESTRAINT OF TRADE.

The law relating to conspiracies in restraint of trade is regulated partly by the common law and partly by statutes. Stated broadly—at common law all combinations to effect alterations in the rate of wages were illegal conspiracies, but practically this has been abolished by the Trade Union code, viz. 34–5 V. 31; 39–40 V. 22; 6 E. 7, 47 (the Trade Disputes Act)—the three together being the Trade Union Acts; and 38–9 V. 86 (Conspiracy and Protection of Property Act). But it is only in respect of "trade disputes" (defined 6 E. 7, 47, 5, 3) that the common law as to restraint of trade has been abrogated; see 39–40 V. 22, 16. "Disturbance of Markets," as in *De Berenger's*, better known as *Cochrane's case*, pp. 117, 351,—a "conspiracy . . . by false rumours to raise the price of the public funds and securities"—though, in effect, due to the common law doctrine, has not been affected. Historically the principle has been almost entirely developed in respect of the wage-earning classes. The first Act of the code just mentioned practically overruled all the cases on the combination of workmen up to 1871, and it does not seem, therefore, worth while to reproduce them here. The Act of 1906 only affects criminal law incidentally, by amending the 1875 Act. See, generally, *Criminal Conspiracies*, by R. S. (afterwards Mr. Justice) Wright (1873).

Trade dispute.] 6 E. 7, 47, 5 (1) runs: "In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, and between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . ."

By 38–9 V. 86, 3: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute . . . shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." The omitted words are, "between employers and workmen"; by s. 5 (3) of 6 E. 7, 47, s. 1 of which here inserts a paragraph (on *actions*).

"Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of parliament." See *e.g.* 14–15 V. 100, 29, pp. 660, 825.

"Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the sovereign.

A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned either absolutely or at the discretion of the court as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on

summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person." This section "distinctly legalises strikes in the broadest terms." *Per* L. Coleridge C.J., *Gibson* v. *Lawson*, *Connor* v. *Kent*, *Curran* v. *Treleaven*, 1891, 2 *Q. B.* at 558; 55 *J. P.* 485; p. 362.

S. 4: "Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by Act of parliament the duty, or who have [*sic*] otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds or to be imprisoned for a term not exceeding three months, with or without hard labour.

Every such municipal authority, company, or contractor, as is mentioned in this section shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable dispatch.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur on summary conviction a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings."

S. 5: "Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour."

For s. 6, see p. 517.

S. 7: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully or without legal authority: —

(1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or,

(2) Persistently follows such other person about from place to place; or,

(3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

(4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,

(5) Follows such other person with two or more other persons in disorderly manner in or through any street or road, shall, on conviction thereof by

a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour."

The rest of the s. is repealed by 6 E. 7, 47, 2 (2); s. 2 (1) of which statute substitutes for it:

"It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working."

"Such other" means *any other*. *Per* the Court of Appeal, *Lyons* v. *Wilkins* (1899, 1 *Ch.* at 268); its meaning is to be sought in the first paragraph of this s.

This s. is not confined to trade disputes; *per* Chitty L.J., *Lyons* v. *Wilkins*, above; it would embrace the case of besetting a man's house with a view to compel him not to receive guests or visitors. It is immaterial whether the person "beset" is an employee or not, *Farmer* v. *Wilson*, 19 *Cox C. C.* 502; 69 *L. J. K. B.* 496; 64 *J. P.* 486 (1900).

Where the secretary of a trade union gave notice to an employer that unless the non-unionists were discharged, the unionists would strike, but no violence or threat of any sort was used, though the non-unionists had good reason to believe that they would get no other employment if discharged, and the employer had reasonable ground for expecting that violence would be used and that great injury from the strike would result to him, so that he discharged the non-unionists, it was held by the Q. B. (practically the Court for C. C. R.) that as there was no threat of violence, there was no intimidation within this s., and that the mere fact of the employer reasonably apprehending injury did not make the notice indictable nor criminal (nor actionable); probably intimidation must be limited to threats of personal violence, as in *McKeevit* (1890), unreported, *per* Cave J. (So J.P. report, summarising *in one Gibson* v. *Lawson*, and the other two cases, p. 361.)

In a conviction under this s. it is necessary to specify the acts which the defendant intended to compel the prosecutor to do or abstain from doing. *McKenzie*, 1892, 2 *Q. B.* 519; 61 *L. J. M. C.* 181, where the conviction did not follow the terms either of the section or of the summons; the court thought the defect one of substance and not merely of form. "The gist . . . of this offence is not the following . . . in a disorderly manner, but such a following as to prevent a person doing such acts as he has a right to do." But "a commitment under this s. for 'following in a disorderly manner with a view to compel one T. to abstain from working as a shoe finisher in the employment of one C. D., a shoe manufacturer, carrying on business in the parish of E.' is a good one, inasmuch as it contains a sufficient description of a specified act from which the complainant was compelled to abstain." *Ex parte Wilkins*, 64 *L. J. M. C.* 221; 18 *Cox C. C.* 161 (1895). Where a conviction under this s. for injuring property did not specify what property, it was quashed. *Smith* v. *Moody*, 1903, 1 *K. B.* 56; 20 *Cox C. C.* 369; 19 *T. L. R.* 7; 72 *L. J. K. B.* 43; 67 *J. P.* 69. "Used violence to or intimidated" is bad for duplicity, as the words express two offences. *Edmondes*, 59 *J. P.* 776 (1895).

A picket who silently follows a person whom he wishes to go on strike may be, even if he is alone, guilty of an offence under sub-s. 5. *Smith* v. *Thomasson*, 16 *Cox C. C.* 740; 54 *J. P.* 569 (1890); *a fortiori* if there is a crowd of disorderly people.

By s. 9, where imprisonment, or a penalty more than 20*l.* may be imposed, the accused may elect to have the case treated as indictable.

S. 10 applies the Summary Jurisdiction Act (defined in s. 13) to this Act.

S. 11 (competence of certain witnesses) is rendered superfluous by 61–2 V. 36; p. 107.

By s. 14, the expression "municipal authority" in this Act is defined.

By s. 15, "the word 'maliciously' used in reference to any offence under this Act [*e.g.* in ss. 4, 5, 9], shall be construed in the same manner as it is required by" s. 58 of the Malicious Injuries to Property Act, 24–5 V. 97 (p. 241).

S. 16: "Nothing in this Act shall apply to seamen or to apprentices to the sea service"; *i.e.* the penalties and punishments prescribed by this Act do not apply to seamen; it is not meant that any one may commit those offences on seamen; *per* Day J., *Kennedy* v. *Cowie*, (1891) 1 *Q. B.* 771; 60 *L. J. M. C.* 170. Seamen under the Merchant Shipping Acts (1894–1906), p. 768, are persons actually employed or engaged on board ship. Persons whose calling or occupation is that of seamen, but who are not so employed or engaged in fact are not exempted by this section. *Lynch*, (1898) 1 *Q. B.* 61; 67 *L. J. Q. B.* 59; *C. C. R.*

Joinder of counts.] In *Warren*, &c. (the *Times*, Oct. 31st, 1907—too late for mention in its proper place, p. 173), an indictment included counts charging five defendants with conspiracies to obtain securities and goods by fraud, and also counts against the different defendants for obtaining securities and goods by fraud. The prosecution proved a conspiracy between two only of the defendants and acts committed by them in pursuance of such conspiracy, and proposed to give evidence of other conspiracies and misdemeanors to which the other prisoners were parties, there being no evidence of a joint conspiracy by all five defendants. The prosecution, having elected to proceed with the charges proved against the first two defendants, the Common Serjeant quashed all the counts alleging other misdemeanors against the other defendants on the ground that the inclusion in one indictment of different misdemeanors committed by different defendants was embarrassing to the court, unfair to the defendants, and contrary to the established practice; and that the court, having control of its own proceedings, could quash part of the indictment as a misuse of the process of the court. (From MS. note of Bosanquet C.S.) The quashed counts were good in themselves; cf. p. 192. The two were convicted. See p. 350.

DEAD BODIES—OFFENCES RELATING TO.

Although larceny cannot be committed of a dead body (p. 560), no one having any right of property therein, yet it is an offence to remove a body without lawful authority—punishable with fine and imprisonment as a misdemeanor. An indictment charged, *inter alia*, that the prisoner, a certain dead body of a person unknown . . . "wilfully, unlawfully, and indecently" did take and carry away, with intent to sell and dispose of the same for gain and profit, &c., &c. It being evident that the prisoner had taken the body from some burial-ground, though from which was uncertain, he was found guilty upon this count; and it was considered by many judges that this was so clearly an indictable offence that no case was reserved. *Gilles*, 1 *Russ. Cri.* 935; *Russ. & Ry.* 366 *n.* (1820). So to take up a buried body, even for the purpose of dissection, is an indictable offence. *Lynn*, 2 *T. R.* 733; 1 *Leach* 497 (1788); in *Cundick*, *Dowl. & Ry. N. P. C.* 13 (1822), an undertaker employed by a gaoler to bury a convict executed was indicted and convicted of selling the body to a surgeon to be dissected though there was no evidence of a sale or of the surgeon's intention. And it makes no difference what are the motives of the removal if the removal is without lawful authority. See *Sharpe, Dear. & B. C. C.* 160; 26 *L. J. M. C.* 43 (1857), where the defendant acted from motives of filial affection. He had committed a trespass against the owner of the soil; but there seems to be no doubt that even without trespass the offence is still complete.

The burial of the dead is the duty of every parochial priest and minister, and if he neglect or refuse to perform the office, he may, by the express words of canon 86, be suspended by the ordinary for three months; "and if any temporal inconvenience arise, as a nuisance, from the neglect" to inter the corpse, "he is punishable also by the temporal courts by indictment or information." *Per* Abney J., *Andrews* v. *Cawthorne*, *Willes*, at 538 *n.* (1744), citing *Taylor* (1721). But see now the Burials Act, 43–4 V. 41, 1, amended 63–4 V. 15, 8.

To bury the dead body of a person who has died a violent death, before the coroner has sat upon it, is punishable as a misdemeanor, and the coroner ought to be sent for, since he is not bound *ex officio* to take the inquest without being sent for. *Clerk*, 1 *Salk.* 377 (1702); *Anon.*, 7 *Mod.* 10 (1702). A coroner has jurisdiction to hold and is justified in holding an inquest if he honestly believes that his information warrants it, and it is a misdemeanor to dispose of the body to prevent an inquest. *Stephenson*, 13 *Q. B. D.* 331; 53 *L. J. M. C.* 176 (1884), *C. C. R.* And "if a dead body in prison or other place, whereupon an inquest ought to be taken, be interred, or suffered to lie so long that it putrify before the coroner hath viewed it, the gaoler or township shall be amerced." 3 *Hawk. P. C.* Bk. 2, ch. 9, s. 23; see 31–2 V. 24, 5, amended 50–1 V. 71, 43. Where the duty of informing the coroner is not specifically imposed by statute, "it is the duty of those who are about the deceased to give immediate notice to the coroner or his officer or to the nearest officer of police." *Jervis* on *Coroners*, p. 6, *6th ed.* (1898).

The preventing a body from being interred has likewise been considered an indictable offence. Thus, the master of a workhouse, a servant, and another

person, were indicted for such a conspiracy. *Young*, p. 352. Digging up a disused burial-ground for building purposes is a misdemeanor at common law. *Jacobson*, 14 *Cox C. C.* 522 (1880). To leave a dead body exposed in a highway is an indictable nuisance. *Clark*, 15 *Cox C. C.* 171 (1883), p. 659.

As to the interment of dead bodies cast on shore, see 48 G. 3, 75.

By s. 7 of 2–3 W. 4, 75 (amended 34–5 V. 16): "It shall be lawful for any executor, or other party, having lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor or other party such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination." S. 8 provides for the party lawfully in the possession of a dead body directing and permitting anatomical examination, where the deceased shall, during his life, have directed it, "unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination." By s. 10, professors of anatomy, and the other persons therein described, being duly licensed, are not liable to punishment for having in their possession human bodies according to the provision of the Act. The 18th s. makes offences against the Act misdemeanors, and subjects offenders to be punished by imprisonment not exceeding three months, or by fine not exceeding fifty pounds.

In *Feist, Dears. & B. C. C.* 590; 27 *L. J. M. C.* 164 (1858), the defendant was master of a workhouse, and had lawful possession of the bodies of deceased paupers. He was in the habit of having the semblance of a funeral with a view of preventing the relatives requiring that the bodies should be buried without being subject to anatomical examination, and the jury found that but for that deception the relatives would have required the bodies to be so buried. The bodies, instead of being buried, as was supposed by the relatives, were delivered to a hospital for anatomical purposes—for which the master was paid. The prisoner was found guilty of offences at common law in disposing of a body for the purpose of dissection, &c., but the only question reserved was whether the defendant was protected by s. 7, above. The Court for C. C. R. held that he was, as the requirement mentioned in that s. had not been actually made. "It may be," said Pollock C.B. "that he prevented the relatives from requiring, &c. . . . but if that was wrong . . . he should have been prosecuted for that wrong. It may be that he was guilty of a conspiracy with the undertaker . . . and if so he should have been prosecuted for that conspiracy. . . . I do not think it a convenient mode of administering the criminal law to impute an offence at common law and then require the defendant to justify his conduct by bringing himself within a particular statute, when in truth his intention was not to infringe the common law at all, but . . . that particular statute. . . . If by acting a lie he prevented the requirement from being made, he should have been prosecuted for that." Willes J. pointed out that this was an offence specially provided for by 7–8 V. 101, 31.

Cremation is not illegal at common law unless it amounts to a public nuisance. *Price*, 12 *Q. B. D.* 247; 53 *L. J. M. C.* 51 (1884). Cremation is now regulated by 2 E. 7, 8, of which s. 8 (2) and (3) run: "Every person who shall wilfully make any false declaration or representation or sign or utter

any false certificate with a view to procuring the burning of any human remains, shall (in addition to any penalty or liability which he may otherwise incur) be liable to imprisonment with or without hard labour not exceeding two years.

(3) Every person who with intent to conceal the commission or impede the prosecution of any offence procures or attempts to procure the cremation of any body, or with such intent makes any declaration or gives any certificate under this Act, shall be liable to conviction on indictment to penal servitude for a term not exceeding five years." In *Byers*, 71 *J. P.* 205 (1907), it was held that this Act applied only to crematoriums and not to simple burning.

By 53 V. 5, 319: "If the manager of an institution for lunatics, or the person having charge of a single patient, omits to send to the coroner notice of the death of a lunatic within the prescribed time, he shall be guilty of a misdemeanor." The prescribed time is forty-eight hours from the death. Rules of the Commissioners in Lunacy, June 26, 1895; Rule 27 (1).

As to retaining in a dwelling-room the body of a person who has died of an infectious disease, see 53–4 V. 34, 10; for the county of London, see 54–5 V. 76, and amending Acts, p. 663.

DEER—OFFENCES RELATING TO.

Stealing deer.] By 24–5 V. 96, 12: "Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed, by this or by any former Act of parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping."

By s. 13: "Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony." Conclusion as in s. 12, above.

The word "deer" in 7–8 G. 4, 29 (repealed), includes all ages and both sexes; "a fawn," therefore. *Strange*, 1 *Cox C. C.* 58 (1843).

By s. 14 of 24–5 V. 96, suspected persons found in possession of venison, &c., and not satisfactorily accounting for the same, are rendered liable to a penalty not exceeding 20*l.* Killing outside "the forest, chase, &c.," is a defence under this s., even though the killing was illegal and done by trespassing on land. *Threlkeld* v. *Smith*, 20 *Cox C. C.* 38 (1901).

By s. 15, persons setting snares or engines for the purpose of taking or killing deer, or destroying the fences of land where deer shall be kept, on conviction before a justice, shall forfeit a sum not exceeding 20*l.*

Power of deer-keepers, &c., to seize guns.] By s. 16: "If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer, and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this Act, every such offender shall be guilty of felony." Conclusion as in s. 12, above.

Pulling a deer-keeper to the ground, and holding him there while another person escapes, is not a beating (within 7–8 G. 4, 29, 29, repealed). There must be a beating in the popular sense of the word; proof of a bare legal battery only is insufficient. *Per* Maule J. in *Hale*, 2 *C. & K.* 326 (1846).

DISTURBING PUBLIC WORSHIP.

By 52 G. 3, 155, 12: "If any person or persons . . . do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorised by this Act, or any former Act or Acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties, to be bound by recognisances in the penal sum of fifty pounds, to answer for such offence, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said quarter sessions, shall suffer the pain and penalty of forty pounds."

Upon an indictment found at the sessions under the Toleration Act, 1 W. & M. 18, 15 (otherwise 18), for disturbing a dissenting congregation, it was held that, upon conviction, each defendant was liable to the penalty of twenty pounds imposed by that statute. *Hube*, p. 2.

This offence may be tried at the sessions, or in the King's Bench, or at the assizes, if removed by *certiorari* from the sessions. *Hube*, above; *Wadley*, 4 *M. & S.* 508 (1815), under 52 G. 3, 155, 12, above.

Now, however, 23–4 V. 32, which abolishes the jurisdiction of the ecclesiastical courts in cases of brawling, provides for the recovery in a summary manner of a penalty of not more than five pounds for any disturbance in any recognised place of worship whatsoever, whether during the celebration of divine service or not. The Act applies to clergymen as well as to laymen; cf. p. 334. *Vallancey* v. *Fletcher*, (1897) 1 *Q. B.* 265; 66 *L. J. Q. B.* 297; *Kensit v. Dean, &c., of St. Paul's*, 20 *Cox C. C.* 829 (1905). And it seems that any disturbance of a congregation assembled according to law would be indictable at common law, 1 & 2 *Hawk.* Bk. 1, ch. 16, s. 32; ch. 63, ss. 24–33; *Anon.*, 1 *Keb.* 491 (1664), more particularly if arising out of any previous conspiracy for the purpose.

See also 24–5 V. 100, 36, p. 250.

DOGS—OFFENCES RELATING TO.

Stealing dogs.] By 24–5 V. 96, 18: "Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding twenty pounds, as to the said justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour."

Having possession of stolen dogs.] By s. 19: "Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen, or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money, not exceeding twenty pounds, as to such justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor." Conclusion as in s. 18, above.

Taking money to restore dogs.] By s. 20: "Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor." Conclusion as in s. 18, above.

As to killing and maiming, see p. 318.

A dog is not a "chattel" within (repealed) 7–8 G. 4, 29, 53 (false pretences). *Robinson*, 1 *Bell C. C.* 34; 28 *L. J. M. C.* 58; 8 *Cox C. C.* 115; 5 *Jur.* (*N. S.*) 203; 7 *W. R.* 203 (1859); dogs never were the subject of larceny at common law.

DWELLING-HOUSE—OFFENCES RELATING TO.

As to "dwelling-house" in arson or burglary, see Index.

As to breaking and entering a dwelling-house by day, see 24–5 V. 96, 53, which is set out, p. 297.

Breaking into any building within the curtilage, &c., and committing any felony.] By s. 55: "Whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years" (see p. 198).

Breaking into any house, shop, warehouse, &c., and committing any felony.] By s. 56: "Whosoever shall break and enter any dwelling-house, school-house, shop, warehouse, or counting-house, and commit any felony therein, or, being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony." Conclusion as in s. 55, above. Cf. p. 313, and *Powell*, pp. 198, 802. See p. 773.

House-breaking, &c., with intent to commit any felony.] By s. 57: "Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony." Conclusion as in s. 55, above, but maximum term is seven years. Cf. *Bain*, p. 257.

Stealing in a dwelling-house to the value of 5l.] By s. 60: "Whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l.* or more, shall be guilty of felony." Conclusion as in s. 55, above. Cf. p. 77.

Stealing in a dwelling-house with menaces.] By s. 61: "Whosoever shall steal any chattel, money, or valuable security in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony." Conclusion as in s. 5, above.

Riotously pulling down dwelling-houses.] See *Riots*, p. 746.

Proof of the breaking and entering.] See *Burglary*, pp. 298, 302, &c.

Proof of the premises being a dwelling-house.] See p. 304, and p. 242.

Proof of stealing in a dwelling-house.] The offence of stealing in a dwelling-house was held not to have been committed in *Campbell*, 2 *Lea.*

564; 2 *East P. C.* 644 (1792); where the landlady of the house gave a lodger a bank-note to get changed, which he stole, for "the property stolen must be such as is usually under the protection of the house," and "a taking from the person," *i.e.* from personal care and custody, is not within 12 Ann. 7 (repealed). So, for the same reason, where the prisoner obtained money from the prosecutor, in the dwelling-house of another person, by *ring-dropping*, p. 537, this also was held not to be within that statute. *Owen*, 2 *East, P. C.* 645; 2 *Leach* 572 (1792). The same point was ruled in subsequent cases. Cf. *Flannagan*, p. 307.

On the other hand, it was held, on a case reserved, that stealing in a dwelling-house to the value of 5*l.* by the *owner* of the house was within (repealed) 7–8 G. 4, 29, s. 12. *Bowden*, 2 *Moo. C. C.* 285 (1843).

Where a lodger invited the prosecutor to take part of his bed, without the knowledge of his landlord, and stole his watch from the bed-head, it was held by a majority of the judges that he was properly convicted of stealing in a dwelling-house. *Taylor*, *R. & R.* 418 (1825), under s. 7 of 12 Ann. 7. So where goods were left by mistake at a house in which the prisoner lodged, and were placed in his room, and carried away by him, they were held to be within the protection of the house. *Carroll*, 1 *Moo. C. C.* 89 (1825). So if a man on going to bed put his clothes and money by his bedside, these are under the protection of the dwelling-house, and not of the person. *Thomas*, *Car. Sup.* 295 (1827). So where a man went to bed with a prostitute, having put his watch in his hat on the table, and the woman stole the watch while the man was asleep, Parke B. and Patteson J., after referring to *Taylor*, above, were of opinion that the prosecutor having been asleep when the watch was taken by the prisoner, it was sufficiently under the protection of the house to bring it within the s. of 7–8 G. 4. *Hamilton*, 8 *C. & P.* 49 (1837). It would appear that had the prosecutor been awake instead of asleep in *Taylor's case*, the property was sufficiently within his personal control to be stolen from his person, and that an indictment under that s. would not have been sustainable. See 2 *Russ. Cri.* 64 *n.* But where a person put money under his pillow, and it was stolen whilst he was asleep, this was held not a stealing in the dwelling-house within 12 Ann. 7, above. *Anon.*, 2 *Stark. Crim. Pl.* 467 (1812); *Challenor*, (1824) *Dickin. Quar. Sess.* 245, 5*th ed.*; 2 *Russ. Cri.* 65.

It is a question for the court, and not for the jury, whether goods are under the protection of the dwelling-house, or in the personal care of the owner. *Thomas*, above.

Indictment.] Where the house belonged to the husband, but the things stolen belonged to the wife (and could only be used by her), an indictment laying the property in him was quashed by the Court for C. C. R., which, however, was clearly of opinion that an amendment should not have been refused at the trial. *Murray*, 1906, 2 *K. B.* 385; 75 *L. J. K. B.* 593; 70 *J. P.* 295; 22 *T. L. R.* 596; 21 *Cox C. C.* 250, p. 177.

Proof of the value of the goods stolen.] It must appear not only that the goods stolen were of the value of 5*l.*, but likewise that goods to that value were stolen "at one and the same time," for a number of distinct larcenies cannot be added together. *Petrie*, 1 *Leach* 294 (1784); *Farley*, 2 *East P. C.* 740 (1786). But if the property of several persons lying together in one bundle or chest, or even in one house, be stolen together at one time, the value of all may be put together, for it is one entire felony. 2 *East P. C.* 740. And where, under 12 Anne, above, property stolen at one time was worth 40*s.* but a part of it only, not amounting to 40*s.*, was found upon the prisoner, the court left it to the jury to say whether he had not stolen the

remainder, which they accordingly found. *Hamilton*, 1 *Leach* 348 (1784); 2 *Russ. Cri.* 66.

Where the prisoner, who was in prosecutor's service, stole a quantity of lace in several pieces, which were not separately worth 5*l.*, and brought them all out of his master's house at one time, Bolland B. held that the offence was made out, although the prisoner might have stolen the lace a piece at a time. *Jones*, 4 *C. & P.* 217 (1830), following a case tried before Garrow B.

See a similar case as to injuries to trees, p. 796.

ELECTIONS—OFFENCES AT.

Offences at Parliamentary elections.] By the Ballot Act, 1872, 35–6 V. 33, 3: "Every person who

(1) Forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the returning officer any nomination paper knowing the same to be forged; or

(2) Forges or counterfeits, or fraudulently defaces or fraudulently destroys any ballot paper, or the official mark on any ballot paper; or

(3) Without due authority supplies any ballot paper to any person; or

(4) Fraudulently puts into any ballot box any paper other than the ballot paper which he is authorised by law to put in; or

(5) Fraudulently takes out of the polling station any ballot paper; or

(6) Without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election;

Shall be guilty of a misdemeanor, and be liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years with or without hard labour, and if he is any other person, to imprisonment for any term not exceeding six months with or without hard labour.

Any attempt to commit any offence specified in this section shall be punishable in the manner in which the offence itself is punishable.

In any indictment or other prosecution for an offence in relation to the nomination papers, ballot boxes, ballot papers, and marking instruments at an election, the property in such papers, boxes, and instruments may be stated to be in the returning officer at such election, as well as the property in the counterfoils."

This Act does not provide for the payment of the costs of the prosecution in the above offences.

At the trial of an indictment for having fraudulently placed papers purporting to be, but to prisoner's knowledge not being, ballot papers in the ballot box, the counterfoils, voting papers, and marked register, produced under an order duly made by authority of the statute, may be given in evidence, and the face of the voting papers may be inspected so as to show how the votes appeared to have been given. *Beardsall*, 1 *Q. B. D.* 452; 45 *L. J. M. C.* 257 (1876); *C. C. R.*

By the Corrupt and Illegal Practices Prevention Act, 1883, 46–7 V. 51, offences at elections have been extended and more clearly defined, and stringent regulations for the conduct of elections have been made. Many of these offences are punishable upon summary conviction.

Most of the offences punishable upon indictment, such as corrupt practices, &c., &c., will be found treated of under *Bribery*, p. 281, where the sections on legal proceedings are set out, p. 284. See also *False Personation*, p. 402.

By s. 41 (4): "If any person makes any agreement or terms, or enters into any undertaking in relation to the withdrawal of an election petition, and such agreement, terms, or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the

seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are, whether lawful or unlawful, not mentioned in the aforesaid affidavits [in sub-s. 1], he shall be guilty of a misdemeanor, and shall be liable, on conviction on indictment, to imprisonment for a term not exceeding twelve months, and to a fine not exceeding 200*l.*"

Offences at municipal elections.] By 45–6 V. 50, 74 (1): "If any person forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the town clerk any forged nomination paper, knowing it to be forged, he shall be guilty of a misdemeanor, and shall be liable to imprisonment for any term not exceeding six months, with or without hard labour. (2) An attempt to commit any such offence shall be punishable as the offence is punishable."

Offences at other elections.] The provisions of the Municipal Elections (Corrupt and Illegal Practices) Act, 47–8 V. 70, are by Sched. I. extended to the elections of members of local boards, improvement commissioners, poor law guardians, and members of school boards. But as to the last, see now 2 E. 7, 42, and 3 E. 7, 24. And by s. 75 of the Local Government Act, 1888, 51–2 V. 41, the provisions of the Municipal Corporations Act, 1882, as amended by 47–8 V. 70, are applied to the election of county councillors.

As to offences when voting for a public library, see 55–6 V. 53 (Public Libraries Act), Sched. I.

EMBEZZLEMENT.

See pp. 527, 545, 557.

Embezzlement by clerks or servants.] By 24–5 V. 96, 68: "Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, and security, was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen years, . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping." See p. 198.

Embezzlement by persons in the queen's service or by the police.] By s. 70: "Whosoever being employed in the public service of her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, and intrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle any chattel, money, or valuable security, which shall be intrusted to, or received, or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service, shall be deemed to have feloniously stolen the same from her Majesty, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . ." (see p. 198).

Venue.] "And every offender against this or the last preceding section [p. 524] may be dealt with, indicted, tried, and punished, either in the county or place in which he shall be apprehended, or be in custody, or in which he shall have committed the offence." *Ibid.*

Form of warrant of commitment and indictment.] "And in every case of" embezzlement, &c. (in this s. and s. 69), "it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in her Majesty."

Distinct acts of embezzlement may be charged in the same indictment.] By s. 71: "For preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against her Majesty, or against the same master or employer,

within the space of six months from the first to the last of such acts; *Description of property in the indictment.*] and in every such indictment where the offence shall relate to any money or valuable security it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled, or fraudulently applied or disposed of, any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; *When part of the property is to be returned.*] or if he shall be proved to have embezzled or fraudulently applied or disposed of, any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly."

Persons indicted for embezzlement not to be acquitted if the offence turn out to be larceny, and vice versâ.] By s. 72: "If upon the trial of any person indicted for embezzlement, or fraudulent application, or disposition, as aforesaid, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application, or disposition, as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application, or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application, or disposition; and no person so tried for embezzlement, fraudulent application, or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application, or disposition, or embezzlement, upon the same facts." Cf. pp. 70, 524.

Summary jurisdiction.] By 42–3 V. 49, 11, 12, and Sch. I., embezzlement by a clerk or servant, where such clerk or servant is a young person (between twelve and sixteen), or an adult who consents to be tried summarily, *may* be dealt with summarily, provided that in the case of an adult the value of the whole of the property does not in the opinion of the court exceed 40s. Any indictable offence, except homicide, charged against a young person is in this position: 62–3 V. 22, 2; 1 E. 7. 20, 14 (Ireland).

Embezzlement by officers of the Banks of England or Ireland.] By 24–5 V. 96, 73: "Whosoever being an officer or servant of the governor and company of the Bank of England, or of the Bank of Ireland, and being intrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or with any security, money,

or other effects of or belonging to the said governor and company, or having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest or money, or any security, money, or other effects of any other person, body politic or corporate, lodged or deposited with the said governor and company, or with him as an officer or servant of the said governor and company, shall secrete, embezzle, or run away with, any such bond, deed, note, bill, dividend or other warrant, security, money, or other effects as aforesaid, or any part thereof, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . ." (see p. 198).

Embezzlement by officers of local marine boards.] By 57–8 V. 60, 248: (1) "A person appointed to any office or service by or under a local marine board shall be deemed to be a clerk or servant within the meaning of s. 68 [p. 375] of the Larceny Act, 1861 (relating to embezzlement). (2) If any person so appointed to an office or service (*a*) fraudulently applies or disposes of any chattel, money, or valuable security received by him (whilst employed in such office or service) for or on account of any local marine board, or for or on account of any other public board or department, for his own use, or any use or purpose other than that for which the same was paid, entrusted to, or received by him; or (*b*) fraudulently withholds, retains, or keeps back the same or any part thereof contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid, that person shall be guilty of embezzlement within the meaning of the said s. 68 of the Larceny Act, 1861.

(3) In any indictment under this section it shall be sufficient to charge any such chattel, money, or valuable security as the property either of the local marine board by whom the person was appointed, or of the board or department for or on account of whom the same was received.

(4) Section 71 of the Larceny Act, 1861 [p. 375] . . . shall apply."

Embezzlement of property of a trade union.] See p. 526.

Embezzlement of property by partners.] See pp. 381–2.

Embezzlement by officers of savings banks.] See 26–7 V. 87, 9, and p. 526.

Embezzling warehoused goods.] By 39–40 V. 36, 85: "If any goods shall be taken out of any warehouse without due entry, the occupier of such warehouse shall forthwith pay the duties due upon such goods; and every person taking out any goods from any warehouse without payment of duty, or who shall aid, assist, or be concerned therein, and every person who shall destroy or embezzle any goods duly warehoused, shall be deemed guilty of a misdemeanor, and shall, upon conviction, suffer the punishment by law inflicted in cases of misdemeanor; but if such person shall be an officer of customs or excise not acting in the due execution of his duty, and shall be prosecuted to conviction by the importer, consignee, or proprietor of such goods, no duty shall be payable for or in respect of such goods, and the damage occasioned by such destruction or embezzlement shall, with the sanction of the Commissioners of the Treasury, be repaid or made good to such importer, consignee, or proprietor by the Commissioners of Customs."

Embezzlement of naval and military stores.] See p. 654.

Embezzlement of post letters.] See p. 706.

Embezzling woollen, flax, mohair, silk, and other manufactures.] By 6–7 V. 40, various offences, partaking of the nature of embezzlement, are provided

for with respect to manufactures. *Edmundson*, 28 *L. J. M. C.* 213 (1859), under 17 G. 3, 56, 10.

Falsification of accounts.] See p. 426. By 38–9 V. 24, 1: "If any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanor, and be liable to be kept in penal servitude for a term not exceeding seven years . . ."

By s. 2: "It shall be sufficient in any indictment under this Act to allege a general intent to defraud without naming any particular person intended to be defrauded."

By s. 3, this Act is to be read as one with 24–5 V. 96.

Interpretation.] As to the meaning of "valuable security," see p. 522.

What persons are within the statute.] The question whether or not the prisoner comes within the statute ought to be left to the jury. "Generally speaking, the question whether a person employed is a clerk or servant depends on so many considerations that it should be left to the jury," *per* Bovill C.J. See *Negus*, *L. R.* 2 *C. C. R.* 34; 12 *Cox C. C.* 492; 42 *L. J. M. C.* 62 (1873), p. 381.

The words of 7–8 G. 4, 29, 47 (repealed), "clerk or servant, &c.," were virtually the same as in s. 68, p. 375; and under them it was always considered that there must be something more than a mere casual temporary employment for the particular occasion when the offence is committed. See p. 384.

General cases.] A female servant was within "servant or clerk, &c.," in 39 G. 3, 85 (repealed); *Smith*, *Russ. & Ry.* 267 (1814), p. 385; so likewise was an apprentice. *Mellish*, *Russ. & Ry.* 80 (1805).

"*Officer*," "*clerk*," "*servant*."] A director of a limited company who is also employed as a servant to collect moneys for them, is within the statute. *Stuart*, (1894) 1 *Q. B.* 310; 63 *L. J. M. C.* 63; *C. C. R.* The clerk or servant, *e.g.* "steward," of a corporation, although not appointed duly nor under the common seal, is a servant within 39 G. 3, 85, above. *Beacall* and *Wellings*, 1 *C. & P.* 457; 310, 454; 1 *Moo. C. C.* 15 (1824), p. 562; within 7–8 G. 4, 29, above; *Williams* v. *Stott*, 1 *Cr. & M.* 675 (1883), below. The clerk of a chapelry, who receives the sacrament money is not the servant either of the curate or of the chapel-wardens, or of the poor of the township, within 7–8 G. 4, 29, above. *Burton*, 1 *Moo. C. C.* 237 (1829). The paid master of a charity-school was held not to be the servant of the treasurer or committee for the purpose of receiving contributions, a totally different employment. *Nettleton*, 1 *Moo. C. C.* 259 (1830); cf. *Smith*, &c., p. 379. A person was chosen at a court leet held by Warwick Corporation, as chamberlain (unpaid) of certain commonable lands. The duties of the chamberlain were to collect monies from the commoners, &c., wherewith to keep the common in order, and to account for the balance at the end of the year to two aldermen. The Exchequer Court held that he was not "a servant, &c." See above, *Williams* v. *Stott*.

The accountant and treasurer of the overseers of the poor is a clerk within 39 G. 3, 85, above. *Squire*, *Russ. & Ry.* 349 (1818); 2 *Star. N. P. C.* 349; cf. *Tyers*, *Russ. & Ry.* 402 (1819), p. 388; *Ward*, *Gow* 168 (1819). The law on this subject is simplified by 12–13 V. 103, 15, which, after reciting that difficulty had arisen in cases of larceny or embezzlement as to the proper description of collectors of poor-rates and assistant-overseers, enacts: "In respect of any indictment or other criminal proceeding, every collector or assistant-overseer appointed under the authority of any order of the poor-law commissioners, or the poor-law board, shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified." Cf. *Carpenter*, *L. R.* 1 *C. C. R.* 29; 35 *L. J. M. C.* 169 (1866). A similar provision is contained in some local Acts. And although the mode of appointing assistant-overseers has been altered by the Local Government Act, 1894, they are still when appointed the servants of the inhabitants of the parish. *Smallman*, 1897, 1 *Q. B.* 4; 66 *L. J. Q. B.* 82; *C. C. R.* An under-bailiff of a county court is not the servant of the high-bailiff, though employed by him to make levies under the process of the court (but of the Registrar). *Glover*, *L. & C.* 466; 33 *L. J. M. C.* 169 (1864), p. 384. But cf. *Parsons*, p. 384.

In *Tongue*, 30 *L. J. M. C.* 49 (1860); *C. C. R.*, p. 384, the paid secretary of a money club was held to be within 7–8 G. 4, 29.

The treasurer of a registered friendly society cannot be indicted for embezzlement, because he is an accountable officer, not a servant. By 18–9 V. 63 (repealed), the Friendly Societies Act, the monies of the society were vested in trustees. The treasurer received no salary, and had to give security upon which the trustees were empowered to sue. He had to account to the trustees when required, and to pay over the balance. *Tyree*, *L. R.* 1 *C. C. R.* 177; 38 *L. J. M. C.* 58; 19 *L. T.* 657; 17 *W. R.* 334; 11 *Cox C. C.* 241 (1869): conviction quashed.

Servant of illegal society.] Where a society, in consequence of administering to its members an unlawful oath (p. 666), was an unlawful combination, it was held that a person charged with embezzlement as clerk, &c., could not be convicted. *Hunt*, 8 *C. & P.* 642 (1838). And see *Milligan* v. *Wedge*, p. 380. But where a society is legal, though some of its rules are void as being in restraint of trade, *e.g.* a trade union (even before the Trade Union Acts), a servant may be convicted of embezzlement. *Stainer*, *L. R.* 1 *C. C. R.* 230; 39 *L. J. M. C.* 54; 18 *W. R.* 439; 11 *Cox C. C.* 483 (1870); *Tankard*, 1894, 1 *Q. B.* 548; 63 *L. J. M. C.* 61; 70 *L. T.* 42; 42 *W. R.* 350; 58 *J. P.* 300; 17 *Cox C. C.* 719; 10 *R.* 149; *C. C. R.*; cf. p. 554. As to trade unions, see *Trade Union Code* in Index.

Employed for single purpose or act.] The prisoner was a carrier whose *only* employment was to carry unsewed gloves from a manufacturer at A. to sewers who resided at B., to carry them back when sewed, and to receive the money for the work and pay it to the glove sewers, deducting his charge. On several occasions he appropriated the sewers' money. It was held that he was not the servant of the sewers so as to be an embezzler; his offence was a breach of trust, as he was a mere bailee of the money. *Cobbs*, *Dears. & P. C. C.* 445; 24 *L. J. M. C.* 63 (1855). Where the relation of master and servant arises, a majority of the judges held that a sum was embezzled though it was obtained in the conduct of a single transaction out of the ordinary course of service. *Smith*, *R. & R.* 516; 1 *Lew.* 86 (1823), p. 384;

Tongue, p. 379, and *Spencer*, *R. & R.* 299 (1815), p. 384; cf. *Nettleton*, p. 378. Note that the words "by virtue of his employment" are omitted in s. 68, p. 375. See p. 384. But where the prisoner's main employment was to get orders on commission, and his employer himself got an order and asked the prisoner to collect the money, which he did and appropriated it, it was ruled that the prisoner was a mere volunteer. *Mayle*, 11 *Cox C. C.* 150 (1868).

When a drover, acting as such from time to time, but not serving in any other way, was ordered to drive the cattle to a purchaser and receive the money, which he did, and appropriated it, the judges, overruling the recorder who wished to follow *Nettleton*, p. 378, were unanimously of opinion that he was a servant within the meaning of the Act. *Hughes*, 1 *Moo. C. C.* 370 (1832), p. 348. But in *Milligan* v. *Wedge*, 12 *A. & E.* 737 (1840), where the buyer of a bullock employed a licensed drover (whom by the by-laws of the City he could alone employ) to drive it from Smithfield to his slaughter-house, Coleridge J. on a question as to the liability of the owner of the bullock for negligence in driving it outside the City, held that no relation of master and servant was created between him and the drover; though it was between the latter and the boy actually driving. But see *Clerk* and *Lindsell* on *Torts*, *3rd ed.*, p. 94.

Agent not servant.] The prosecutors, who were manure manufacturers, engaged the prisoner, who kept a refreshment house at B., to get orders which they supplied from their stores. The prisoner was to collect the money, and pay it at once to them, and send a weekly account, and was called agent for the B. district. Subsequently, the prosecutors sent large quantities of manure to stores at B., which were under the control of the prisoner, who took them in his own name and paid the rent, which they repaid him. The prisoner supplied manure from these stores, but the first-mentioned mode of supplying orders might, if convenient, have been used. The prisoner received a salary of 1*l.* per annum besides commission. It was held that the relation was one not of master and servant, but of principal and agent, and therefore the prisoner could not be guilty of embezzlement. *Walker, Dears. & B. C. C.* 600 (1858).

In *May*, 1 *L. & C.* 13; 30 *L. J. M. C.* 81 (1861), a company had told the prisoner that they would not appoint him as their agent, but that for all business he did for them they would pay him a commission. The court held that the prisoner could not be convicted of embezzlement under 7–8 G. 4, 29, for not accounting for moneys received, because he was "a commission agent and no more," and even if the prisoner had been a clerk or servant, he was not employed to receive money.

The prisoner was a member of a friendly society, and one of a joint committee appointed by his own and another society to manage an excursion. He sold the tickets, but did not pay over the money received to the proper person: he was to have no remuneration. It was held he was wrongly convicted, under s. 68, p. 375, of embezzlement. *Bren*, 1 *L. & C.* 346; 33 *L. J. M. C.* 59 (1863): p. 382. This appears, however, to have been decided partly upon the ground that the prisoner was a joint owner of the money; but see now 31–2 V. 116, 1, pp. 382, 524.

In *Bowers*, *L. R.* 1 *C. C. R.* 41; 35 *L. J. M. C.* 206; 10 *Cox C. C.* 250; 14 *L. T.* 671; 12 *Jur.* 550; 14 *W. R.* 803 (1866), however, it was held that a person who was employed to get orders for goods and to receive payment for them, but who was at liberty to get the orders and receive the money where and when he thought proper, being paid by a commission on the goods sold, was not a clerk or servant: he had first received a salary and a commission, but a subsequent agreement was come to by which the salary was stopped and the commission continued; and it was held that though

under the first agreement he was a servant, the state of things under the second—disposing of his time as he thought best—was inconsistent with that relation. *Negus*, p. 378. See also *Hall*, 13 *Cox C. C.* 49 (1875): *C. C. R.*; and *Harris*, 17 *Cox C. C.* 656 (1893), where the Court for C. C. R. followed *Bowers* with great reluctance.

Where the prosecutor said, "I paid the prisoner commission, but no salary; he was not obliged to be at my office at any particular time, excepting on Friday and Saturday to account for what money he had received for me; I did not give the prisoner directions to go to any particular place for orders; he went where he pleased," it was held that he was not a clerk or servant. *Marshall*, 11 *Cox C. C.* 490 (1870): *C. C. R.* But where the prisoner was bound by the terms of his agreement "diligently [to] employ himself in going from town to town . . . and soliciting orders," he was ruled by Lush J. to be a clerk or servant, saying: "If a person says to another carrying on an independent trade, 'If you can get any orders for me I will pay you a commission,' and that person receives money and applies it to his own use, . . . he is not a 'clerk or servant'; but if a man says 'I employ you, and will pay you, not by salary, but by commission,' then the person employed is a servant"—the test being, is there any control over the employed? *Turner*, 11 *Cox C. C.* 551 (1870).

A person who acts as a traveller for various mercantile houses, takes orders and receives moneys for them, and is paid by a commission, is a *clerk* within 39 G. 3, 85. The prisoner was convicted for embezzling the property of his employers. He was employed by them and other houses as a traveller, to take orders for goods, and to collect money for them from their customers. He did not live in the house with them. He was paid by a commission on all goods sold, whether he received the price or not, provided they proved good debts. He had also a commission upon all orders that came by letter, whether from him or not. He was not employed as a clerk in the counting-house, nor in any other way as a servant. The employers did not allow him anything at all for travelling expenses. The judges held the conviction for embezzling such money right. *Carr, Russ. & Ry.* 198 (1811): p. 382, affirmed in *Tite*, 1 *L. & C.* 29; 30 *L. J. M. C.* 142 (1861).

Shareholders, part owners and sharers in profits—sharers.] Cf. p. 553. In *Atkinson*, 2 *Moo. C. C.* 278 (1843), it was held by a majority of one that a clerk to a joint-stock banking company might be convicted of embezzling the money of the company, notwithstanding that he was a shareholder.

Payment by or out of profit does not prevent the payee being a servant. The prisoner was employed by a colliery owner to take his coals, sell them, and bring the money to him. The mode of paying him was by allowing him two-thirds of the price for which he sold the coal, above the cost price. It was objected that the money was the joint property of himself and the employer; but the judges held that the prisoner was a servant within 39 G. 3, 85. They said that the mode of paying him for his labour did not vary the nature of his employment, nor make him less a servant than if he had been paid so much a chaldron or a day; and as to the cost price at the colliery, that part of the total sum he received *solely* on his master's account as his servant, and by embezzling it he became guilty of larceny. *Hartley, Russ. & Ry.* 139 (1807). See also *Wortley*, below. The prisoner was employed by the prosecutors and was paid proportionately to what he did. It was part of his duty to receive orders, to take the necessary materials from his master's stock, to work them up and deliver them out, to receive the price and pay over the whole of it. In due course he received three shillings, for which he did not account: his share would have been one. A conviction for embezzling the three shillings was held good despite a

doubt whether this was not a fraudulent concealment of the order, and an embezzlement of the materials. *Hoggins*, *Russ. & Ry.* 145 (1809). A partner in a firm with the consent of the other partners, contracted to give his clerk one-third of his own share of the profits; it was held that the clerk might be convicted of embezzlement. *Holmes*, 2 *Lew. C. C.* 256 (1811); 2 *Russ. Cri.* 836.

The prisoner was a cashier and collector to commission agents. He was paid partly by salary and partly by a percentage on the profits, but was not to contribute to the losses, and had no control over the management of the business. It was held that he was a servant within 7–8 G. 4, 29, and not a partner as between himself and his employers, whatever might be the case as between himself and third parties. *M'Donald*, 1 *L. & C.* 85 (1861).

The prisoner entered into the following agreement with the prosecutor: "S. W. agrees to take charge of the glebe land of J. B. C., his wife undertaking the dairy, poultry, &c., at 15*s.* a week till Michaelmas, 1850; and afterwards at a salary of 25*l.* a year, and a third of the clear annual profit after all expenses of rent, rates, labour, and interest on capital, &c., are paid, on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given; at the expiration of which time the cottage to be vacated by S. W., who occupies it as bailiff in addition to his salary." It was held that this agreement created not a partnership but the relation of master and labourer, and that S. W. might be convicted of embezzlement. *Wortley*, 2 *Den. C. C.* 333; 21 *L. J. M. C.* 44 (1851).

A member of a certified friendly society, who was the paid secretary and acted as treasurer, but without being elected to that office, received, as treasurer, moneys due from the members, and gave correct receipts, but made false entries in the book kept by him as secretary, and appropriated some money. A conviction for embezzlement was held to be right. *Proud*, p. 77. But see *Marsh*, 3 *F. & F.* 523 (1862; an *unenrolled* club); cf. *Hall*, p. 383; and see also *Bren*, p. 380, where Martin B. said that in the case of *Proud* the property of the society was vested in trustees.

Many of the old difficulties as to partners, part-owners, &c., are now removed by 31–2 V. 116, 1, p. 524; see *Neat*, p. 554. A "co-partnership," however, at law denotes a society formed for the purpose of gain; and where the prisoner was indicted for embezzling the funds of a Young Men's Christian Association, having for its object the spiritual benefit of its members, and not the acquisition of gain, it was held that he could not be convicted as a co-partner, but it seems he might have been as a joint "beneficial owner." *Robson*, 16 *Q. B. D.* 137; 55 *L. J. M. C.* 55; 15 *Cox C. C.* 772 (1888); *C. C. R.*, p. 554.

Persons employed by several.] In *Leech*, 3 *Stark.* 70 (1821), the prisoner was in the employment of B. and R. as their book-keeper; while in this situation he stole certain bank-notes, private property of B. Being indicted for embezzling the notes as the servant of B., it was objected that he was the servant of the partners and not of individuals; but Bayley J. held that he was the servant of each, and referred to *Carr*, p. 381, where it was held that "a traveller employed by several houses to receive money is the individual servant of each." In *Batty*, 2 *Moo. C. C.* 257 (1842), it was held that a person employed by A. B. to sell goods for him at certain wages might be convicted of embezzlement as the servant of A. B., though at the same time he was employed by other persons for other purposes.

A coachman employed by one proprietor of a coach to drive a certain part of the journey, and to receive and hand money over to him, may be guilty of embezzling the money of that proprietor, though when received by the latter it belongs to his partners and him. *White*, 8 *C. & P.* 742; 2 *Moo. C. C.* 91 (1839).

A railway station was maintained at the joint expense of four companies, and managed by a committee, who appointed and paid, amongst others, the prisoner, a delivery clerk. He appropriated a part of the amount paid to him for the carriage and delivery of a parcel: it was held that the prisoner might be indicted either as the servant of the four companies, or of the eight directors forming the committee. *Bayley, Dears. & B. C. C.* 121; 26 *L. J. M. C.* 4 (1856). See also *Carr*, and *Tite*, p. 381.

In whose employment.] Sometimes there is no doubt that the person indicted is a clerk or servant, or employed in that capacity, but it is difficult to say precisely who his employer is. On an indictment against the clerk of a savings bank, the judges held that he was properly described as clerk of the trustees, although he might in fact have been elected by the managers. *Jenson*, 1 *Moo. C. C.* 434 (1835), followed in *Hall*, 1 *Moo. C. C.* 474 (1836), where it was held that the secretary (and member) of an unenrolled society appointed by the society *generally*, might be described as the servant of the trustees. Cf. *Marsh*, p. 382. And the clerk of a friendly society, if appointed by the society or the trustees, may be described as the servant of the trustees. *Miller*, 2 *Moo. C. C.* 249 (1842). See 59–60 V. 25, 87.

In *Beaumont, Dears & B. C. C.* 270; 23 *L. J. M. C.* 54 (1854), it appeared that one W. had engaged with a railway company to find horses and carmen to deliver the company's coals, and that he or his carmen should deliver to the company all moneys received from customers. The prisoner was one of W.'s carmen. No account of money so received and paid was apparently kept between W. and the company. It was held by a majority that there was privity between the prisoner and the company, and that he was the agent of the company and not of W., and that the money was received by him on their account and not on the account of W., and that consequently an indictment against the prisoner, as the *servant* of W., could not be supported. A very similar case was that of *Thorpe, Dears. & B. C. C.* 562 (1858). The chief difference between the two appears to be that in the latter the master was liable to account to the railway company for the money received by his carmen; in the former not, and as the prisoner clearly "received the money . . . on account of his master" (p. 387), although "in the name of the company," the Court for C. C. R. unanimously thought he was a servant.

In *Foulkes, L. R.* 2 *C. C. R.* 150; 44 *L. J. M. C.* 65 (1875), the prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board, and there was no evidence that he received any salary from his father. The prisoner, acting for his father, received some money for the board, and appropriated a part of it. It was held, that there was evidence that the prisoner was "employed as a clerk or servant." As to *whose* servant a given person is, cf. *Quarman* v. *Burnett*, 6 *M. & W.* 499 (1840); *Jones* v. *Scullard*, 1898, 2 *Q. B.* 565; 67 *L. J. Q. B.* 895; 79 *L. T.* 386; 47 *W. R.* 303, and other cases cited *Clerk* and *Lindsell* on *Torts*, *3rd ed.*, pp. 94–5.

Persons in the Queen's service.] The prisoner, a constable, was, with the sanction of the treasury, employed as agent by the inspector of prisons, who was authorised to receive the contributions of parents towards the maintenance of their children committed to reformatory and industrial schools, to collect, &c., such contributions under 29–30 V. cc. 117, 118. Prisoner received and misappropriated such moneys, which were the property of the treasury. It

was held that the prisoner was, while so employed, in the public service of the Queen, and could be convicted of embezzlement under 24–5 V. 96, 70, p. 375. *Graham*, 13 *Cox C. C.* 57 (1875), *C. C. R.* But where the high bailiff of a county court duly appointed the prisoner a bailiff to assist him in his duties, it was held that the prisoner was not a person "employed in the public service of her Majesty" within that s., but that he was the servant of the high bailiff. *Parsons*, 16 *Cox C. C.* 498 (1888), discussing *Glover*, p. 379, and *Graham*, above; see p. 379.

"*For or in the name or on the account of his master.*"] In 24–5 V. 96, 68, p. 375, the words "by virtue of his employment" are omitted, although they occur in s. 70, *ib.*, with respect to persons in the public service and the police. These words "were advisedly omitted in order to enlarge the enactment, and get rid" of the following decisions: *Thorley*, 1 *Moo. C. C.* 353 (1832); *Mellish*, p. 378; *Snowley*, 4 *C. & P.* 390 (1830); *Crow*, 1 *Lew.* 88 (1823); *Hawtin*, p. 547; and others; *Greaves's Crim. Stat.*, p. 118. Cf. *Townsend*, p. 712.

It has, however, been held not to be necessary, even under 39 G. 3, 85, that the servant should have been acting in the ordinary course of his employment when he received the money, provided that he was employed by his master to receive the money on that particular occasion. The prisoner was employed to collect the tolls at a particular gate, which was all that he was hired to do; but on one occasion his master ordered him to receive the tolls of another gate, which the prisoner did, and embezzled them. See *Smith*, p. 379.

So, where a man was hired as a journeyman miller, and not as a clerk or accountant, or to collect money, but was in the habit of selling small quantities of meal on his master's account, and of receiving money for them, Richards C.B. held that 39 G. 3, 85, was intended to comprehend masters and servants of all kinds, "whether originally connected in any particular character and capacity or not." *Barker, Dow. & Ry. N. P. C.* 19 (1822).

Where the prisoner was intrusted to receive from porters such moneys as they had collected from customers in the course of the day, the receiving immediately from the customers, instead of through the porters, was held to be "by virtue of his employment." *Beechey, Russ. & Ry.* 319 (1817); *Spencer*, p. 380; *Hughes*, p. 380. In *Tongue*, p. 379, the Court for C. C. R. followed these cases. And see *Hastie*, 1 *L. & C.* 269; 32 *L. J. M. C.* 63 (1863).

Although it is no longer necessary to show that the money was received "by virtue of the employment," yet it is essential to show that the money was the master's property; and where a servant, contrary to express orders, and not for, or on account of his master, but by using his master's barge for his own advantage, earned freight-money, it was held that such money was not received by him on account of his master, and was not his master's property, and therefore his conviction for embezzlement was quashed. *Cullum*, *L. R.* 2 *C. C. R.* 28; 42 *L. J. M. C.* 64 (1873). In *Gale*, 2 *Q. B. D.* 141; 46 *L. J. M. C.* 134 (1876); *C. C. R.*, the prisoner's—a head manager's—duty was to indorse cheques and pay them to the cashier at the bank; but instead of doing so, he got a friend to give him cash for two cheques and then appropriated the money. He was charged with embezzlement, not of the cheques, but of the money, and it was held that he had received the money for and on account of his masters. In *Read*, 3 *Q. B. D.* 131; 47 *L. J. M. C.* 50 (1878); *C. C. R.*, below, and p. 428, a gamekeeper killed wild rabbits on his master's land without authority, and sold them; it was held that he could not embezzle them, as he did not receive them into possession "for or on account of his master."

Nature of embezzlement.] Embezzlement is only a species of larceny. It is in every respect a precisely similar crime to that which is committed by a servant who receives property from his master, and appropriates it. This is *larceny*, because the possession of the master continues in law until the wrongful appropriation by the servant takes place. The case which was held not to be larceny was that of a banker's clerk who received money from a customer and appropriated it, and the reason given was that, as the employer had never had possession of the money he had never been wrongfully deprived of the possession of it, which was a necessary ingredient in larceny. *Bazeley*, 2 *Leach* 835; 2 *East P. C.* 571 (1799); 2 *Russ. Cri.* 334, p. 547. The effect of 39 G. 3, 85, passed in consequence of this case, and of subsequent statutes is to make the master's possession commence from the moment that his property comes into the servant's hands, see s. 68, p. 375. See also *Read*, above.

Distinction between larceny and embezzlement.] It seems hardly necessary after 24–5 V. 96, 68, p. 375, to keep up the distinction between larceny and embezzlement, especially as, if the principle of the possession of the servant being the possession of the master had been interpreted with the same latitude in criminal as in civil cases—see *Pollock* and *Wright* on *Possession*, pp. 58–60—for which there seems to be no reason to the contrary, that statute would have been altogether unnecessary. By 24–5 V. 96, 72, p. 376, where a person is indicted for embezzlement, and the offence turns out to be larceny, he may be found guilty of larceny, and *vice versâ*. But this does not enable a jury—despite 14–15 V. 100, 13 (repealed 24–5 V. 95, 1)—to find a prisoner guilty on an indictment for larceny on facts which only prove embezzlement; *Gorbutt, Dears. & B. C. C.* 166; 26 *L. J. M. C.* 47 (1857), p. 557; so that even now the distinction must still be observed: see the last section. In *Masters*, pp. 203, 545, it was held that where money was received on account of his master by one clerk, and by him handed to another in due course of business, and the latter appropriated it, that this was embezzlement, as the master had clearly never had possession by the first servant any more than by the second. So where the servant was sent by his master to get change for a 5*l.* note, which he did, and then appropriated the change to his own use, it was held that as the master had never had possession of the change, this was embezzlement under 39 G. 3, 85, and not larceny at common law. *Sullens*, 1 *Moo. C. C.* 129 (1826), p. 547. Exactly the same was held where the prosecutors, suspecting the prisoner, desired a neighbour to go to their shop and purchase some articles, and pay for them with some marked money which they supplied; this was done, and the prisoner appropriated the money. The prisoner was indicted for and convicted of embezzlement, though here it was urged that the money in law had always been in the master's possession. *Headge, Russ. & Ry.* 160; 2 *Leach* 1033 (1809), followed in *Gill*, 1 *Dears. & P. C. C.* 289; 23 *L. J. M. C.* 50 (1854). Cf. *Grove*, p. 388. See also p. 557.

Proof of embezzlement.] The first possession being lawful, the act of embezzlement sometimes consists in a mere act of the mind without any overt or outward and visible trespass, as in many cases of larceny. That this intention of fraudulent appropriation has been formed has to be inferred from the conduct of the prisoner, or from his own admissions; cf. *Taylor*, p. 386; *Smith*, p. 378, in which the master had given his servant money to pay taxes which the collector had never received, was, if anything, a case of larceny, though the remarks of the judges were directed to embezzlement. It is clear that, as there stated, the bare non-application of money in the manner directed, or "default of payment," is not sufficient to

convict a person of embezzlement. For all that appeared in that case, the servant had never appropriated the money at all. The same remarks apply to *Hodgson*, p. 163, where it was admitted that the prisoner had made no false entry (in contrast with *Hall*, p. 388), and that he had charged himself in the books with all the moneys which he had received, but it was charged (under 7-8 G. 4, 29) that he had not sent on one amount to his employers; but, on the other hand, it is clearly settled that a prisoner, by making an admission in his account that he has received the money, does not thereby necessarily free himself from the charge of embezzlement, if there be other circumstances—as there were here—from which the jury may infer that the money was fraudulently appropriated. *Lister, Dears. & B. C. C.* 118 (1856); cf. *Grove* and *Jones*, p. 388. Any doubt on this point arises from not keeping clearly in view the distinction between the offence and the evidence of it. See *Guelder*, 30 *L. J. M. C.* 34 (1860); *C. C. R.* Cf. p. 387. Evidence may be given of other acts of embezzlement in order to show that a wilful embezzlement and not a mere mistake has been committed. See p. 85.

Venue—At what time the offence is committed.] There is sometimes difficulty in ascertaining the precise time when the embezzlement takes place, which is important as to venue. In general there can be no evidence of the act of embezzlement until the person who has received the money refuses to account, or falsely accounts, for it. Where the prisoner received the money in Shropshire, and told his master in Staffordshire that he had not received it, the question was, whether he was properly convicted in the former county. On a case reserved, the conviction was held right. Lawrence J. thought that embezzlement being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other judges were of opinion, that the indictment might be in Shropshire where the prisoner received the money, as well as in Staffordshire, where he *embezzled it*, by *not accounting for it to his master*; that the statute (39 G. 3. 85, repealed; *S. L. R.* 1861) having made receiving money and embezzling it a larceny, made the offence a felony where the property was first taken, and that the offender might, therefore, be indicted in that or in any other county into which he carried the property. *Hobson*, 1 *East P. C. Add.* xxiv.; *Russ. & Ry.* 56 (1803). The converse of this is the following case, where the doctrine, that the not accounting is the evidence of the embezzlement, was also laid down. The prisoner was indicted in Middlesex for embezzling. He received the money in Surrey, and returning into Middlesex, denied to his master the receipt of the money. L. Alvanley C.J., after referring to the last case, said, "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into Middlesex. . . . It is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars Bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the [above] statute, *until he is called upon by his master to account.* . . . This was the first act from which the jury could with certainty say, that the prisoner intended to embezzle the money . . . nor could the offence be complete *until he refused* to account to his master." *Taylor*, 3 *Bos. & Pul.* 596; 2 *Leach* 974; *Russ. & Ry.* 63 (1803). The prisoner was a travelling salesman, whose duty it was to go into Derbyshire every Monday to sell goods, and receive the money for them there, and return with it to his

master in Nottinghamshire every Saturday. He thus received two sums in Derbyshire, but never returned to render any account of them. Two months afterwards he was met by his master in Nottinghamshire, who asked him what he had done with the money, and the prisoner said he had spent it. It was held that he was rightly indicted in Nottinghamshire, there being some evidence to go to the jury of an embezzlement in that county, but chiefly on the ground of the not accounting. *Murdoch*, 2 *Den. C. C. R.* 298; 21 *L. J. M. C.* 22 (1851). Where there was evidence of a conversion in Yorkshire and of a letter sent by the prisoner to Middlesex, "indirectly or inferentially" denying the receipt of the money, the prisoner was held to have been rightly tried in Middlesex, where the offence was completed, though it was generally agreed he might have been tried in Yorkshire. The important question is, was a material part of the crime committed in Middlesex? *Per* Field J. *Rogers*, 3 *Q. B. D.* 28; 47 *L. J. M. C.* 11; 14 *Cox C. C.* 22 (1877); *C. C. R.* p. 425.

It is impossible to avoid seeing that these decisions are coloured with the error, that a denial of the receipt or an omission to account is necessary to constitute the crime of embezzlement, and that the distinction already adverted to, p. 386, between the offence and the evidence of it, is not always kept in view. *Davison*, p. 268, and see the dissenting judgment of Huddleston B. in *Rogers*. It is, however, only reasonable, where there is no other indication of the time at which the money was appropriated, to conclude that this act took place at the same time as the first indication of it, viz. the refusal to account, or the omission to do so at the proper time. As to falsification of accounts, see p. 426.

Where a claim of right is set up (though unfounded).] The prosecutors were owners of a vessel of which the prisoner was master. The vessel carried culm from Swansea to Plymouth, which weighed 215 tons at Plymouth, for which the prisoner received payment. When asked for his account by the owners, he delivered a statement acknowledging the delivery of 210 tons, and the receipt of freight for so much. Being asked whether this was all that he had received, he answered that there was a difference of five tons between the weighing at Swansea and Plymouth, and that he had retained the balance for his own use, according to a recognised custom between owners and captains in the course of business: there was no evidence of the alleged difference of weight, or of the custom. Cresswell J. held that this did not amount to embezzlement. "Embezzlement necessarily involved secrecy; the concealment, for instance, by the defendant of his having appropriated the money. If, instead of denying his appropriation, a defendant immediately owned it, alleging a right or an excuse for retaining the sum, no matter how frivolous the allegation, and although the fact itself on which the allegation rested were a mere falsification; as if, in the present case, it should turn out that there was no such difference as that asserted by the defendant between the tonnage . . . at Swansea and at Plymouth, or that there was no such custom as that set up," it would not amount to embezzlement whatever else it might be. *Norman*, *Carr. & M.* 501 (1842).

Absconding—evidence of embezzlement.] Where the prisoner was sent to receive money due to her master, and on receiving it went off to Ireland, Coleridge J. held that that was evidence from which the jury might infer that she intended to embezzle the money, and she was convicted. *Williams*, 7 *C. & P.* 331 (1836).

Particulars of the crime.] Where the prisoner receives several sums of money, and his accounts do not fix him with the embezzlement of any

particular one at a particular time, the crime is very difficult of proof. In *Hall, Russ. & Ry.* 463; 3 *Stark.* 671 (1821), the prisoner received on account of his masters 18*l.* in one-pound notes: he immediately entered in the books of his employers 12*l.* only as received, and accounted only for that sum. In the course of the same day he also received 104*l.* for them, and paid over 116*l.* odd. It was urged for the prisoner that this money might have included all the eighteen pound notes, and if so, he could not be said to have embezzled any of them. But a great majority of the judges held the conviction right, holding that from the time of making the false entry (cf. *Hodgson*, p. 386) it was an embezzlement. Abbott C.J. thought that the point should have been left to the jury.

It was at one time held that the indictment ought to set out specifically some article of the property embezzled, and that the evidence should support that statement. *Furneaux, Russ. & Ry.* 335 (1817); *Tyers*, p. 379. But by 24–5 V. 96, 71, set out, p. 375, that difficulty, as to money, &c., has been removed. But where an indictment alleged an embezzlement of money, and the evidence was that the prisoner had embezzled a cheque, but not that he had converted it into money, a conviction was quashed. *Keena, L. R.* 1 *C. C. R.* 113; 37 *L. J. M. C.* 43 (1868).

A banker's clerk admitted he had taken 900*l.* of the bank's, but whether he had first put it into a box or till, as was his duty, or had intercepted it from the customers could not be shown: there was no false entry: he was acquitted of larceny but convicted of embezzlement. It was urged that his admission only went to "deficiency of amount" (see p. 386); but a majority of the judges, after very considerable doubt, were of opinion that there was sufficient evidence to go to the jury of his having received certain moneys on a particular day, and for them to find he had embezzled the sum mentioned in the indictment. *Grove*, 7 *C. & P.* 635; 1 *Moo. C. C.* 447 (1835). But Alderson B. after stating that *Grove's* case proceeded more upon the particular facts than upon the law, said, "It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." *Jones*, 8 *C. & P.* 288 (1838). It was the duty of a clerk to receive money for his employer, and pay wages thereout, and to keep accounts and pay over balances. He entered his payments at 10*l.* too much, and two months after, in accounting with his employer, by this means made his balance 10*l.* too little, and paid it over accordingly. Williams J. held that he could not, on these facts, be convicted of embezzlement, without its being shown that he had received some particular sum on account of his employer, and had converted either the whole or part of it to his own use. *Chapman*, 1 *C. & K.* 119 (1843); and see *Wolstenholme*, 11 *Cox C. C.* 313 (1869).

There is still likely to be much difficulty on this point. Where a person is employed in the receipt and payment of money it is almost impossible to prove anything more than a deficiency in account, and if the words of Alderson B. in *Jones*, above, were to be taken in their strictest sense, it would be impossible ever to procure a conviction for embezzlement where there were running accounts between the parties. See Dr. Kenny, *Outlines of Crim. Law*, ch. 14, p. 234. Perhaps there has been some misapprehension of the principles of law here applicable. The first statute of embezzlement was passed to meet a particular case which was held not to be larceny, namely, the appropriation of money by a clerk received by him from a customer on account of his master, p. 385. Very strong arguments could be used to show that this was larceny at common law, the only difficulty that the judges had in the case referred to being about "the trespass," and they seemed timid about extending the doctrine of constructive possession (pp. 473, 545). But now

that that difficulty has been removed by the legislature, embezzlement ought to stand on precisely the same footing as larceny by a servant; if money pass from the master to the servant, and the servant, instead of applying it to the purposes indicated by the master, appropriates any part of it to his own use, he is guilty of larceny; and in the numberless cases which must have occurred of this kind no one has ever thought of objecting that the servant could not be convicted of larceny, because he either could not be shown to have received a particular sum or to have appropriated a part or the whole of *that particular* sum. And what difference can it make now that the possession of the servant is made the possession of the master in all cases, that the money was received not from the master, but from third persons on account of the master?

In *Moah, Dears. & P. C. C.* 626; 25 *L. J. M. C.* 66 (1856), under 2 W. 4, 4, 1 (repealed S. L. R. 1891), the prisoner was an officer of inland revenue, and he was allowed to retain in his hands a balance of 300*l.* According to his accounts sent in to the Board, there stood an admitted balance against him of more than 5,000*l.*, which he said he was not prepared to hand over, nor any part of it. He was then reminded that there was a sum of 300*l.* excise duties, which he had received at a particular place on the previous Monday (not, apparently, included in his accounts). He then handed over 281*l.* odd, and said that was all the money he had in the world: "he had spent the rest in an unfortunate speculation"—which may only have referred to the 300*l.* It was held that a conviction might be sustained for embezzling 300*l.*; as to the 5,000*l.*, the court thought it was doubtful, though inclining to the same view.

As to embezzling aggregate sums made up of smaller ones, see *Balls* and *Stephens*, p. 85, and cf. *Davison*, p. 268. In *Stephens* the evidence that the prisoner had issued certain tickets or had had the money for them was purely inferential, but this was held to justify a conviction.

Other particulars.] Though it is not necessary to state in the indictment from whom the money, &c., was received, the judge may order the prosecutor to furnish the prisoner with a particular of the charges. *Bootyman*, p. 163. Where three acts of embezzlement were stated in the indictment, the prisoner moved, upon affidavit, for an order directing the prosecutor to furnish a particular of the charges; notice of the motion had been given. Vaughan B. said, "I think the prosecutor ought at least to give the names of the persons from whom the sums of money are alleged to have been received, and, if the necessary information be refused, I will, on an affidavit of that fact, grant an order, and put off the trial." *Hodgson, ib.* See *Anon.*, 1 *Chit. Rep.* 698 (1819), where a particular was refused a defendant by the K. B. of "divers goods" for defrauding of which he was indicted, chiefly on the ground that an indictment for conspiracy is sometimes necessarily vague. Cf. p. 173, and p. 358.

Proof of the thing embezzled.] 24–5 V. 96, 71, p. 375, allows great latitude in the description of money or valuable securities in indictments; it is sufficient if any part of the money or valuable securities described in the indictment be proved to have been embezzled, *ib.* The same rules of description will apply to chattels as in larceny; see p. 522. See also the general rules applicable to descriptive averments, p. 74.

Proof of embezzlement by officers, &c., of the Banks of England and Ireland.] It was held that it was not sufficient, in order to bring prisoner within 15 G. 2, 13, 12 (repealed), that he should be an officer of the bank, and as such *have access* to a *cancelled* bank-note (which he had sold, merely

to show the Bank of England how easily it could be defrauded and to get a reward); it must appear also that he was *intrusted* with it, and, therefore, a conviction was wrong. *Bakewell, Russ. & Ry.* 35 (1802).

Where the prisoner was indicted under that section for embezzling "certain bills, commonly called exchequer bills," and it appeared that the bills had been signed by a person for the government not legally authorised to sign them, it was held that the prisoner could not be convicted. *Aslett*, 2 *Leach*, 954 (1803). The prisoner was again indicted, under the same section, for embezzling, &c., "certain effects" or securities of the bank, and being convicted, the judges were of opinion that these bills or papers were *effects* within the section; "for they were issued under the authority of government as valid bills, and the holder had a claim on the justice of government for payment." *Aslett, Russ. & Ry.* 67; 2 *Leach* 958; 1 *N. R.* 1 (1804). See now 24–5 V. 96, 1, p. 522.

EMBRACERY.

See p. 589.

ESCAPE.

See *Prison Breach*, p. 714, *Rescue*, p. 745; and p. 793.

An escape from custody on a criminal charge may be either with or without force, or with or without the consent of the officer or other custodian.

Proof of escape by the detained.] "All persons are bound to submit themselves to the judgment of law," and therefore, if any one, being in custody, "frees himself from it by any artifice . . . (he) is guilty of a high contempt, punishable with fine and imprisonment." 3 *Hawk. P. C.* Bk. 2, ch. 17, s. 5. And if by the consent or negligence of the gaoler the prison doors are opened, and the prisoner escape, or otherwise, without making use of any force or violence, he is guilty of a misdemeanor (only). *Ib.* Bk. 2, ch. 18, s. 9; 1 *Hale P. C.* 611; 1 *Russ. Cri.* 889.

Proof of the lawful custody.] "It must be proved that the party was in custody upon a criminal charge, otherwise the escape is not a criminal offence." 1*st ed.* of this work: founded, apparently, on 3 *Hawk.* Bk. 2, ch. 19, s. 3. Cf. 1 *Russ. Cri.* 890; but in *Allan, Carr. & M.* 295 (1841), it was held that to aid a person confined under the remand of the Commissioners for the Relief of Insolvent Debtors (and not on a criminal charge) to escape from custody, was a common law misdemeanor. See p. 745. The conviction may be proved in the manner provided by 14–15 V. 99, 13, p. 136.

Proof of escape suffered by an officer.] The officer must be a known officer of the law. Thus, where the constable of the Tower committed a prisoner to the house of a yeoman warder of the Tower, the latter was held not to be such an officer as the law took notice of, and that he could not therefore be guilty of a negligent escape; it was merely a breach of trust against the constable. *Hill* (1694): 2 *Burn's Justice*, 4, 30*th ed.* But "whoever *de facto* occupies the office of gaoler is liable to answer for such an escape, and it is no way material whether his title to such an office be legal or not." 3 *Hawk. P. C.* Bk. 2, ch. 19, s. 28, who also says, s. 29, it is the better opinion that the sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; and that either the sheriff or the bailiff may be charged for that escape. 1 *Hale, P. C.* 597; 1 *Russ. Cri.* 893. But this is opposed to the authority of L. Holt, who says that the sheriff is not answerable criminally but civilly for the acts of his bailiff. *Fell*, 1 *Salk.* 272; which, however, is contradicted by the report in 1 *L. Raym.* 424 (1689).

Proof of escape suffered by an officer—proof of arrest.] In case of a prosecution against an officer, it must appear that there was an actual arrest of the offender. Therefore, "where an officer, having a warrant to arrest a man, see him shut up in a house and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape." *Hawk. ib.* s. 1. In *Simpson* v. *Hill*, 1 *Esp.* 431

(1795), giving in charge to a constable who did not take into custody was held not to be imprisonment.

Arrest must be justifiable.] The arrest must be justifiable in order to render the escape criminal; "and it seems to be a good general rule that wherever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape." *Hawk. ib.* s. 2. A lawful imprisonment must also be continuing at the time of the escape; and, therefore, if an officer suffers a criminal who was acquitted and detained for his fees to escape, it is not punishable. *Ib.* s. 4. [The rest of the s. refers to gaol fees, abolished by 55 G. 3, 50; cf. p. 195.]

Voluntary escape.] It is not every act of releasing a prisoner that will render an officer subject to the penalties of voluntarily permitting an escape. The better opinion appears to be that the act must be done *malo animo*, with an intent to defeat the course of justice. Thus, "it seems agreed that a person who hath power to bail is guilty only of a negligent escape by bailing one who is not bailable; neither can I meet with any authority . . . to support the . . . opinion that the bailing of one who is not bailable, by one who hath no power to bail, must necessarily be esteemed a voluntary escape. . . . Also there are some cases wherein an officer has "knowingly given his prisoner more liberty than he ought to have had, as to go out of prison on promise of returning, &c. . . . and yet seems to have been only adjudged guilty of a negligent escape. . . . The judgment to be made of all offences of this kind must depend on the circumstances of the case, as the heinousness of this crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning," and the intention and motives of the officer, &c. *Hawk. ib.* s. 10; 1 *Russ. Cri.* 892.

Voluntary escape—retaking.] It is laid down in some books that after a voluntary escape the officer cannot retake the prisoner by force of his former warrant, for it was by the officer's consent. But if the prisoner return, and put himself again under the custody of the officer, the latter may lawfully detain him, and bring him before a justice in pursuance of the warrant. 2 *Burn's Justice, Escape*, s. 5, 30*th ed.*, citing *Dalt.* ch. 169; 3 *Hawk.* Bk. 2, ch. 13, s. 9, who, however, observes that the purport of the authorities seems to be no more than this, "that a gaoler who hath been fined for an escape shall not avoid the judgment of his fine by retaking the prisoner. But I do not see how it can be collected from hence that he cannot justify the retaking him." *Ib.* Bk. 2, ch. 19, s. 12.

Negligent escape.] "A negligent escape is where the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again before he hath lost the sight of him." *Dalt.* ch. 159, as cited 2 *Burn's Justice*, above, s. 4. Thus if a thief suddenly, and without the assent of the constable, hang or drown himself, this is a negligent escape. *Ib.* "If a prisoner for felony break the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it." 1 *Hale P. C.* 601. But upon this passage it has been remarked that it would be competent to a person charged with a negligent escape under such circumstances to show that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security. 1 *Russ. Cri.* 892–3.

Negligent escape—retaking.] Where a prisoner escapes through the negligence of the gaoler, but the latter makes such fresh pursuit as not to lose sight of him until he is retaken, this is said not to be an escape in law; but if he loses sight of him, and afterwards retakes him, the gaoler is liable to be punished criminally. The sheriff or gaoler, though he had no other means of retaking his prisoner, would not be justified in killing him in such a pursuit. 3 *Hawk. P. C.* Bk. 2, ch. 19, s. 13; 1 *Hale, P. C.* 602.

Escape from private custody.] The evidence upon an indictment against a private person, will in general be the same as on one against an officer. A private person may be guilty either of a voluntary or of a negligent escape where he has another lawfully in his custody. Even where he arrests merely on suspicion of felony, yet he is punishable if he suffer the prisoner to escape. 3 *Hawk.* Bk. 2, ch. 20, s. 2. And if in such case he deliver the prisoner to another private person, who permits the escape, both, it is said, are answerable. *Ib.* But if he deliver over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody there is an escape, he is not liable. *Ib.* s. 3; 1 *Russ. Cri.* 898.

Punishment.] A negligent escape in an officer is punishable now by a fine, at the discretion of the court. 3 *Hawk.* Bk. 2, c. 19, s. 31; 1 *Hale P. C.* 600.

A voluntary escape in an officer amounts to the same kind of offence, and is punishable in the same degree as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. But the officer cannot be thus punished until after the original delinquent has been found guilty or convicted; he may, however, before the conviction of the principal party, be fined and imprisoned for a misdemeanor. *Hawk. ib.* s. 26; 1 *Hale P. C.* 598, 599; 4 *Bl. Comm.* 130.

Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both. 3 *Hawk.* Bk. 2, ch. 20, s. 6.

As to escapes from reformatory and industrial schools, see 29–30 V. 117, 22; 118, 34; 57–8 V. 33, 2 (extended by 1 E. 7, 20, 15).

"It is not now the practice to indict a prisoner for escape before trial, since if he is retaken he can be sufficiently punished on conviction." Encyc. Laws, Eng.: *Escape.*

Aiding in escape.] By 28–9 V. 126, 37: "Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any person, conveys or causes to be conveyed into any prison any mask, dress, or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years." See p. 716. And see pp. 714, 744.

EXPLOSIVES, INJURY BY.

Blowing up dwelling-house to the danger of any one.] By 24–5 V. 97, 9: "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down or damage the whole or any part of any dwelling-house, any person being therein, or of any building whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned [see p. 198], and if a male under the age of sixteen years with or without whipping."

Blowing up building with intent to murder.] By 24–5 V. 100, 12: "Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent to commit murder, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life, or for any term not less than three years" (see p. 198).

Placing gunpowder, &c., near any building with intent to destroy.] By 24–5 V. 97, 10: "Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods, or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen and not less than three years [see p. 198], or to be imprisoned . . . and if a male under the age of sixteen years with or without whipping."

Placing gunpowder near any ship or vessel with intent to destroy it.] By 24–5 V. 97, 45: "Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any ship or vessel any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony." Punishment same as in s. 10.

Placing gunpowder near any ship or vessel with intent to do any bodily injury.] By 24–5 V. 100, 30: "Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony." Punishment same as in s. 10, above.

Injuries to person by gunpowder, &c.] By 24–5 V. 100, 28: "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony." Conclusion as in s. 9, above.

Sending or throwing explosive or dangerous substances.] By s. 29, "Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to, or cause to be taken or received by any person, any explosive substance, or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon, or otherwise apply to any person any corrosive fluid, or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony." Punishment same as in s. 28, above.

Making or having possession of gunpowder, &c.] By 24–5 V. 97, 54: "Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour . . . and if a male under the age of sixteen years with or without whipping."

There is a similar provision in 24–5 V. 100, 64.

See as to keeping large quantities of gunpowder or other explosive substances, p. 658.

Proof of malice.] As to malice against the owner of the property being unnecessary, see 24–5 V. 97, 58, p. 241.

Persons endangered within 24–5 V. 97, 9, p. 394.] It would seem that the endangering of life, to be within this s., must result from the damage done to the building particularised in the indictment, but it includes the case of persons outside the building whose lives are imperilled by anything proceeding from the damaged building. *McGrath*, 14 *Cox C. C.* 598 (1881). Endangering of life by damage done to other buildings not mentioned in the indictment which are injured by the explosion, is not evidence of the endangering of life alleged in the indictment, but evidence of the damage done to them is admissible for the purpose of showing the character of the explosion, the extent of the damage, and its tendency to injure the particular building. *Ib.*

Explosive substance.] It must be shown under s. 10, p. 394, that the substance thrown was in a condition to explode at the time it was thrown. The throwing of a bottle of gunpowder alone, which by itself would not explode, would not be within it. *Sheppard*, 11 *Cox C. C.* 302 (1868).

Explosives Act, 1875.] This being an Act "to amend the law with respect to manufacturing, keeping, selling, carrying, and importing gunpowder, nitroglycerine, and other explosive substances," p. 659, made various offences punishable by fine or imprisonment; by s. 91, such offences may be prosecuted by indictment; by s. 92, a person accused of any offence the penalty for which exceeds 100*l.*, may object to be tried summarily.

Explosive Substances Act, 1883.] By 46–7 V. 3, 2: "Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property, shall, whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for life,

or for any less term (not less than the minimum term allowed by law), or to imprisonment, with or without hard labour, for a term not exceeding two years" [p. 198].

3. "Any person who within or (being a subject of her Majesty) without her Majesty's dominions unlawfully and maliciously—

(*a*) Does any act with intent to cause by an explosive substance or conspires to cause by an explosive substance an explosion in the United Kingdom, of a nature likely to endanger life or to cause serious injury to property, or

(*b*) Makes, or has in his possession or under his control, any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom, shall, whether any explosion does or not take place, and whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for a term not exceeding twenty years, or to imprisonment, with or without hard labour, for a term not exceeding two years, and the explosive substance shall be forfeited."

4. (1) "Any person who makes, or knowingly has in his possession or under his control, any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it, or does not have it in his possession or under his control, for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to penal servitude for a term not exceeding fourteen years, or to imprisonment for a term not exceeding two years with or without hard labour, and the explosive substance shall be forfeited." If several persons unite in a common design for the manufacture of explosive substances each is responsible for the articles in the possession of the others. *Charles*, 17 *Cox C. C.* 499 (1892).

(2) "In any proceeding against any person for a crime under this section, such person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case." "Upon the application of the person so charged" must now be added, under 61–2 V. 36, 1*c*, and 6, pp. 830, 831; hence, practically, he or she can only be called for the defence.

S. 5 is set out *ante*, p. 158.

By s. 6 provision is made for inquiry by order of the Attorney-General, into offences under this Act before justices, and for the apprehension of absconding witnesses.

7. (1) "If any person is charged before a justice with any crime under this Act, no further proceeding shall be taken against such person without the consent of the Attorney-General, except such as the justice may think necessary by remand, or otherwise, to secure the safe custody of such person.

(2) In framing an indictment, the same criminal act may be charged in different counts as constituting different crimes under this Act, and upon the trial of any such indictment the prosecutor shall not be put to his election as to the count on which he must proceed.

(3) For all purposes of and incidental to arrest, trial and punishment, a crime for which a person is liable to be punished under this Act, when committed out of the United Kingdom, shall be deemed to have been committed in the place in which such person is apprehended or is in custody.

(4) This Act shall not exempt any person from any indictment or proceeding for a crime or offence which is punishable at common law, or by any Act of parliament other than this Act, but no person shall be punished twice for the same criminal act."

S. 8 provides for search and seizure of explosives.

9. "In this Act, unless the context otherwise requires, the expression 'explosive substance' shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement." Any part of a vessel which when filled with an explosive substance is adapted for causing an explosion is within this section. *Charles*, p. 396.

Injuries by persons in possession of property injured.] See 24–5 V. 97, 59, p. 241.

Form of indictment.] See 24–5 V. 97, 60, p. 241, and s. 7 (2), above.

EXTRADITABLE OFFENCES

hardly come within the scope of this work, but see p. 218. There is a summary of "the Practice in England" in *Clarke* on *Extradition*, *4th ed.* (1903), pp. 230–41.

FALSE COPIES OF RULES OF REGISTERED TRADE UNIONS, DELIVERING.

By 34–5 V. 31, 18: "If any person with intent to mislead or defraud gives to any member of a trade union registered under this Act, or to any person intending or applying to become a member of such trade union a copy of any rules or of any alterations or amendments of the same other than those respectively which exist for the time being, on the pretence that the same are the existing rules of such trade union, or that there are no other rules of such trade union; or if any person with the intent aforesaid gives a copy of any rules to any person on the pretence that such rules are the rules of a trade union registered under this Act which is not so registered, every person so offending shall be guilty of a misdemeanor."

By s. 19, 2, the description of any offence under this Act in the words of the Act shall be sufficient in law. A definition of Trade Union is given 39–40 V. 22, 16; the expression includes "a branch" under 6 E. 7, 47, 5 (2).

FALSE DECLARATIONS.

At elections—parliamentary.] By 6–7 V. 18, 81, 82, cf. 35–6 V. 33, 10, two questions only may be put to a person about to vote. See 2 *Rogers on Elections*, p. 111, 18*th ed.* Part of 6–7 V. 18, 81, is, "if any person shall wilfully make a false answer to either of the questions aforesaid, he shall be deemed guilty of a misdemeanor, and shall and may be indicted and punished accordingly."

Upon such an indictment under 2–3 W. 4, 45, 58 (repealed), the word "wilfully" should be construed in the same way as on one for perjury, and be supported by the same sort of evidence. *Ellis, Car. & M.* 564 (1842). On this s. see *Bowler, Ib.* 559 (1842); *Spalding*, 1 *ib.* 568 (1842); and *Lucy, ib.* 511 (1842). Cf. *Bent*, 1 *Den. C. C. R.* 157 (1845); and see p. 682.

By 46–7 V. 51, 33 (7), candidates or election agents knowingly making declarations required by that section falsely are indictable and punishable as for wilful and corrupt perjury, p. 676, and are also guilty of a "corrupt practice" within the meaning of the Act.

At elections—municipal.] Under 5–6 W. 4, 76 (repealed by 45–6 V. 50), it was held that an indictment charging that "the defendant falsely and fraudulently answered" questions (similar to those mentioned above), was bad for omitting the word "wilfully." *Bent*, above. See now 45–6 V. 50, 59. Falsely or fraudulently signing certain declarations under 41–2 V. 26, is made a misdemeanor by s. 25.

Before magistrates.] 5–6 W. 4, 62, 18, is: ". . . whereas it may be necessary and proper in many cases not herein specified to require confirmation of written instruments or allegations, or proof of debts or of the execution of deeds or other matters . . . it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorised to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this Act annexed; and if any declaration so made shall be false and untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor."

Erskine J. held in *Boynes*, 1 *C. & K.* 65 (1843), that the enacting words were not restrained by those in the preamble of this s., so as to exclude from the statute a declaration by a member of a benefit society that he had sustained a loss by an accidental fire, it being a rule that any full member was to be indemnified in such a case to the extent of 15*l.*, on making a declaration before a magistrate; the preamble, perhaps, included matters *eiusdem generis.*

On registration of births, deaths, and marriages.] 6–7 W. 4, 86, 41, ran: "Every person who shall wilfully make, or cause to be made for the purpose of being inserted in any register of *birth, death, or* marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty

of perjury." *Birth, death, or* here are repealed by s. 54 of 37–8 V. 88, of which s. 40 is:

"Any person who commits any of the following offences; that is to say:—

(1) Wilfully makes any false answer to any question put to him by a registrar relating to the particulars required to be registered concerning any birth or death, or wilfully gives to a registrar any false information concerning any birth or death, or the cause of any death; or,

(2) Wilfully makes any false certificate or declaration under or for the purposes of this Act, or forges or falsifies any such certificate or declaration, or any order under this Act, or, knowing any such certificate, declaration, or order to be false or forged, uses the same as true, or gives or sends the same as true to any person; or,

(3) Wilfully makes, gives, or uses any false statement or representation as to a child born alive having been still-born, or as to the body of a deceased person or a still-born child in any coffin, or falsely pretends that any child born alive was still-born; or

(4) Makes any false statement with intent to have the same entered in any register of births or deaths;

shall for each offence be liable on summary conviction to a penalty not exceeding ten pounds; and, on conviction on indictment, to fine . . . or to penal servitude for a term not exceeding seven years." (Omitted words repealed, S. L. R. No. 2 Act, 1893).

Cf. 24–5 V. 98, 36, pp. 451, 471.

To support an indictment under 6–7 W. 4, 86, 41, above, it is essential that the false statement should have been made wilfully and intentionally, and not by mistake only. *L. Dunboyne*, 3 *C. & K.* 1 (1850), *per* Campbell C.J. To constitute an offence under this s. it is not essential that the purpose for which the false declaration was made should have been effected. *Mason*, 2 *C. & K.* 622 (1848). An indictment under this s. charged that a clergyman had solemnised a marriage, and was about to register in duplicate the (false) particulars already supplied by prisoner to the clerk, and entered by him, which the prisoner repeated to the clergyman for the purpose of their being inserted in the register of marriage. After the ceremony the clergyman asked the prisoner if they were correct; he said they were, and the clergyman signed the register. It was held that the prisoner had been rightly convicted. *Brown*, 1 *Den. C. C. R.* 291; 17 *L. J. M. C.* 145 (1848). Upon such an indictment it is not necessary to prove that the marriage register book is the identical book directed to be furnished by the registrar-general under 6–7 W. 4, 86, 30.

It was a felony under 6–7 W. 4, 86, 43 (repealed by 24–5 V. 95), to cause the registrar to make a false entry of a birth, marriage, or death. *Mason*, above. Apparently, the distinction between s. 41 and s. 43 was that the former applied to "one or more particulars" and the latter to "an entire false entry." Thus, where a woman duly registered a birth giving particulars all false (except that a child had been born), it was held that this amounted to felony within s. 43, and was not merely the misdemeanor under s. 41, p. 399. *Dewitt*, 2 *C. & K.* 905 (1849).

Marriage with Foreigners Act, 1906.] By 6 E. 7, 40, 1, certain false oaths and representations as to the marriage of a British subject with a foreigner abroad are made perjury: if the offence is committed abroad the venue is wherever in the United Kingdom the offender may be.

Customs.] As to making false declarations, see 39–40 V. 36, 168; penalty one hundred pounds.

Bankruptcy.] As to false declarations, see 32–3 V. 62, 14, p. 262.

In other cases.] Misdemeanors are also created as to registration under the Pharmacy Act, 1868, 31–2 V. 121, 14; lunatics, 53–4 V. 5, 317 (prosecution only by order of Commissioners or Attorney-General, &c.), 318; under the

Capital Punishment Amendment Act, 31–2 V. 24, 9; under the Vaccination Act, 30–1 V. 84, 30 (false certificates); under the Pensions Commutation Act, 34–5 V. 36, 9; under the Lodgers' Goods Protection Act, 34–5 V. 79, 1; under the Land Transfer Act, 1875, 38–9 V. 87, 99 (p. 347), 100, 101; under the Dentists Act, 1878, 41–2 V. 33, 35; under the Burial Laws Amendment Act, 1880, 43–4 V. 41, 10; under the Coal Mines Regulation Act, 1887, 50–1 V. 58, 32; under the Merchant Shipping Act, 1894, 57–8 V. 60, 67; under the Midwives Act, 1902, 2 E. 7, 17; under the Trade Marks Act, 1905, 5 E. 7, 15, 66; under the Limited Partnerships Act, 1907, 7 E. 7, 24, 12; under the Patents Act, 1907, 7 E. 7, 29, 89; and in many other cases; *e.g.*, see p. 366.

As to soldiers, sailors, &c., see p. 402.

As to servants, p. 404.

As to moneylenders, p. 609.

FALSE PERSONATION.

At Common law.] "The bare fact of personating another though for the purpose of fraud," is no more than a cheat or a misdemeanor at common law. 2 *East P. C.* 1010; 2 *Russ. Cri.* 770. See p. 321. In most cases of this kind more than one are concerned in the offence, and the indictment is for conspiracy; very few cases are to be found of prosecutions at common law for false personation. But where the indictment merely charged that the prisoner personated one A. B., clerk to H. H., justice of the peace, with intent to extort money from several persons in order to procure their discharge from certain misdemeanors, for which they stood committed, the court refused to quash the indictment on motion, but put the defendant to demur. *Dupee*, 2 *Sess. Cas.* 11; 2 *East P. C.* 1010 (1726). "It might probably have occurred to the court, that this was something more than a bare endeavour to commit a fraud by means of a falsely personating another, for that it was an attempt to pollute . . . public justice." *East, ib.* Cf. p. 697.

Offence by statute.] In many statutes against forgery—one common form of which is, in fact, false personation—provisions are likewise contained against that offence, which in general is made felony, see, *e.g.* pp. 442–3, 454. Cf. p. 373.

Personating bail—acknowledging recovery, &c.] By 24–5 V. 98, 31: "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall in the name of any other person acknowledge any recognisance or bail, or any *cognovit actionem* [= "a defendant's written confession of an action brought against him, to which he has no available defence," *Wharton Law Lex.*] or judgment, or any deed, or other instrument, before any court, judge, or other person lawfully authorised in that behalf, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for any term not exceeding seven years and not less than three years . . ." (See p. 198.)

False personation of soldiers, seamen, &c.] The false personation of soldiers and seamen was made felony by several statutes. Those still in force are, with respect to soldiers: 7 G. 4, 16, 35, 38, p. 456; 2–3 W. 4, 53, 49; 44–5 V. 57, 36, and 58, 142; and with respect to sailors: 28–9 V. 124, 8, 9. Cf. 16–17 V. 69, 16, and 6 E. 7, 5 (Summary Jurisdiction). Cf. *Westhorpe* v. *Powley*, 20 *Cox C. C.* 747 (1904).

Where a statute had the words, "any officer," &c., "entitled, or supposed to be entitled," &c., it was held for such false personation there must be some evidence to show that there was some person of the name and character assumed, who was either entitled, or might, at least *primâ facie*, be entitled, to the prize-money in question. *Brown*, 2 *East P. C.* 1007 (1800). Where the prisoner was indicted for personating, &c., the name and character of Peter M'Cann, a seaman on board the *Tremendous*, and it appeared in evidence that there had been a seaman of the name of M'Carn on board the vessel, but no one of the name of M'Cann; the jury expressly finding that

he intended to personate M'Carn, the judges held the conviction wrong. *Tannet*, p. 75. Where an oath is involved, see p. 682.

The offence is the same, though the seaman personated was dead at the time the offence was committed, and no money was obtained. *Martin, Russ. & Ry.* 324 (1817); *Cramp, ib.* 327 (1817).

All persons present aiding and abetting a person in personating a seaman are guilty within 57 G. 3, 127 (repealed). *Pott, Russ. & Ry.* 353 (1818), where a woman came and asserted that a personater (convicted) was the real man.

On an indictment under 2–3 W. 4, 53, 49, against L. and B. for personating C., a soldier, it appeared that L. instigated B. to do so, to get certain prize-money. L.'s defence was that he had bought the claim from C., and this there was nothing to disprove. Lush J. directed the jury that if they believed that L. instigated B. to represent himself as C., and that B. knowingly and wilfully represented himself as C., then, whatever B.'s motive may have been, both were guilty. Even if B. believed L. was really C., or had C.'s authority to get the money, yet if he falsely represented *himself* to be C., though authorised by L. to do so, he would be guilty. *Lake, Bird*, 11 *Cox C. C.* 333 (1869): both guilty.

As to obtaining a police pension by false personation, &c., see 53–4 V. 45, 9.

False personation of voters.] By 35–6 V. 33, 24: "A person shall, for all purposes of the laws relating to parliamentary and municipal elections, be deemed to be guilty of the offence of personation, who at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead or of a fictitious person, or who, having voted once at any such election, applies at the same election for a ballot paper in his own name." See pp. 282, 285.

46–7 V. 51, 3, is set out p. 282.

46–7 V. 51, 6 (2) is set out p. 285. S. 24, above (partly repealed by 46–7 V. 51, sched. 5) goes on: "It shall be the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person at the election for which he is returning officer, and the costs and expenses of the prosecutor and the witnesses in such case, together with compensation for their trouble and loss of time, shall be allowed by the court in the same manner in which courts are empowered to allow the same in cases of felony.

The provisions of the Registration Acts specified [viz. 6-7 V. 18, 13–14 V. 69] in the Third Schedule to this Act, shall in England and Ireland respectively apply to personation under this Act, in the same manner as they apply to a person who knowingly personates and falsely assumes to vote in the name of another person as mentioned in the said Acts."

47–8 V. 70, 1, see p. 285, now makes personation, &c., at municipal elections in all respects a corrupt practice, or just as if it had been committed at a parliamentary election. As to extension of the Act, see p. 374.

Personating owners of real estate, &c.] 37–8 V. 36, 1, is: "If any person shall falsely and deceitfully personate any person, or the heir, executor or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony, and, upon conviction, shall be liable to be kept in penal servitude for life" (see p. 198).

2: "Nothing in this Act shall prevent any person from being proceeded

against and punished under any other Act, or at common law, in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law."

By s. 3, the offence is not triable at quarter sessions.

Personating owners of stocks, &c.] See 24–5 V. 98, 4, p. 443, 26–7 V. 73, 14 (India stock), 30–1 V. 131, 35—amended S. L. R. No. 2 Act, 1893—(ordinary shares, &c.), 33–4 V. 58, 4, p. 442—amended, *ib.*—(National Debt).

Falsely personating an officer of inland revenue for the purpose of obtaining admission to any house, or of doing or procuring to be done any act, or for any other unlawful purpose, is made a misdemeanor by 53–4 V. 21, 12.

Servants.] As to frauds with regard to their characters, see 32 G. 3, 56 (Summary Jurisdiction).

FALSE PRETENCES.

Obtaining money, &c., by false pretences.] Cf. pp. 321, 324. By 24–5 V. 96, 88, "Whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude," &c. (see p. 198). For the terms here, see p. 418.

No acquittal because the offence amounts to larceny.] "If, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." *Ib.* Cf. p. 70.

Form of indictment and evidence.] "Provided also, that it shall be sufficient in any indictment for obtaining, or attempting to obtain, any such property by false pretences to allege that the party accused did the act with intent to defraud, without alleging any intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." *Ib.* *Sowerby*, see p. 424.

Summary Jurisdiction.] Offences under this s. are in the same position as embezzlement, p. 376, by 62–3 V. 22, 1 and Sched.

Causing money, &c., to be delivered to another person.] By s. 89: "Whosoever shall by any false pretence cause or procure any money to be paid, or any chattel or valuable security to be delivered to any other person, for the use or benefit, or on account of the person making such false pretence, or of any other person with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security within the meaning of the last preceding section."

Inducing persons by fraud to execute deeds and other instruments.] By s. 90: "Whosoever with intent to defraud or injure any other person shall, by any false pretence, fraudulently cause or induce any other person to execute, make, accept, indorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into, or used, or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude," &c. (see p. 198). See p. 418.

Indictment for obtaining money, &c., by false pretences not to be preferred unless authorised.] See 22–3 V. 17, p. 160; and 30–1 V. 35, 1, p. 826.

Obtaining credit by false pretences.] Under the Debtors Act, 32–3 V. 62, 13, see pp. 262, 266–7.

Procuring the defilement of a woman by false pretences.] See 48–9 V. 69, 3, p. 722.

What constitutes a "false pretence."] Great difficulty has been experienced in deciding where to draw the line between the frauds which may be punished criminally under this statute and those which only give rise to civil remedies. On the one hand, the tendency of modern opinion and legislation has been, as far as possible, to make all frauds criminal. On the other hand, the necessity has been felt that the line which separates the criminal law should be clearly drawn. The consequence is, that there is some conflict between the decisions, as will appear from the following cases. These are arranged, as far as possible, under the following heads: 1. The act of obtaining the property. 2. The nature of the pretences used. 3. The nature of the property obtained. In reading these cases, it should be borne in mind that there is a distinction between holding that a sufficient false pretence has not been alleged in the indictment, and that a sufficient false pretence has not been proved. Many expressions of the courts, which are apparently contradictory, may be reconciled if this distinction be attended to.

1. *The "obtaining."*

Meaning of the word "obtain."] The property must be "obtained" by the prisoner. In *Kilham, L. R.* 1 *C. C. R.* 261; 39 *L. J. M. C.* 109; 11 *Cox C. C.* 561 (1870), p. 407, it was held that the obtaining under s. 88, p. 405, must be coupled with an intention to deprive the owner of his property, and not a mere intention to make use of the thing and return it.

Obtaining as a loan.] Very frequently chattels, moneys, or valuable securities are fraudulently obtained, but only by way of a loan. The result of the cases appears to be that it is immaterial whether the prosecutor regarded the matter as a loan or not, but there must be an intention in the mind of the prisoner to deprive the owner wholly of his property, and not a mere intention to make use of the thing obtained and then return it. The prisoner had accepted a bill drawn upon him by the prosecutor for 2,638*l.*, which he owed the latter. When the bill became due, the prosecutor asked him if he was prepared to pay it, and the prisoner said he had enough all but 300*l.*, which he expected to get from a friend. The prosecutor, who was not any longer the holder of the bill, expressed his willingness to advance the 300*l.* himself, and ultimately did so; but the prisoner, instead of taking up the bill, applied the 300*l.* to his own purposes, and suffered the bill to be dishonoured, and the prosecutor eventually had to pay it: at the time the prisoner obtained the money, he was in insolvent circumstances. For him it was contended that the representation was not a false pretence within the statute, "being a mere mis-statement, or at the worst a naked lie," and *Codrington*, below, was cited; and secondly, that the Act (7–8 G. 4, 29, 53 (repealed), very similar to s. 88, p. 405) did not extend to cases where the prosecutor had only lent, not parted with, the property in the goods or money. Patteson J. said, "The words of this Act are very general, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the 300*l.* from the prosecutor by a

deliberate falsehood, averring that he had all the funds required to take up the bill, except 300*l.*, when in fact he knew that he had not, and meaning all the time to apply the 300*l.* to his own purposes, and not to take up the bill, it appears to me that the jury ought to convict the prisoner. In *Codrington*, it does not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling. As to the money being advanced by the prosecutor only as a loan, the terms of the Act of parliament embrace every mode of obtaining money by false pretences, by loan as well as by transfer." The prisoner was acquitted. *Crossley*, 2 *Moo. & R.* 17; 2 *Law. C. C.* 164 (1837). The prisoner represented to the prosecutor, who lent him 80*l.*, that he had built a house worth 300*l.* on certain land, and deposited with the prosecutor a lease of the land as a security, and entered into a written agreement to execute a mortgage of the land: whereas, in fact, the house was built on other land adjoining, and had already been mortgaged by the defendant. It was held that the prisoner was properly convicted of obtaining by false pretences. *Burgon*, 25 *L. J. M. C.* 105 (1856), *C. C. R.* In *Codrington*, 1 *C. & P.* 661 (1825), the indictment stated that the defendant, by falsely pretending to the prosecutor that he was entitled to a reversionary interest in one-seventh share of a sum of money, obtained 29*l.* 3*s.* from him. It was proved that the prosecutor agreed to purchase the seventh part of an interest to which prisoner would be entitled on the death of a relation; and an assignment was accordingly prepared containing a covenant for title, and the money paid. A previous assignment of the same interest by the defendant to another person was then put in. It was held that this was not an indictable offence, but was only a breach of covenant for title, for which a civil action would lie: a decision which was much doubted apparently in *Adamson*, pp. 415, 419; see *per* L. Denman in *Kenrick*, pp. 357, 415.

A railway pass was obtained by false pretences. At the end of the journey it would have to be returned to the company. The court having held that it was "while in the hands of the party using it . . . an article of value" and a "chattel," within 7–8 G. 4, 29, above, held also that the fact that it was to be returned at the end of the journey did not affect the question. *Boulton*, 1 *Den. C. C. R.* 508; 19 *L. J. M. C.* 67; *T. & M.* 201; 3 *Cox C. C.* 576 (1849). "The reasons for this decision do not very clearly appear . . . the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied;" the Court, in *Kilham*, p. 406, which held where a man by false pretences obtained a horse on hire, and rode him for the day, and returned him in the evening, but never paid the hire, that, as he had no intention to deprive the owner of his property in the horse, or to appropriate it to himself, but only intended to obtain the use of it for a limited time, he could not be convicted of obtaining the horse by false pretences. Had he meant to ride away with the horse altogether which he fraudulently pretended to hire, that would have been an obtaining by false pretences, and also a larceny. See pp. 409, 547.

Result of the false pretence.] The obtaining must be the result (see *Butcher*, p. 423) of the false pretences, and must not be too remotely connected with them. In *Ady*, 7 *C. & P.* 140 (1835), under 7–8 G. 4, 29, p. 406, an endeavour was made to show that the prosecutor parted with his money with a full knowledge that the pretence was false and to entrap prisoner. Patteson J. said, if the defendant did obtain the money by false pretences, and knew them to be false at the time, it did not signify whether it was intended to entrap him or not. But according to subsequent cases the defence set up would, if proved, have been good. Thus in *Mills, Dears. & B. C. C.* 205; 26 *L. J. M. C.* 79; 7 *Cox C. C.* 263 (1857), the

indictment alleged that money was obtained by prisoner by a false pretence that he had cut sixty-three fans of chaff, when in fact he had only cut forty-five fans. The prosecutor had seen the prisoner remove eighteen fans of chaff, from a heap for which he was not entitled to be paid, and place them with that for which he was entitled to be paid; but, notwithstanding, paid him the amount which he demanded. It was held that the conviction was wrong, as the money was not obtained by means of the false pretence. The prisoner might however be convicted of the attempt: as was a begging-letter writer who obtained money though the giver knew the statements in the letter were false. *Hensler*, 11 *Cox C. C.* 570 (1870), *C. C. R.* In *Gardner*, *Dears. & B. C. C.* 40; 7 *Cox C. C.* 136; 25 *L. J. M. C.* 100 (1856), p. 413, the prisoner represented himself to be and dressed as a naval officer, and by that false pretence at first obtained lodging. He subsequently and without any fresh pretence obtained board as well, and was indicted for obtaining articles of food by falsely pretending he was a naval officer; it was held that the obtaining of the food was too remotely the result of the false pretence. This case may be usefully compared with *Burton*, 16 *Cox C. C.* 62 (1886), *C. C. R.*, where the prisoner was received as a lodger without making any false pretence. After having lodged for a day or two, he falsely stated to his landlady that he had come from another lodging, where he had left some of his clothes, and asked for and obtained board as well as lodging, the landlady believing his statement as to his clothes. The jury having found the prisoner guilty of obtaining food by false pretences, the court upheld the conviction. In *Bryan*, 2 *F. & F.* 567 (1861), where a contract was obtained for board and lodging by false pretences, and under it prisoner subsequently obtained both and sixpence as a loan, it was held, following *Gardner*, above, "too remote to say that he obtained the goods or the money by the false pretences": it was the contract he so obtained. It may be that the indictment was only for the sixpence. See *Martin*, below; at any rate, the doctrine as to obtaining under a contract is overruled. *Ib.* The prisoner was charged with obtaining the prize in a swimming race by false pretences. He obtained his entry-ticket for the race by representing himself to be a member of a certain club, and by a forged letter from the secretary thereof (for which he was ultimately convicted); on the faith of this, which turned out to be false, he was allowed twenty seconds' start in the race and won the prize. It was held that the obtaining the prize was too remotely connected with the false pretence. *Larner*, 14 *Cox C. C.* 497 (1880); but see *Button*, below. In a case tried before Lindley J. a professional runner, by representing himself to be an amateur and assuming a false name, competed in a race exclusively for amateurs and was allowed a start, and won the race. He was convicted of *attempting* to obtain the prize by false pretences. *Dickenson* (reported, *Times*, 1879, July 25th, and 10*th ed.* of this work, p. 502). This was followed—and *Larner* disapproved—in *Button*, 1900, 2 *Q. B.* 597; 69 *L. J. Q. B.* 901; 64 *J. P.* 600; 19 *Cox C. C.* 568; *C. C. R.*, where the fraud was exactly of the same nature as in the last two cases (but the prisoner had not asked for the prize): it was distinctly held that the attempt here was not too remote from the false pretence: it follows, therefore, that the actual obtaining cannot be. It would seem, however, that in all such cases the question of remoteness is for the jury. See *Martin*, *L. R.* 1 *C. C. R.* 56; 36 *L. J. M. C.* 20; 10 *Cox C. C.* 383 (1867), where it was held that it is not necessary that the goods obtained should be in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence. See also *Welman*, pp. 78, 409.

Constructive obtaining.] See *Moseley*, p. 423, and *Butcher*, p. 423. Where

several persons are acting together, see *Young*, pp. 173, 410. Even where they are not all present, if they have assisted and concurred in the fraud, they are guilty of false pretences, for "in misdemeanors all parties are principals, whether present or not." *Moland*, 2 *Moo. C. C.* 276 (1843), p. 423. Cf. pp. 151, 158.

Causing money, &c., to be delivered to another person, for his or any one else's benefit.] See s. 89, p. 405. The defendant was indicted for a misdemeanor, in attempting to obtain moneys from L. & Co. by false pretences. He had a circular letter of credit for 210*l.*; by altering this figure to 5210*l.* he obtained large sums from a firm in St. Petersburg, who presented his drafts on L. & Co., a London firm, who were responsible for the 210*l.*, but who refused to honour them. The jury found that his intention was that L. & Co. should ultimately be cheated, but the Court for C. C. R., after two arguments, held that, even if the London firm had paid the drafts, there was no "obtaining" by the prisoner within 7–8 G. 4, 29, 53, p. 406, on which the judgments entirely proceeded, for it would have been no advantage to him as his act was complete at St. Petersburg, and for that he was not criminally responsible in London (although on this last point the court seems not to have been agreed. Cf. pp. 216, 564). *Garrett*, 6 *Cox C. C.* 260; 17 *J. P.* 774; *Dears. & P. C. C.* 232 (1853), p. 216. See *Greaves's Criminal Statutes*, p. 136; 2 *Russ. Cri.* 468 *n.*, where it is said that s. 89 was designed to meet cases like this.

Obtaining amounting to larceny, forgery, &c.] Sometimes the obtaining amounts to a taking sufficient to constitute larceny. See p. 529. See s. 88, p. 405. In all cases, therefore, where it is doubtful whether, in point of law, the offence is larceny or a misdemeanor, the safest course is to indict for a misdemeanor; for should it appear upon an indictment for the felony, that the offence is in fact that of obtaining under false pretences, the prisoner must be acquitted. If the facts proved amount to larceny, still the false pretences must be proved as laid, for it is the misdemeanor which is charged, and which must be proved. *Bulmer*, p. 424, where the facts showed a larceny. Cf. *Shott*, 3 *C. & K.* 206 (1851), p. 731, where it was held that 14–15 V. 100, 12, p. 70, only applied to merger of a misdemeanor in a felony, *e.g.* false pretences in forgery (as in s. 88, p. 405); it did not mean that the misdemeanor as laid in the indictment need not be proved; and as there the variance was of substance (the age of a child being laid as over ten and under twelve, but proved to be under ten), amendment (in a carnal knowledge case) was refused.

Before that, where goods were obtained by a forgery, the indictment must be for the forgery, and could not be for the obtaining by false pretences. *Evans*, 5 *C. & P.* 553 (1833); *Anderson*, 2 *Moo & R.* 469 (1843); cf. *Inder*, 1 *Den. C. C.* 325; 2 *C. & K.* 635 (1848), p. 470. As to the distinction between false pretences and larceny, see p. 557.

2. *The Nature of the Pretence.*

Existing and future facts: promises.] The false pretence laid must be of some bygone or existing fact. See *Welman*, pp. 78, 408, 421, *per* Jervis C.J. It is not expressly laid down there that the false pretence must not be of some future event or a mere dishonest promise, but it may well be implied, for that view was long held. Indeed, Dr. Kenny says: "A statement purely affecting the future will not suffice. For all future events are obviously matters of conjecture upon which every person must exercise his own judgment" (*Outlines*, ch. 15, p. 245); but, after pointing out that a

promise to pay for goods only founds a civil remedy, and citing *Lee*, below, he goes on, "This distinction betweeen present and future is, however, now being undermined by the principle that representations which do not expressly mention anything but the future may nevertheless imply a representation about the present; viz. a representation that the existing state of affairs is such that in the ordinary course of events, the future occurrence mentioned will take place." After citing *Giles*, below, and *Murphy*, p. 414, Dr. Kenny remarks, in drawing a cheque, "a document which on the face of it is only a command of a future act," there is implied a "statement" that such a state of things exists at present that the cheque *will* be honoured.

The "principle" here alluded to was materially advanced by some remarks (which, however, were distinctly *obiter*) of Wills J. in *Gordon*, p. 411, viz. "I find it difficult to see why an allegation as to the present existence of a state of mind *may* not be under some circumstances as much an allegation of an existing fact as an allegation with respect to anything else. . . . But I am very sensible that in such an inquiry there must always be a danger of confounding intention with a representation or a promise as to something future." With which Dr. Kenny (*ib.* p. 249) compares the dictum of L. Bowen, "the state of a man's mind is just as much a fact as the state of his digestion," *Edgington* v. *Fitzmaurice*, 29 *Ch. D.* 483 (1885), and adds, "But if such expressions of intention are to be recognised as sufficient pretences, it will be hard indeed to distinguish between them and mere promises which (as we have seen) are not sufficient to constitute an indictable pretence." Where four prisoners came to the prosecutor representing that they had betted that a certain man would run ten miles within one hour, and that they should probably win, the court were of opinion that the false pretences were within 30 G. 2, 24 (repealed). *Young*, pp. 173, 409, where the pretence laid was that of having actually made a bet (and not, as the headnotes state, of some future fact). Cf. p. 121.

Where the prisoner falsely pretended that he had got to and would pay his rent, it was held that this was not a false pretence of an existing fact. *Lee*, *L. & C.* 309 (1863).

Where the defendant pretended that she had the power to bring A.'s runaway husband "over hedges and ditches," it was held that this was not a mere promise, but was a false pretence within the statute. *Giles*, *L. & C.* 502; 34 *L. J. M. C.* 50; 10 *Cox C. C.* 44 (1865); cf. *Jessop*, p. 418. The prisoner obtained money by representing that a new directory which W. & Co. were getting up was about to be published, whereas in fact there was no such firm, and no such directory; it was held that this was a misrepresentation of an existing fact, though the prisoner asserted that he intended to bring out a directory under that name. *Speed*, 15 *Cox C. C.* 24 (1882), *C. C. R.*; *Taylor*, p. 352.

Where the prisoner falsely pretended to H. P., who kept Madame T.'s accounts, that she was to give 10s. to one Clark, as Madame T. was going to allow Clark 10s. a week, it was held by a majority that it did not with sufficient certainty appear from the averments that there was any false pretence, *i.e.* as to an existing fact. *Henshaw*, *L. & C.* 444; 33 *L. J. M. C.* 132 (1864).

So also a promise to pay for goods on delivery is not a false pretence of an existing fact. *Goodhall*, *Russ. & R.* 461 (1821), under 30 G. 2, 24, above; cf. *Dale*, p. 420.

Where the prisoner was charged with pretending that he would tell the prosecutor where his horses were, and so obtaining a sovereign, it was held that this was not a false pretence of an existing fact, and the prisoner ought to have been indicted for falsely pretending that he knew where they were. *Douglas*, 1 *Moo. C. C.* 462 (1836).

It is a question for the jury, whether the words used by the defendant fairly conveyed what is charged as the false pretence. "It is extremely essential that the judges should in all these cases be able clearly to point out and define what is the false pretence which will be sufficient in fact to support the indictment," *per* Pollock C.B. (*L. J.*). *Cooper*, 2 *Q. B. D.* 510; 46 *L. J. M. C.* 219; 36 *L. T. N. S.* 671 (1877), *C. C. R.*; *Randell*, 16 *Cox C. C.* 335 (1887), *C. C. R.* The prisoner was indicted for obtaining two milk churns by false pretences. A letter written by the prisoner to the prosecutor, in which he stated that the two churns did not require a name on them as they were only wanted for home use, was put to the prosecutor in his examination in chief, and he was asked what opinion he formed on it of the prisoner's position. He replied that he took him to be a dairyman or farmer. It was held that though the inference to be drawn from the letter was for the jury, yet the question was admissible to show what the prosecutor understood by it. *King*, p. 198.

A curious question whether a statement amounted to a false representation of an existing fact arose in *Powell*, 54 *L. J. M. C.* 26; 15 *Cox C. C.* 568 (1884); *C. C. R.*, p. 421. The defendant, who was agent to an insurance company and whose business it was to collect the annual premiums from persons insured in the company, collected from one V. in 1883 the annual premium then due. The defendant did not account to the company for this sum, but appropriated it and notified to the company that V. had failed to renew his policy, which was thereupon treated as lapsed. On April 7, 1884, the defendant called on V. for his next annual premium. V. was unable to pay the amount on that day, and requested the defendant to call later. The defendant came again on the 21st April, and received from V. part of the annual premium. It was for obtaining this amount that the defendant was indicted, by falsely pretending to V. that his policy was then in full force, that the current year's premium thereon was then due and payable, and that he was then authorised to receive the same. On the 21st April the days of grace within which the premium had to be paid had expired. V. was aware of this, but the defendant told him that the payment would be "effectual." Three judges held that the conviction was right, as prisoner's conduct on April 7 and 21 amounted to a representation that the policy was alive and he had authority to say so; but two were of a contrary opinion; they held that the company was bound by the receipt of their agent in 1883, and consequently that the policy did not then lapse, and the defendant made no false pretence in representing it to be in full force.

Falsely pretending that the prisoner was prepared to pay the prosecutors 100*l.* which meant that he had the money ready for them, on their signing a promissory note, by which means the prosecutors were induced to make a promissory note (and only got 60*l.*), is a false pretence of an existing fact, and *not* of a future event or a statement of his intention. *Gordon*, 23 *Q. B. D.* 354; 58 *L. J. M. C.* 117; 60 *L. T.* 872; 16 *Cox C. C.* 662; 53 *J. P.* 807 (1889); *C. C. R.*, pp. 410, 418.

Combination of false statements: tacit pretences or by conduct.] Very often the prisoner has made a series of false statements, some of which are false pretences of existing facts, and some promises or exaggerations. *Jennison*, p. 412.

Prosecutrix stated that she was a single woman, the prisoner had paid his addresses to her, and she had consented to marry him, she being ignorant that he was already married (as was proved); that, after promising to marry the prisoner, she changed her mind, and told him so, whereupon he threatened her with an action for breach of promise of marriage; that she, believing

that he could and would carry his threat into effect, and in order to induce him to refrain from doing so, paid him 100*l.*, on a written stipulation (produced at the trial) that, in consideration of such payment, he would forgo proceedings against her for her broken promise. On cross-examination she said that, but for the prisoner's threat, she would not have paid the money; and that she was induced by such threat to pay it; and she added that, had she known that the prisoner was a married man, she would not have paid the money. At the close of the case, L. Denman C.J. left it to the jury to say, whether the money was, in fact, obtained by the false pretence that the prisoner was single, and a verdict of "Guilty" was returned. After conference with Maule J., L. Denman said they were both clearly of opinion that there was evidence to go to the jury that the money was obtained by the false pretence that the prisoner was a single man, and in a position to marry the prosecutrix; and that Maule J. was further of opinion that there was also evidence of the money having been obtained by the false pretence of the prisoner, that he was entitled to maintain an action for breach of promise of marriage; and that such latter false pretence was sufficient within the statute. *Copeland* or *Martin*, *C. & M.* 516 (1842).

In *Johnston*, 2 *Moo. C. C.* 255 (1842), prisoner pretended to H. that he intended to marry her on the 8th day of February, that he had purchased a suit of clothes for the wedding, and that he wanted the sum of 4*l.* to pay for the same, whereby he obtained that sum from her; the banns were regularly published in church with his sanction, and after the publication of the banns, the prisoner met her at a shop by appointment, where he bought the suit of clothes for 4*l.*, which she had given him. Rolfe B. doubted, and the judges held the conviction wrong.

Where prisoner had falsely represented that he was a single man, that he would go to Liverpool to furnish a house with her money, and that he would return and marry the prosecutrix, it was held that the statement of his being an unmarried man was a false pretence of an existing fact, and "was essential, for without it he would not have obtained the money . . . although it is united with two promises, neither of which alone would have supported the conviction," and that the conviction was right. *Jennison*, *L. & C.* 157; 31 *L. J. M. C.* 147 (1862), p. 411.

The prisoner falsely told the prosecutrix that she kept a shop at N., and promised her that if she lent her—as she did—half a sovereign she should go home with her until she got a situation, and that the money would be there repaid: the prisoner immediately ran away. The jury found that prosecutrix parted with the money under the belief that the prisoner kept a shop at N., and that the former would get her money back. It was held that the prisoner was rightly convicted. *Fry*, *Dears. & B. C. C.* 449; 27 *L. J. M. C.* 68 (1858). So when the prisoner pretended that he had bought some skins and had paid ten shillings on them, and wanted 4*l.* 10s. to enable him to fetch them away; all which was false, but the prosecutrix, believing it to be true, lent him the money, which he kept; this was held to be obtaining money by false pretences. *West*, 27 *L. J. M. C.* 227; *Dears. & B. C. C.* 575 (1858), following *Fry*.

If the prisoner makes several statements which are true, and which influence the mind of the prosecutor, or if the prosecutor's mind is influenced by other circumstances, yet if the prisoner makes one false statement which materially affects the mind of the prosecutor, that is sufficient to support a conviction. Prisoner induced a brickmaker, after inspecting his ground, to make a contract to take it, he having specifically asserted that he had made good bricks, produced, out of it—which was false. The jury found that the buyer was not "solely" influenced by the pretences, but "they turned the balance, so to speak, in his mind." *English*, 12 *Cox C. C.* 171 (1872), p. 419. Prisoner

made some true statements and one false one, which made prosecutor jump to a wrong conclusion and give him goods: held that the statements were "divisible." *Lince, ib.* 451; 25 *L. T.* 570 (1873); *C. C. R.*, p. 419. See also *Hewgill, Dears. & P. C. C.* 315; 2 *Com. Law Rep.* 600; 18 *Jur.* 158 (1854), p. 419.

Cf. *Wickham*, 10 *A. & E.* 34 (1839), decided on purely technical grounds. See below, pp. 418, 419.

Pretence by conduct, acts not words.] Where a person at Oxford, who was not a member of the university, went to a shop dressed as one, and stated that he was one, and obtained goods; this was held a sufficient false pretence to satisfy the statute, even though "nothing had passed in words. It clearly is so by analogy to the cases in which offering in payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence without any words being used." *Barnard*, 7 *C. & P.* 784 (1837).

The indictment stated that the prisoner falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note which he then delivered to A. B., was a valuable security for 21*l.*; by means of which false pretences he obtained from A. B. 8*l.* 15*s.* It was held that as it did not appear but that the note was the prisoner's own note, or that he knew it to be worthless, there was no sufficient false pretence in that respect; and that, as the two pretences were to be taken together, the indictment was bad: and the judgment given upon it was reversed in error. *Wickham* v. *R.*, above. And it is said in *West*, p. 412, that if the jury had found that the money had been obtained by means of the false pretence of being a captain, the conviction would have been good. See also *Gardner*, p. 408.

As to false pretences in the course of a contract, see p. 415–6, and *Abbott*, p. 416.

Pretence by conduct—worthless cheques, notes, &c.] See *Kenny's Outlines*, at p. 246, cited p. 410.

The prisoner was indicted under 30 G. 2, 24, p. 410, for unlawfully pretending that he was the person named in a money order, and for obtaining the sum mentioned therein. It appeared that the prisoner had gone to the post-office, and inquired for letters for John *Story*, whereupon, by mistake, a letter for John *Storer*, containing the money order, was delivered to him. He then presented the order to A. B., who desired him to write his name upon it, which he did in his real name, John *Story*, and received the money. The terms of the letter clearly explained that the order could not have been intended for the prisoner, who at first denied that he had ever received the money, but afterwards admitted it. Chambre J. left it to the jury to find against the prisoner, if they were satisfied that he had, by his conduct, fraudulently assumed a character which did not belong to him, although he made no false assertions. The jury found him guilty. The judges held the conviction right, being of opinion, 1st, that the prisoner writing *his own name* on the order, did not amount to a forgery [cf. p. 457]; and 2ndly, that by presenting the order for payment, and signing it at the post-office, he was guilty of obtaining money by a false pretence within the statute. *Story, Russ. & Ry.* 81 (1805). See *Freeth, ib.* 127 (1807).

If a person with intent to defraud gives a cheque, which he knows will not be paid, upon a banker with whom he keeps no account, this is a false pretence within 30 G. 2, 24, p. 410. *Jackson*, 3 *Camp.* 370 (1813). See *Garratt*, p. 417. So where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain, a

majority of the judges held the conviction right. *Parker*, 7 *C. & P.* 825; 2 *Moo. C. C.* 1 (1837). So where the prisoner, who formerly had an account at a bank, drew cheques upon the bank and thereby obtained goods, but he knew that the account was virtually closed, and that his cheques would not be paid, it was held that there was evidence of the false pretence that the cheques were good and valid orders for the payment of their amount, and that the prisoner was rightly convicted. *Hazelton*, *L. R.* 2 *C. C. R.* 134; 44 *L. J. M. C.* 11 (1874), p. 421; and see also *Dowey*, 37 *L. J. M. C.* 52; 11 *Cox C. C.* 115 (1868); *C. C. R.*, p. 421 (note of bank bankrupt forty years before to prisoner's knowledge), so *Jarman*, below. Where prisoner was indicted for obtaining goods by false pretences by sending half bank-notes, and requesting goods to the value of the entire notes to be sent to her, and it was proved that she had not the corresponding half notes in her custody, having, in fact, sent them to other persons with similar requests, it was held by seven judges that she was rightly convicted, for, apart from her implied promise to send the other halves, she represented that she had them to send. *Murphy*, 13 *Cox C. C.* 298; *Ir. Rep.*, 10 *C. L.* 508 (1876); *C. C. R.* See 2 *Russ. Cri.* 484.

Fraudulently offering a "flash note" in payment, under a false pretence that it is a Bank of England note, is within 7–8 G. 4, 29, 53, p. 406; *Coulson*, 1 *Den. C. C.* 592; 19 *L. J. M. C.* 182; 4 *Cox C. C.* 227 (1850), p. 424; or the note of a bank which has stopped payment. *Jarman*, 14 *Cox C. C.* 111 (1878), *C. C. R.* See *Dowey*, above.

Compare *Jones*, p. 266.

The prisoner had dealt largely, and in an assumed name, in foreign bonds which had been stolen seven years before. It was held that there was evidence of false representation by conduct. *Pinter*, 17 *Cox C. C.* 497 (1891), *Q. B.*

False account of wages paid, work done, weight delivered, &c.] The prosecutors were clothiers, and the prisoner employed as shearman and superintendent had to keep an account of the persons employed, and the amount of their wages, &c. At the end of each week he was supplied with money to pay the different shearmen by a clerk, who advanced to him such sums as, according to a written note delivered to him by the prisoner, were enough. The prisoner was not authorised to draw money generally *on account*, but merely for the sums actually earned by the shearmen; and the clerk was not authorised to pay any sums, except such as he carried in in his note. The prisoner delivered to the clerk a note in this—the common—form: "9 Sept. 1796, 44*l.* 11*s.* 0*d.*" In a book in his handwriting, which it was his business to keep, were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed, so as to make out the sum of 44*l.* 11*s.* 0*d.* The prisoner being found guilty, the judges all agreed, that *if the false pretence created the credit*, the case was within 30 G. 2, 24, p. 410. They considered that the defendant would not have obtained the credit but for the false account he had delivered in; and, therefore, that he was properly convicted. *Witchell*, 2 *East P. C.* 830 (1798); pp. 415, 419.

Falsely pretending that a certain quantity of work has been done would be within the statute, but a mere overcharge for work would not. Some counts alleged that the prisoner "unlawfully, knowingly, and designedly," did falsely pretend that he having executed certain work, there was a certain sum of money due to him for that work, by means of which said false pretence the prisoner did then unlawfully obtain, &c., with intent thereby then to defraud; in other counts, the false pretences were stated to be that the prisoner did falsely pretend that the money was due and owing. The

defendant worked for the prosecutors as a journeyman, and the quantities of the work done by him during each week were entered in a book. The prices for the work so entered were placed in a column opposite to each quantity of work, and were added up on behalf of the prosecutors at the end of each week. The weekly totals of these prices were entered by them in this account book, and the amount was paid by them to him on the production by him of the book. After these weekly totals had been thus entered, the defendant had altered them into larger amounts, and then had procured payments of those larger amounts, which he then erased, restoring the figures of the original totals. After verdict of guilty had been recorded, it was objected that the indictment did not disclose any false pretence within 7–8 G. 4, 29, p. 406. Parke B.: "An indictment for false pretences must disclose a false pretence of an existing fact. In this case there is merely a fraudulent claim in respect of *quantum meruit* of the prisoner's work and labour; and the indictment would be supported by evidence that the prisoner made a false estimate of the value of his work. I do not think that is an indictable offence. . . . The false pretence consists of nothing more than what might be mere matter of opinion." *Oates*, *Dears. & P. C. C.* 459 (1855). By means of a false wage-sheet a foreman obtained a cheque from his master. It was informally drawn, and payment was refused by the bank. The prisoner consequently returned it to his master, who tore it up, and gave another for the same amount, which the prisoner cashed, appropriating the difference between that sum and what was really due for wages. It was held that the false pretence was a continuing one, and that the second cheque was obtained thereby equally with the first. *Greathead*, 14 *Cox C. C.* 108 (1878), *C. C. R.*

In *Eagleton*, pp. 259, 324, 419, who was found guilty of attempting to obtain, &c., by false pretences, Parke, B., delivering the judgment of the court, said, "This is not the case of the sale of goods by a false pretence of their weight; it is an attempt to obtain money by the false and fraudulent representation of an antecedent fact, viz. that a greater number of pounds of bread had been delivered than had been actually delivered, and that representation made with a view of obtaining as many sums of twopence as the number of pounds falsely pretended to have been furnished amount to. In this respect the case exactly resembles that of *Witchell* [414] where the prisoner obtained money by the false pretence that certain workmen . . . had earned more than they really had, and there since are cases of similar convictions where the prisoner falsely stated the quantity of work which he had done according to which he was to be paid; we therefore think that the indictment would be maintainable if the money had been obtained."

False statement as to quality, quantity, or weight in course of a contract - "puff."] 1. *As to quality.*—In *Kenrick*, pp. 357, 359, one of the false pretences was that certain horses were quiet to ride and drive. L. Denman said, in delivering the judgment of the court, "A general question seems here to be raised, whether, if money be obtained through the medium of a contract between the defendant and the party defrauded, the charge of false pretences can be maintained. Questions approaching this have been raised in the criminal courts. With some plausibility the thing obtained through the false pretence may be said to be the contract, and not the money which is paid in fulfilment of it, and which the party is probably by its terms liable to repay." After referring (*semble*) to *Adamson*, 2 *Moo. C. C.* 286; 1 *C. & K.* 192 (1843), p. 419, he concluded: "We think that in this case the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were false; and the money was obtained by their means." The prisoner kept a cheese stall, and sold to W. B. a quantity of

cheeses at the rate of 6½*d.* per lb. At the time the prisoner offered the cheese for sale, he bored two of them with an iron scoop, and produced a piece of cheese called "a taster" which prosecutor tasted. The cheese, however, which he so tasted, had not in fact been extracted from the cheese from which it was pretended, but was of another and superior kind, which the prisoner had privily inserted into the top of the scoop. The prosecutor would not have bought the cheese unless he had believed that the sample had been extracted from it. The cheese which had been so bought was delivered to the prosecutor, and he retained it. It was of a very inferior kind. The defence was that this was a sale and an indictment would not lie for mere "puffing." Ten judges held the conviction right, on the authority of *Kenrick*, p. 357, &c., above; *Abbott*, 1 *Den. C. C.* 273; 2 *C. & K.* 630; 2 *Cox C. C.* 430 (1847); see below. See also *Goss*, *Bell C. C.* 208; 29 *L. J. M. C.* 86; 6 *Jur.* (*N. S.*) 178; 1 *L. T.* 337; 8 *W. R.* 193; 8 *Cox C. C.* 262 (1860); where the facts were very similar.

The prisoner called at a pawnbroker's shop with a chain, on which he asked for an advance of ten shillings. The pawnbroker asked if the chain was silver; the prisoner replied that it was. The pawnbroker then examined the chain, and having tested it with an acid, which the chain withstood, lent the prisoner ten shillings on it as a pledge. He paid the money, relying on his own examination and test, and without placing any reliance on the statement of the prisoner. That and other chains were worth a farthing an ounce, being much less than ten shillings each. The recorder told the jury that, though they could not convict of the full offence, they might convict of an attempt, which they did. The judges upheld the conviction upon the authority of *Abbott*, above, Jervis C.J. apparently, being the only one who approved of that decision, which L. Campbell C.J. disapproved; Parke B. apparently, was very strong against the conviction, but did not give judgment. *Roebuck*, p. 84.

But where prisoner induced a pawnbroker—who relied solely on his statements—to advance him money on some silver-plated spoons, but of which he falsely exaggerated the quality in several respects (using technical trade terms), *e.g.* that they were "equal to" a well-known line, and they were not worth the money advanced on them, it was held by ten judges (*dissentiente* Willes J. and *dubitante* Bramwell J.), that this was not an indictable offence. *Bryan*, *Dears. & B. C. C.* 265; 26 *L. J. M. C.* 84; 3 *Jur.* (*N. S.*) 620; 5 *W. R.* 598; 7 *Cox C. C.* 312 (1857). Willes J. based his judgment on the words of 7–8 G. 4, 29, 53 (p. 406), and the intention of the legislature therein, and says, "If the matter was a simple commendation of the goods without any specific falsehood as to what they were; if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, and knew what they were, I apprehend it would easily have been disposed of by the jury, who were to pass an opinion upon the subject, acting as persons of common sense and knowledge of the world, and abstaining from coming to any conclusion as that praise of that kind should have the effect of making the party resorting to it, guilty of obtaining money by a false pretence. I say nothing on the effect of a simple exaggeration except that it appears to me that it would be a question for the jury, in each case, whether the matter was such ordinary praise of the goods (*dolus bonus*) as that a person ought not to be taken in by it, or whether it was a representation of a specific fact material to the contract, and intended to defraud, and [which] did defraud, and by which the money in question was obtained. . . . It is said that the effect of establishing a rule, such as that for which I contend, would be to interfere with trade; no doubt it would, and I think ought to, prevent trade being carried on in the way in which it is said to be carried on. . . . I am far from wishing to interfere

with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to fair cheapening on the other; those are things persons may expect to meet with in the ordinary and usual course of trade; but I cannot help thinking that people ought to be protected from any such acts, as those I have referred to being resorted to for the purpose and with intent to cheat or defraud purchasers of their money, or tradesmen of their goods. If the result of it would be to multiply prosecutions, that must be because we live in an age in which fraud is multiplied to a very great extent, and amongst others in this form. . . . If there be such a commerce as requires to be protected by the statute being limited in the mode proposed, it ought to be made honest and conform to the law, and not the law bent to the purpose of allowing fraudulent commerce to go on." Cf. pp. 422–3.

In *Ardley*, *L. R.* 1 *C. C. R.* 301; 40 *L. J. M. C.* 85; 24 *L. T.* 193; 19 *W. R.* 478; 12 *Cox C. C.* 23 (1871), *Bryan*, above, is distinguished, and it was pointed out that if the prisoner there had represented the spoons as being *in fact* "Elkington's" (instead of "equal to") when he knew they were not, he would have been rightly convicted; in *Ardley*, the jury had found that the prisoner represented a chain as in fact 15-carat gold when he knew that it was nothing of the sort; he was held rightly convicted. Where the prisoner was indicted for falsely pretending that he was in the tea trade in Leicester, and that he had good tea for sale, and that he did sell 16 packages which he falsely pretended were composed of good tea, and it was proved that he was not in the tea trade in Leicester, and that the mixture he sold was not tea at all, he was held to be rightly convicted. Kelly C.B. said, "To call tea good when it was not good might be mere commendation, and not the subject of a criminal prosecution." *Foster*, 2 *Q. B. D.* 301; 46 *L. J. M. C.* 128; 36 *L. T.* 34; 13 *Cox C. C.* 393 (1877); *C. C. R.* See also *Garratt*, 10 *T. L. R.* 167 (1893), *C. C. R.*; cf. p. 413.

A false representation of the value of a business (upon the sale of the goodwill) will not, it seems, support an indictment for obtaining money by false pretences nor will such a representation when made for the purpose of obtaining a deposit from a proposed assistant in the business. *Williamson*, 11 *Cox C. C.* 328; 21 *L. T.* 444 (1869). But where it is not a question of degree, and the fact is there is no business whatever, there is no doubt that the prisoner may be convicted. *Crab*, 18 *L. T.* 370; 16 *W. R.* 732; 11 *Cox C. C.* 85 (1868); *C. C. R.*

2. *As to quantity or weight.*]—The prisoner having agreed with the prosecutrix to sell and deliver coal at a certain price, delivered a load which he knew to be only 14 cwt., but which he falsely pretended to be 18 cwt., stating that it had been weighed at the colliery; and he produced a ticket which showed the weight to be 18 cwt., which ticket he said he had made out himself when the coal was weighed, and received the money for 18 cwt. It was held by twelve judges that he was properly convicted of obtaining by false pretences. *Sherwood*, *Dears. & B. C. C.* 251; 26 *L. J. M. C.* 8; 3 *Jur.* (*N. S.*) 547; 5 *W. R.* 577; 7 *Cox C. C.* 270 (1857).

The difference as to false weights between a mere lie and an indictable false pretence is thus stated by Bramwell B.: "If a man is selling an article, such as a load of coal, for a lump sum, and makes a false statement as to its weight or quantity, for the purpose of inducing the intended purchaser to complete the bargain, that is not a false pretence within the statute. But if he is *selling* it by quantity, and says there is a greater quantity than there really is, and thereby gets paid for a quantity of coal over and above the quantity delivered, I am quite satisfied he is indictable." *Ridgway*, 3 *F. & F.* 838 (1862); and see also *Lee*, *L. & C.* 418; 33 *L. J. M. C.* 129; 10 *L. T.* 348; 12 *W. R.* 750; 9 *Cox C. C.* 460 (1864).

Pretences obviously false.] Although the pretences are so obviously false that no reasonable person ought to be taken in by them, yet if in fact the property was obtained by means of the false pretences, it is no defence to say that the prosecutor ought not to have been deceived.

Where the secretary of an Oddfellows' Lodge told two members that each owed to the lodge more than he really did, and obtained (but did not pay over) the larger sums, a conviction under 7–8 G. 4, 29, 53, p. 406, was sustained, though the members knew the true facts. Erle J. said, "It was once thought [see 2 *East P. C.* 828–9] that the law was only for the protection of the strong and prudent; that notion has ceased to prevail." L. Campbell, "If a tradesman, knowing that a customer owes him nothing whatever, says that he owes him 5*l.* and gets the money, I think he comes within the statute. . . . I entirely agree with the observations of L. Denman in *Wickham* [p. 413], and think this case clearly within the statute." *Woolley*, 1 *Den. C. C.* 559; 3 *C. & K.* 98; *T. & M.* 279; 4 *New Sess. Cas.* 341; 19 *L. J. M. C.* 165; 14 *Jur.* 465; 4 *Cox C. C.* 193 (1850).

The prisoner fraudulently pretended that a genuine 1*l.* Irish bank-note was a 5*l.* note, and thereby obtained the full change for a 5*l.* note. It was held that he was properly convicted of obtaining money by false pretences, although the person to whom the note was passed could read, and upon the face of it it afforded ample means of detecting the fraud. *Jessop, Dears. & B. C. C.* 442; 27 *L. J. M. C.* 70; 4 *Jur.* (*N. S.*) 123; 6 *W. R.* 245; 7 *Cox C. C.* 399 (1858). Cf. *Giles*, p. 410.

3. *The Property Obtained.*

"*Chattel, money, or valuable security.*"] For "valuable security," see p. 523; and for "goods and chattels" and "valuable securities" generally, see pp. 802–3.

An unstamped cheque which to be of any use to the dishonest obtainer ought to be stamped, was held not to be a valuable security within 7–8 G. 4, 29, p. 406. *Yates*, 1 *Moo. C. C.* 170; *Carr. Suppl. Cr. L.* 333 (1827); to the same effect, *Bushworth*, p. 421 (*Starkie*). But see *Watts* (1850), p. 545, and cf. p. 803. G., a secretary to a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer to pay him a sum and charge it to the society. In fact he got the money from the treasurer's daughter, without his authority. It was held that this was a valuable security within 7–8 G. 4, 29, above, "order, &c., for the payment of money"; cf. p. 523. *Greenhalgh, Dears. and P. C. C.* 267; 2 *W. R.* 171; 6 *Cox C. C.* 257 (1854).

In 1857 it was held that no offence had been committed where a person by false pretences induced another to accept a bill of exchange, negotiated it, and fraudulently appropriated the proceeds. *Danger, Dears. & B. C. C.* 307; 26 *L. J. M. C.* 185; 7 *Cox C. C.* 303 (1857); but *per* L. Coleridge C.J. s. 90, p. 405, was expressly designed to meet this case: *Gordon*, p. 411, which was a conviction for inducing to make a promissory note, although it would not be of any value until it had been delivered into the prisoner's hands.

As to a "chattel," see *Boulton*, p. 407, and *Kilham*, pp. 406, 407.

As to property coming into existence after the false pretence, see *Martin*, p. 408. As to dogs, see *Robinson*, p. 369.

In order to induce the prosecutors, who were the defendant's bankers, to give him credit and honour his cheques to a much greater amount than they would have done, he delivered to them a bill drawn by him upon a person with whom he had no account, and which (the jury believed) had no chance of being paid. The defendant was convicted of obtaining money by false

pretences, but the judges were of opinion that the prisoner could not be said to have obtained any specific sum on the bill, though some one else had; all that was obtained was *credit on account*, and they therefore held the conviction wrong. *Wavell*, 1 *Moody C. C.* 224 (1829); but see now p. 266, and s. 89, p. 405, within which this case seems to be. See also *Garrett*, p. 409. In *Eagleton*, pp. 259, 324, 415, all that the prisoner obtained was credit in account between him and the prosecutor. The money was not actually due till after his conviction. See also *Witchell*, p. 414. But where a cheque on a closed and overdrawn account was given before goods were taken away this was obtaining goods, not credit, by false pretences. *Cosnett*, 20 *Cox C. C.* 6 (1901), *C. C. R.*

It is sufficient to prove that some part of the goods, &c., stated in the indictment, were obtained by the false pretences as in larceny, p. 71. See below, and *Kealey*, p. 420. Cf. *Leonard*, p. 422.

Proof of the false pretences as laid.] The false pretences must be proved exactly as laid, and must be clearly laid. *Butcher*, p. 423. Where the averment wast hat the defendant pretended that he had paid a certain sum into the Bank of England, but the evidence was that the words used were "the money has been paid at the bank," L. Ellenborough held that this assertion was very different from the other, and that the defendant must be acquitted. *Plestow*, 1 *Camp.* 494 (1808). See *per* Maule J. in *Hewgill*, p. 413. But where the indictment charged, that the defendant having in his custody a *certain parcel* to be delivered, &c., for which he was to charge 6*s.*, delivered a ticket for the sum of 9*s.* 10*d.* by means, &c., and it appeared that the parcel was a *basket* of fish, it was objected that this was a variance; but L. Ellenborough held that "a basket answered the general description of a parcel well enough." *Douglass*, 1 *Camp.* 212 (1808), p. 422.

As to *materiality* of any given pretence—although it may be shown that other matters, not laid in the indictment, operated in some measure upon the mind of the prosecutor—see *Hewgill*, *English*, *Lince*, all at p. 412. But the rule (p. 71), that it is sufficient to prove any part of the pretences laid, if the property were obtained thereby, must be confined to those cases where such part is a separate and independent pretence; for if false pretences are so connected together that one cannot be separated from the other, and the statement of one is insufficient in point of law, no judgment can be given on the other. *Wickham*, p. 413.

Parol evidence is admissible of the false pretences laid in the indictment, though a deed of partnership between the parties, stating that the consideration for parting with the money, was the general partnership (and not the special (invented) transaction on account of which the money passed), be also put in evidence for the prosecution, if such deed had been made to effect the fraud. *Adamson*, p. 415. The prisoner was indicted for falsely pretending that his wife was dead, with intent to defraud a benefit society. The stewards required a certificate of her death, and the prisoner produced to them a false one. It was held, that the actual false pretence was that of the wife's death, and not the feigned certificate, which was only evidence of the false pretence. *Dent*, 1 *C. & K.* 249 (1843). Where the false pretences are contained in a letter, and such letter has been proved to be lost, the prisoner may be convicted on parol evidence of its contents. *Chadwick*, 6 *C. & P.* 181 (1833).

The prisoner was indicted for obtaining a filly by the false pretence that he was a gentleman's servant, and had lived at Brecon, and had bought twenty horses at Brecon fair. He bought the filly of the prosecutor, and made him this statement, which was false, and also told him that he would come down to the Cross Keys and pay him. The prosecutor stated that he parted with his filly, because he believed that the prisoner would come to the Cross Keys

and pay him, and not because he believed that the prisoner was a gentleman's servant, &c. It was held by Coleridge J. that the prisoner must be acquitted. *Dale*, 7 *C. & P.* 352 (1836); 2 *Russ. Cri.* 517, p. 410.

A. was indicted for attempting, by false pretences made to "B. and others," to obtain goods, the property of the said B. and others, with intent, &c. It was proved that B. and others were partners, and that the pretences were made to B. alone, with intent to defraud the firm. Jervis C.J. was of opinion that the conviction was right: the averment of the pretences might be viewed in three ways: the words "B. and others" might either mean B. and the rest of the firm, in which case it would be important to consider whether a pretence made to one partner alone may be laid as made to the whole firm; or they may mean "B., and other persons," not belonging to the firm, in which case he thought averment of a pretence to A., B., and C. would be proved by evidence showing a pretence made to A. only; or—which he thought the correct view—the words "and others" may be rejected as surplusage. Erle J.: "I think that the allegation of a pretence to B. and others only admitted proof of a pretence to B. alone. It would perhaps have been different if the pretence had been laid as made to two persons, A. and B. by name; proof of a distinct several pretence to each must then have been regarded." [The reports of this last sentence are contradictory.] Martin B.: "I think that the pretence as laid means a pretence to the firm, and was correctly proved." *Kealey*, 2 *Den. C. C.* 68; 20 *L. J. M. C.* 57; *T. & M.* 405; 5 *Cox C. C.* 193 (1851), p. 419. Cf. p. 357.

Proof of falsity.] This must be clearly proved. The prisoner bought from the prosecutor a horse for 12*l.*, and tendered him notes to that amount on the Oundle bank. The prosecutor objected to receive these notes, but the prisoner assured him they were good notes. The prisoner was indicted for and convicted of obtaining the horse on false pretences, viz. by delivering to the prosecutor certain papers purporting to be promissory notes, well knowing them to be of no value, &c. It appeared in evidence that these notes had never been presented by the prosecutor at Oundle, or at Sir J. Esdaile's in London, where they were made payable. A witness stated, that he recollected a bank at Oundle stopping payment seven years before, but added that he knew nothing but what he saw in the papers, or heard from the people who had bills there. The notes appeared to have been exhibited "under a commission of bankrupt" against the Oundle Bank; the words importing the memorandum of exhibit had been attempted to be obliterated, but the names of the commissioners remained on each of them. The judges held the conviction wrong, as the evidence did not sufficiently prove that the notes were bad. "No opinion was given, whether this would have been an indictable fraud, if the evidence had been sufficient." *Flint*, *Russ. & Ry.* 460 (1821). The defendant was indicted for obtaining money by falsely pretending that a note purporting to be the promissory note of Coleman, Smith, and Morris, was a good and available note of C., S., and M. The defendant gave the note in payment: a witness proved that he had told the defendant that the bank from which the note issued had stopped payment. It was also proved that the bank was shut up, and that Coleman and Morris had become bankrupts; but it appeared that Smith, the third partner, had not. Gaselee J. said, that upon this evidence the prisoner must be acquitted, because, as it appeared that the note might ultimately be paid, it could not be said that the defendant was guilty of a fraud in passing it away. *Spencer*, 3 *C. & P.* 420 (1828); and see *Clark* (1837), *Dick. Q. S.*, *5th ed.*, *by Talfourd*, 315; *Evans*, 29 *L. J. M. C.* 20; *Bell C. C.* 187; 1 *L. T.* 108; 8 *Cox C. C.* 257 (1859); *Walne*, 11 *Cox C. C.* 647; 23 *L. T.* 748 (1870); *C. C. R.* See *per contra* —though the bankruptcy proceedings were not proved, and there was no

evidence as to what dividend (if any) had been paid—*Dowey* and *Hazelton*, p. 414.

With *Copeland* or *Martin*, p. 412, may be compared *Burnsides*. An indictment for false pretences alleged that the prisoner obtained goods by falsely pretending that "a person who lived in a large house down the street, and had a daughter married," had asked him to procure the goods. No person was named in the indictment, or appears to have been named by the prisoner as being the lady in question. A lady was called who answered the description given by the prisoner, and denied that she had ever asked the prisoner to procure any goods. It was objected that the false pretence was not sufficiently "negatived" by the evidence, but the court affirmed the conviction. *Burnsides*, *Bell C. C.* 282; 3 *L. T. N. S.* 311; 8 *Cox C. C.* 370; 30 *L. J. M. C.* 42 (1860). The court probably thought that the jury must have been satisfied that the lady called was from local circumstances sufficiently identified with the person alluded to by the prisoner. See also, as to tacit false pretences, *Powell*, p. 411, where demanding money as a premium on a life policy was held by some judges to be a representation that the policy was alive.

Evidence confined to the issue.] For the general rule, see p. 77. But sometimes a fraud is constructed out of a long series of transactions. If that is the case, then all may be given in evidence *upon their connection being shown*, as in *Welman*, pp. 78, 408, &c.

See also *Roebuck*, pp. 84, 416. In *Holt*, *Bell C. C.* 280; 3 *L. T. N. S.* 310; 8 *Cox C. C.* 411; 30 *L. J. M. C.* 111 (1860); 9 *W. R.* 74 (1800) p. 84; the defendant obtained money by falsely representing to a customer of his employer's that he was authorised to receive payment of a debt. Evidence that the prisoner had soon afterwards obtained money from another customer by a similar representation was admitted. But the Court for C. C. R. quashed the conviction on the ground that the evidence was inadmissible. This case seems to overrule the inference which might be drawn from *Roebuck*. See *Smith*, p. 82 and cases p. 83. Evidence of a *previous* obtaining of money by similar false pretences is clearly admissible in order to show guilty knowledge. *Francis*, pp. 1–2, 85, 479, &c.

Proof of intent to cheat or defraud.] Formerly it must appear that the defendant obtained the money, &c., with intent to cheat or defraud some person of the same; but see now s. 88, p. 405. Thus, where the charging part of an indictment did not allege an intent to cheat a certain person or any one, nor that the obtaining was effected "knowingly, &c." (although all this abundantly appeared in another part), the judges held the indictment was bad. *Rushworth*, *Russ. & Ry.* 317; on another point, *Stark.* 396 (1816), p. 418. Cf. *James*, p. 176.

So where a jury found "guilty of obtaining food and money by false pretences. But whether there was any intent to defraud, the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy," it was held that this amounted to a verdict of not guilty. *Gray*, 17 *Cox C. C.* 299 (1891), *C. C. R.*; *Naylor*, p. 422, distinguished.

The immediate and primary intent must be to cheat and defraud. Thus, where the prisoner received parochial relief, and on the overseer bidding him to go to work, he said he could not, because he had no shoes, upon which the overseer supplied him with a pair of shoes, whereas the prisoner had two pairs before; the judges held a conviction wrong as the pretence was not within 30 G. 2, 24, p. 410, his statement being "rather a false excuse for not working than a false pretence to obtain goods." *Wakeling*, *Russ. & Ry.* 504 (1823). A. owed B. a debt, of which B. could not obtain payment. C., a servant of B., went to A.'s wife, in A.'s absence, and got two sacks of

malt from her, saying that B. had bought them of A., which he knew to be false, and took the malt to his master, in order to enable him to pay himself; it was held that if C. did not intend to defraud A., but only to put it in his master's power to compel A. to pay him a just debt, he could not, despite the falsehood, be convicted of obtaining by false pretences. *Williams*, 7 *C. & P.* 354 (1836). The prisoner, on entering the service of a railway company, signed a book of rules, a copy of which was given to him; one of the rules was "no servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving, the prisoner knowingly delivered up, as part of his uniform, a great coat belonging to a fellow servant, and so obtained his wages. It was held that he was properly convicted of obtaining by false pretences. *Bull*, 13 *Cox C. C.* 608; 36 *L. T.* 376 (1877); *C. C. R.* It is no defence to a charge of obtaining by false pretences that at the time of falsely pretending and obtaining, the defendant intended (as the jury found) to pay the price when it should be in his power to do so. *Naylor*, *L. R.* 1 *C. C. R.* 4; 35 *L. J. M. C.* 61; 31 *L. T.* 381; 10 *Cox C. C.* 421 (1865), p. 421. The prisoner by falsely pretending to be an eminent surgeon induced the prosecutor to buy, for 5*s.*, a bottle containing something which he said would cure the eye of a child. The prosecutor gave him a sovereign, and received 15*s.* in change. It was held that this was a false pretence within 7–8 G. 4, 9, 53, p. 406, and that the intent was properly laid as obtaining a *sovereign* with intent to cheat him of five shillings "parcel of the value" thereof. *Bloomfield*, *Car. & M.* 537 (1842). But see the note to *Leonard*, 1 *Den. C. C. R.* 304 (1848), p. 419, where it is suggested that that (the second) count in *Bloomfield* was bad, as averring an obtaining of one thing with intent to cheat of another. In *Leonard*, the first count charged the prisoner with obtaining a cheque for 14*l.* 1*s.* 2*d.* by false pretences, with intent, &c., to defraud him of the same, but the evidence was that the prisoner only intended to defraud the prosecutor of 7*s.*, as the rest of the money was properly applied; it was held that the first count was proved. The second count was similar to the second count in *Bloomfield*; there were others, and the jury found prisoner guilty of the whole indictment, and the Court for C. C. R. recommended the recorder to pass a separate sentence upon all the counts except the first—seeming "to imply that those counts would be bad on error:" *note.*

Proof of the ownership of the property.] The property obtained must be proved to be the property of the person mentioned in the indictment. The prisoner brought a basket of fish, which he delivered to a lady's servant, with a false ticket, charging 3*s.* 4*d.* too much for carriage. The servant paid him the full amount and was repaid by his mistress. On it being objected, that at the time of payment this was not her money, L. Ellenborough said, that her subsequent repaying it did not make the money paid her money (as alleged in the indictment) at the time. She was not chargeable for more than was actually due for the carriage, and it depended upon her whether she should pay the overcharge. The servant, however, afterwards swore that, at the time of this transaction he had in his hands upwards of 9*s.* 10*d.* (the whole sum charged), belonging to her, which L. Ellenborough considered sufficient to sustain the averment. *Douglass*, p. 419.

A., B., and C. entered into partnership for the sale of lamps. It was afterwards agreed that A. should act as agent for the sale on commission, and that his expenses and commission should be paid from the partnership funds before the profits were divided. A. falsely pretended that he had received orders for 100 lamps, whereby he obtained from B. and C. 12*l.* 10*s.*, which would be the amount of his commission. It was held that, inasmuch as his charges were

to be payable out of the funds of the partnership, and would thus be a matter of account between him and his partners, his false statement was a misrepresentation respecting a partnership matter, and he could not be convicted. *Evans*, 32 *L. J. M. C.* 38; 9 *Cox C. C.* 238 (1862); *C. C. R.*, Pollock C.B. thought that the statute was not intended to apply to those who by fraudulent and knavish statements obtain money in the course of a real commercial transaction. Cf. pp. 415–7.

Pretence to one person—money obtained from another.] Indictment for obtaining money from A. The false pretence was made to A., who told the prisoner to go to his wife for the money. A.'s wife gave the money to the prisoner, A. not being present. The court confirmed a conviction. *Moseley*, *L. & C.* 92; 31 *L. J. M. C.* 24; 5 *L. T.* 328; 9 *Cox C. C.* 492 (1861), p. 408.

Pretence made through an innocent agent.] The prisoner sent a little boy to get J. B.'s wages. The boy innocently asked for them, and took them to the prisoner. The indictment charged the prisoner with obtaining the money from the prosecutor by falsely pretending to him, that he, the prisoner, had authority from J. B. to receive it. The second count charged the prisoner with obtaining money from the prosecutor and the boy by falsely pretending to the boy that he had authority from J. B. to receive it. It was held that both these counts were bad; but that a count, charging the prisoner with obtaining money from the prosecutor by falsely pretending to him that the boy had authority from J. B. to receive it, would have been good, because that in fact was the pretence by which the money was got. *Butcher*, 1 *Bell C. C.* 6; 28 *L. J. M. C.* 14; 8 *Cox C. C.* 77 (1858). See pp. 472–3.

Proof of all being principals.] See *Young*, pp. 173, 410, &c., and *Moland*, p. 409. See, too, *Kerrigan*, *L. & C.* 383; 33 *L. J. M. C.* 71; 9 *L. T.* 843; 9 *Cox C. C.* 441 (1864).

See, as to obtaining money by means of forged instruments, 24–5 V. 98, 38, p. 452.

Form of indictment.] See 24–5 V. 96, 88, p. 405. But note *James*, p. 176, where the intent to defraud might have been inferred from the general words of the indictment; and cf. *Rushworth*, p. 421.

The chief difficulty in framing indictments for obtaining by false pretences, arises on the statement of the false pretences themselves. The following are cases in which objections of a formal nature have been taken. An indictment alleged that "P. was possessed of a mare, and H. of a horse, and that H. and B. falsely pretended to P. that B. was possessed of the sum of 12*l.*, and that if P. would exchange his mare for H.'s horse, B. was willing to purchase the said horse of P. and give him 12*l.* for it"; whereas in truth and in fact B. was not then possessed of 12*l.* This indictment was held on demurrer to be insufficient, as not averring that the defendants *knew* that B. was not possessed of the 12*l.*: "falsely and fraudulently" pretending is not enough. *Henderson*, 2 *Mod. C. C.* 192; *Car. & M.* 321 (1841), below. In *Hamilton* v. *R.*, 9 *Q. B.* 271; 16 *L. J. M. C.* 9 (1846); also 1 *Cox C. C.* 244, the indictment charged that the defendant contriving and intending to cheat W., on a day named, did falsely pretend to W., that he, the defendant, then was a captain in the 5th regiment of Dragoon Guards, by means of which false pretences the defendant did obtain of W. a valuable security, the property of W., with intent to cheat W. of the same, whereas the defendant was not at the time of making such false pretence a captain in the said regiment, as he well knew. It was held in error, that, after conviction and judgment, this

was a good indictment, as to the allegation both of the intent and the mode of obtaining the money, and as to the denial of the truth of the pretence, and that it was unnecessary to aver that the security was unsatisfied, it being generally sufficient, after verdict, that the indictment, as in this case, followed the words of the statute (7–8 G. 4, 29, 53, p. 406) creating the offence. In *Bowen*, 13 *Q. B.* 790; 19 *L. J. M. C.* 65 (1849), where the indictment alleged that the defendant "did unlawfully falsely pretend, &c.," this was objected to, on a motion to arrest the judgment, on the same ground as that in *Henderson*, above; but the court thought that there it was not sufficiently noticed the word "knowingly" did not occur in the statute, and they held the indictment good after verdict. So *Gruby*, 1 *Cox C. C.* 249 (1845). An indictment stated that the defendant "did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from the Agricultural Company 22*l.* 10s., with intent thereby to cheat and defraud the company." It was objected that the money was not laid as the property of any one, and there was no misdemeanor stated of attempting which the prisoner could be convicted, and both objections were upheld. *Marsh*, 1 *Den. C. C.* 505; 19 *L. J. M. C.* 12 (1849). An indictment, charging that A. unlawfully did falsely pretend that a printed paper, a "flash note," was a good promissory note, is sufficient without setting out the paper, for that is only necessary where the court must see if the instrument falls within a particular description, which is not the case in false pretences. *Coulson*, p. 414.

The indictment must, however, contain averments stating to whom the false pretence was made and from whom the money was obtained or attempted to be obtained. *Sowerby*, 1894, 2 *Q. B.* 173; 63 *L. J. M. C.* 136; 17 *Cox C. C.* 767; *C. C. R.* It is sufficient, however, if it avers that the pretence was made to all subjects of her Majesty (*e.g.* by advertisement). *Silverlock*, p. 148.

Where the indictment charged that the prisoner falsely pretended he was the servant of *Hardman*, and in fact he did so pretend at first, but subsequently finding that the prosecutor confused *Hardman* and *Harding*, pretended that he was the servant of *Harding*, and the prosecutor was induced to part with his mare upon such second false pretence, it was held that the evidence did not support the indictment. *Bulmer*, *L. & C.* 476; 33 *L. J. M. C.* 171; 9 *Cox C. C.* 492 (1864), pp. 409, 557.

Description of property.] See pp. 74, 522; and cf. p. 557.

Obtaining bounty-money.] By the annual Army Acts (see p. 520) recruits obtaining enlistment-money improperly are punishable summarily before justices of the peace. Under the old "Mutiny" Acts it was made punishable in the same way as obtaining money by false pretences, to obtain money by making false representations as to any matters contained in the oaths and certificates mentioned there. See *Jessup*, 25 *L. J. M. C.* 54 (1856), *C. C. R.* There can be no doubt that obtaining bounty-money fraudulently is within the general law relating to false pretences.

Obtaining the property of building societies or industrial societies by false pretences is punishable on summary conviction or by indictment by 37–8 V. 42, 1; 56–7 V. 39, 64.

Venue.] The prisoner, residing in the county of M., wrote a begging letter to the prosecutor, who resided in the same county, but which letter was posted by an accomplice of the prisoner, in the county of K. The prosecutor, according to the request contained in the letter, sent a post-office order to the prisoner, addressed to him at G., in the county of K., which the accomplice having received, he delivered the proceeds to the prisoner in M.

It was held that the prisoner was rightly tried in M. *Jones*, 1 *Den. C. C.* 551 (1850). The prisoner wrote and posted in the county of A. a letter containing a false pretence, which the prosecutor received in the borough of B. The prosecutor, in answer, posted a letter in the borough of B., containing money, which the prisoner received in the county of A. It was held that, under 7 G. 4, 64, 12, p. 219, the prisoner might be tried in the borough. *Leech.* 25 *L. J. M. C.* 77; 1 *Dears. & P. C. C.* 642 (1856). See *Holmes*, 12 *Q. B. D.* 23; 53 *L. J. M. C.* 37; 15 *Cox C. C.* 343 (1883); *C. C. R.* (letter received in France); *Rogers*, p. 387. Where the prisoner was indicted for obtaining money by sending a false return of fees to the Treasury, posted in Northampton, where he swore the necessary affidavit, and received at Westminster, upon which a minute was drawn up directing the money to be paid, and it was paid at Westminster, it was held that the venue was rightly laid in Northamptonshire. *Cooke*, 1 *F. & F.* 64 (1858).

Where the prisoner obtained sheep by false pretences in Middlesex, and a few days afterwards removed them into Essex, where he was apprehended, his conviction was quashed, as the quarter sessions of Essex had no jurisdiction to try the offence. *Stanbury*, *L. & C.* 128; 31 *L. J. M. C.* 88; 9 *Cox C. C.* 94 (1862). See *Dawson*, p. 268.

FALSIFICATION OF ACCOUNTS.

See pp. 378, 454, 717, for statutes and *Credit in Account* in *Index.*

A rate-collector stated correctly accounts in his book showing "a balance in hand" due from the overseers to the inhabitants, but he could not produce the amount when called upon. Held, that as the words "in hand" did not make the entry false he could not be indicted under 38–9 V. 24, p. 378. *Williams,* 19 *Cox C. C.* 239 (1899), *C. C. R.* There must be, under s. 1, an intent to defraud found by the jury. Where a conviction was obtained by a direction that falsification was criminal even if made merely to conceal repayments of money lent in the business without the employer's knowledge —which was the defence—it was quashed. *Drewett,* 69 *J. P.* 37; 21 *T. L. R.* 164 (1904); *C. C. R.* An omission under s. 1 may be one not made by the defendant himself but due in the ordinary course of book-keeping to his omission to communicate. *Oliphant,* 1905, 2 *K. B.* 67; *C. C. R.* The account, &c., falsified must be the master's, and in his possession, and not the prisoner's own. *Palin,* 1906, 1 *K. B.* 7; *C. C. R.* In *Oliphant* the omission to furnish accounts was made in Paris, the defective papers being forwarded to England and copied there into a book, but it was held there was jurisdiction to try in London. Cf. p. 217.

FERÆ NATURÆ,

LARCENY OF ANIMALS.

"Of domestic animals, as sheep, oxen, horses, &c., or of domestic fowls, as hens, ducks, geese, &c., and of their eggs, larceny may be committed at common law, for they are under propriety, and serve for food." 1 *Hale P. C.* 511; so 1 *Hawk. P. C.* Bk. 1, ch. 33 (1st part), s. 43. The indictment should state the species of eggs, so that it may appear that they are the subject of larceny. *Cox*, 1 *C. & K.* 494 (1844); doubted in *Gallears*, 1 *Den. C. C. R.* 501; 19 *L. J. M. C.* 13 (1849), where "one hen" was held a sufficient description. And "it being felony to steal the animals themselves, it is also felony to steal the product of any of them, though taken from the living animals. Thus milking cows at pasture, and stealing the milk, was holden felony by all the judges." *Anon.* 2 *East P. C.* 617 (1769). So pulling the wool from a sheep's back. *Martin*, *ib.* 618; 1 *Leach* 171 (1777). "The stealing a stock of bees seems to be admitted to be felony." *Tibbs* v. *Smith*, *Thos. Raym.* 33 (1662); 2 *East P. C.* 607; 2 *Russ. Cri.* 247.

"Larceny cannot be committed of things that are *ferœ naturæ*, unreclaimed, and *nullius in bonis*, as of deer or conies, tho in a park or warren, fish in a river or pond, wild fowl, wild swans, pheasants" (*Hale*, *ib.*), "although any person may have an exclusive right *ratione loci aut privilegii*, to take them if he can in those places." 2 *East P. C.* 607; cf. 4 *Bl. Com.* 235, 6. So of swans, though marked, if they "range abroad out of the precincts or royalty of the owner, it is not felony to kill and take them, because they cannot be known to belong to any." *Hale*, *ib.* So of rooks in a rookery. See *Hannam* v. *Mockett*, 2 *B. & C.* 934; 4 *D. & R.* 518 (1824); but see 2 *Russ. Cri.*, at 249.

As to game, see p. 481.

Where animals *ferœ naturæ* "are dead, reclaimed and known to be so, or confined, and may serve for food, it is" larceny "even at common law" to take them. Thus "of deer so inclosed in a park . . . fish in a trunk or net [cf. p. 430], or, as it should seem, in any other inclosed place which is private property, and where they may be taken at the pleasure of the owner at any time; pheasants or partridges in a mew; young pidgeons, or old ones when shut up; young hawks in a nest, or even old ones, or falcons reclaimed, and known by the party to be so, larceny may be committed. The same as to peacocks." 2 *East P. C.* 607; young pheasants hatched by a hen in a coop in a field at a distance from the house are the subjects of larceny. *Cory*, 10 *Cox C. C.* 23 (1864); cf. 1 *Hale P. C.* 511. Tame, *i.e.* reclaimed, pigeons, although unconfined, with free access at their pleasure to the open air, are the subjects of larceny; Campbell C.J. saying, "We all think that tame pigeons may be the subject of larceny, although they have the opportunity of getting out and enjoying themselves in the open air." *Cheafor*, 2 *Den. C. C.* 361 (1851). See p. 699. So of tame pheasants. *Head*, 1 *F. & F.* 350 (1857). So of partridges three weeks old, and able to fly a little, reared in a coop since removed, so that the hen and they wandered freely about the owner's premises, but still returning to sleep under the hen's wings,

and unable to escape. *Shickle*, *L. R.* 1 *C. C. R.* 158; 38 *L. J. M. C.* 21 (1868).

Of the eggs of hawks or swans (not even, apparently) though reclaimed, larceny cannot be committed, the reason of which is said to be, that a less punishment, namely, fine and imprisoment, is appointed by statute for that offence. 2 *East P. C.* 607; 1 *Hawk.* Bk. 1, ch. 33 (pt. 1), s. 42; 2 *Russ. Cri.* 247. *A fortiori* of the eggs of pheasants and partridges and other birds *not* reclaimed; as the taking of the parents is not felony. Cf. 3 *Inst.* 109, and *Hawk. ib.* s. 43. Pheasants' eggs, if reduced into possession (which ought to be distinctly averred), clearly may be the subject of larceny. *Stride*, 24 *T. L. R.* 243 (1908): *C. C. R.*

When an animal *feræ naturæ* is killed larceny may be committed of its flesh, as in the case of wild deer, pheasants, partridges, &c., for the flesh or skins are the subject of property, p. 428. 3 *Inst.* 110. An indictment for stealing a dead animal should state that it was dead, otherwise it will be intended that it was stolen alive. *Edwards*, p. 74; cf. *Roe*, 11 *Cox C. C.* 554 (1870), *C. C. R.*, where the indictment alleged a dead partridge, but the proof was that prisoner picked it up alive but dying, and a conviction was quashed, as it had never been reduced into possession. So an indictment for stealing two turkeys was held not to be supported by proof of stealing two dead turkeys. *Halloway*, 1 *C. & P.* 127 (1823), pp. 74, 563. So where the prisoner was indicted for stealing a pheasant, value 40s., of the goods and chattels of H. S., all the judges, after much debate, agreed that the conviction was bad; for in the case of larceny of animals *feræ naturæ*, the indictment must show that they were either "dead, tame, or confined, otherwise they must be presumed to be in their original state, and it is not sufficient to add 'of the goods and chattels' of such a one." *Rough*, 2 *East P. C.* 607 (1779). But where the indictment was for receiving a stolen lamb, and it appeared that the animal had been killed before it was received by the prisoner, the judges held a conviction good, on the ground that it was immaterial as to the prisoner's offence whether the lamb was alive or dead, his offence and the punishment for it being in both cases the same, and 'lamb' being the right name in either case." *Puckering*, 1 *Moo. C. C.* 242; 1 *Lew. C. C.* 302 (1829). Rabbits or game upon being killed by a wrong-doer or trespasser become the property of the owner of the soil; *Blade* v. *Higgs*, 11 *H. L. C.* 621; 34 *L. J. C. P.* 286 (1865); but see *Townley*, *L. R.* 1 *C. C. R.* 315; 40 *L. J. M. C.* 144 (1870), p. 433. In *Petch*, 14 *Cox C. C.* 116 (1878), *C. C. R.*, the wrong-doer took the rabbits he trapped to another part of the same land, instead of to the head keeper, as was his duty, and placed them in a bag, with the intention of appropriating and carrying them away; a keeper observing him, went and nicked some of them to identify them. There was no abandonment of possession on prisoner's part, and he ultimately took them away; and the act of the keeper was not for the purpose of reducing them into the possession of the master. It was held that prisoner could not be convicted of larceny, following *Read*, p. 384. Cf. *Roe*, above.

There is, says Coke, a distinction "between such beasts as be *feræ naturæ*, and, being made tame, serve for pleasure only, and such as be made tame, and serve for food, &c." 3 *Inst.* 110. Thus, although the owner may have a lawful property in them, in respect of which he may maintain an action of trespass, yet there are some things of which, "in respect of the baseness of their nature," larceny cannot be committed, "as mastiffs, spaniels, grayhounds, bloodhounds," and other things, "wild by nature yet reclaimed by art or industry, as bears, foxes, ferrets, &c., or their whelps or calves, because, tho reclaimed, they serve not for food, but pleasure, and so differ from pheasants, swans, &c., made tame, which, tho wild by nature, serve for

food." 1 *Hale P. C.* 512; thus ferrets though tame and saleable; *Searing, Russ. & Ry.* 350 (1818), but they are animals "ordinarily kept in a state of confinement" within 24–5 V. 96, 21, 22, *per* Darling J., *Sherriff*, pp. 184, 186, 641. "Animals of a wild nature which are not fit for food are not the subject of larciny, although they be reduced into possession or reclaimed. This rule includes bears, foxes, apes, monkeys, polecats, cats and dogs, ferrets, thrushes, singing birds in general, parrots, squirrels, and animals kept merely for pleasure." 1*st Rep. Commissioners on Crim. Law* (1834), p. 22. The young of such animals are within this rule. *Ib.* p. 23.

See as to dogs, p. 369, and as to cattle, p. 318.

Fish in the sea] are reduced into possession of the owner of the smack as soon as they are taken, and a "skipper" who put into port and fraudulently sold the fish he had taken (outside territorial waters) was rightly convicted of larceny. *Mallison*, 20 *Cox C. C.* 204 (1902), *C. C. R.* Cf. pp. 430 and 545.

FISH,

TAKING OR DESTROYING.

As to fish in captivity, see *East*, p. 427. But it was no larceny to take fish "in a river, or other great water, wherein they are at their natural liberty," though it was "out of a trunk or pond," &c. 1 *Hawk. P. C.* Bk. 1, ch. 33, (pt. 1) s. 39; *East, ib.* 610. Cf. p. 429. By 24-5 V. 96, 24: "Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor, and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall, by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any such sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto." See *Jones* v. *Davies*, 20 *Cox C. C.*, 184 (1902).

Under this section, the *taking* may mean *catching* and not such a taking as constitutes larceny. See *Glover, Russ. & Ry.* 269 (1814), p. 483.

Under this section the jurisdiction of the justices is not ousted because the accused acted under a *bonâ fide* though mistaken notion of a right *which could not by any possibility exist* (*e.g.* of fishing in a non-navigable river), or because there was no *mens rea*, the accused having acted without criminal intent. *Hudson* v. *Macrae*, 4 *B. & S.* 585 (1863), p. 699.

A *bonâ fide* claim of right (*e.g.* to fish in a tidal navigable river fished by the public for forty years), involving a real question between the parties, will oust the jurisdiction of the justices, and if the justices decide that there is no such *bonâ fide* claim, the court will quash a conviction. *Stimpson* and *Peak*, 9 *Cox C. C.* 356; 4 *B. & S.* 301 (1863).

In 7 8 G. 4, 29, 38 (repealed), "adjoining" imported actual contact, and, therefore, ground separated from a house by a narrow walk and paling, wall, or gate was not within the meaning of that word, though it might have been within that of "belonging." *Hodges, M. & M.* 341 (1829), p. 795.

By 24–5 V. 96, 25: "If any person shall at any time be found fishing, against the provisions of this Act, the owner of the ground, water, or fishery where such offender shall be so found, his servant or any person authorised by him, may demand from such offender any rod, line, hook, net, or other implement for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, may seize and take the same from him, for the use of such owner: provided that any person angling, against the provisions of this Act, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, from whom any implement used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling."

By s. 26: "Whosoever shall steal any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny [p. 523]; and whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever within the limits of any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be deemed guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement; and it shall be sufficient in any indictment to describe either by name or otherwise, the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill; provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument or engine adapted for taking floating fish only."

By 31–2 V. 45, 51: "All oysters and mussels being in or on an oyster or mussel bed within the limits of a several oyster and mussel fishery granted by an order under this part of this Act, and all oysters being in or on any private oyster bed which is owned by any person independently of this Act, and is sufficiently marked out or sufficiently known as such, shall be the absolute property of the grantees, or of such owner, as the case may be, and in all courts of law and equity, and elsewhere, and for all purposes, civil or criminal, or other, shall be deemed to be in the actual possession of the grantees and such owner respectively."

By s. 52: "All oysters and mussels removed by any person from an oyster or mussel bed within the limits of any such several fishery, and all oysters removed by any person from any such private oyster bed, and not either sold in market overt or disposed of by or under the authority of the grantees or owner (as the case may be), shall be the absolute property of the grantees and owners respectively, and in all courts of law and equity, and elsewhere, and for all purposes, civil, criminal, or other, the absolute right to the possession thereof shall be deemed to be in the grantees and owners respectively."

By s. 55: "When two or more oyster or mussel beds or fisheries belonging to different proprietors are contiguous to each other, and any proceeding by indictment or otherwise is taken against any person for stealing oysters or mussels from any bed formed under an order made in pursuance of this part

of this Act, or for stealing oysters from any bed formed independently of this Act, it shall be sufficient in alleging and proving the property and lawful possession of the oysters or mussels stolen, and the place from which they were stolen, to allege and prove that they were the property of, and in the lawful possession of one or other of such proprietors, and were stolen from one or other of such contiguous beds or fisheries."

As to destroying the dams of fish ponds, &c., see p. 766.

As to poisoning fish, see p. 704.

FIXTURES, OFFENCES RELATING TO.

"FIXTURES are personal chattels annexed to the land, that is, fastened to or connected with it." *Sweet, Law Lex.* Cf. p. 300.

At common law larceny could only be committed of "goods personal" and, therefore, not "of things that adhere to the freehold, as trees, grass, bushes, hedges, stones, or lead of a house or the like"; 1 *Hale P. C.* 510; 2 *East P. C.* 587; and this extends not only to things actually attached to the realty, but to things savouring of and belonging to the realty, as title deeds. *Hale, ib.*; *East, ib.* 596; *Westbeer*, p. 59; *Walker*, 1 *Moo. C. C.* 155 (1827), p. 802. But this would probably not now be extended, as if these things be "severed from the freehold, as wood cut, grass in cocks, stones digged out of a quarry, then felony may be committed by stealing of them, for they are personal goods. But if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time or so come and fetch it away, this hath been held felony, because the act is not continuated, but interpolated, and in that interval the property lodgeth in the right owner as a chattel," nor was there larceny of "corn standing on the ground, for tho it be a chattel personal . . . yet it savours of the realty while it stands so. *Co. P. C. p.* 109." [*i.e.* 3 *Inst.*] 1 *Hale P. C.* 510.

"If," says Gibbs C.J., "a thief severs a copper, and instantly carries it away, it is no felony at common law, if indeed he lets it remain after it is severed any time, then the removal of it becomes a felony, if he comes back and takes it; and so of a tree which has been some time severed." *Lee* v. *Risdon*, 7 *Taunt.* 191 (1816). The rule is thus stated by the Criminal Law Commissioners (see p. 429):

"Although a thing be parcel of the realty, or be any annexation to or unsevered produce of the realty, yet if any person sever it from the realty and remove it with an intent to steal it, after an interval which so separates the acts of severance and removal that they cannot be considered as one continued act, the thing taken is a chattel, the subject of theft, notwithstanding such previous connection with the realty.

If any parcel of the realty, or any annexation to or unsevered produce of the realty be severed, otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly after such severance." 1*st Rep.* p. 18, where see their comments on the origin of the rule. It seems, this must be taken to mean, that it is larceny if a thing is severed and the person severing has gone away and "abandoned and lost property and possession," and afterwards, when his wrongful possession has ceased, he comes again and resumes it; but a "mere cessation of physical possession" by the wrong-doer, does not render a subsequent carrying away larceny. *Per* Blackburn J., *Townley*, p. 428. In that case some poachers killed rabbits, and deposited them in bags, &c., in a ditch on the land where they had killed them. Prisoner, one of them, afterwards returned and carried the rabbits away. It was taken as a fact that the poachers had no intention of abandoning the rabbits, but only deposited them for convenience. Conviction for larceny quashed.

Now by 24–5 V. 96, 31: "Whosoever shall steel, or shall rip, cut, sever,

or break with intent to steal, any glass or wood work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny [p. 523]; and in the case of any such thing fixed in any such square, street, or place as aforesaid, it shall not be necessary to allege the same to be the property of any person." See *O'Brien*, p. 171, *Hickman*, p. 558, and *Wortley*, p. 764; and cf. *Millar*, p. 564.

See, as to the punishment, 24–5 V. 96, 4, 7, 8, 9, p. 523. As to venue, see s. 114, p. 218.

It has been held that where a trespasser cut growing grass on another's close, and returned three days afterwards and carried it away, he was rightly convicted of larceny. *Foley*, 17 *Cox C. C.* 142; 26 *L. R. Ir.* 299 (1889); *C. C. R.*

Under 4 G. 2, 32 (repealed), it was held, that a person who procured possession of a house under a written agreement between him and the landlord, with an intention to steal the fixtures belonging to the house, and did steal the lead, was guilty of a felony. *Munday*, 2 *Leach* 850; 2 *East P. C.* 594 (1799).

S. 31, above, by designedly omitting to specify any particular building, and using only the words, "any building whatsoever," has removed the doubts as to *eiusdem generis* which existed under the repealed statute. *Norris*, *Russ. & Ry.* 69 (1804); *Parker*, 2 *East P. C.* 592; 1 *Lea.* 320 (1782). An unfinished building intended as a cart-shed which was boarded up on all its sides, and had a door with a lock to it, and the frame of a roof ready for thatching with loose gorse thrown on, was held to be a building within 7–8 G. 4, 29 (repealed). *Worrall*, 7 *C. & P.* 516 (1836).

In that statute, "any square, street, or other place dedicated to public use or ornament," it has been held, includes a churchyard; *per* Bosanquet J., *Blick*, p. 75; see also *Reece*, 2 *Russ. Cri.* 226 (1828); and a similar decision with respect to a tombstone in a churchyard, in *Jones*, 2 *Russ. Cri.* 224 (1828).

The prisoner was indicted (in the usual form) for stealing lead affixed to a building. The jury found him guilty of stealing the lead when lying severed, but not of stealing it when fixed. It was held that the prisoner could not be found guilty of a simple larceny on such an indictment. *Gooch*, 8 *C. & P.* 293 (1838).

An indictment for stealing a copper pipe fixed to the dwelling-house of A. and B., is not supported by proof of stealing a pipe fixed to two rooms, of which A. and B. are separate tenants, in the same house. *Finch*, 1 *Moo. C. C.* 418 (1834).

A copper sun-dial fixed on the top of a wooden post standing in a churchyard is "metal fixed in land" within the above (repealed) s. *Jones*, *Dears. & B. C. C.* 555; 27 *L. J. M. C.* 171 (1858). The prisoner was indicted for stealing lead "fixed to . . a wharf"; the lead formed the gutter of two sheds of brick, timber, and tiles on the wharf; it was held that it was sufficiently alleged and proved that the lead was "fixed to a building." *Rice*, *Bell C. C.* 87; 28 *L. J. M. C.* 64 (1859).

FORCIBLE ENTRY AND DETAINER.

At common law.] It seems that entering with such force and violence into lands or tenements, as to exceed a bare trespass, was an offence indictable at common law. *Wilson*, 8 *T. R.* 357 (1799); 1 *Russ. Cri.* 717, where "twelve persons with force and arms and with a strong hand violently entered into a certain mill . . . and expelled the prosecutor"; *per* L. Kenyon C.J. and a very strong court. The two names sufficiently express the difference between the two offences; see p. 437.

By statute.] The first enactment against forcible entries is that of 5 R. 2, st. 1, c. 7 (1381).

By 15 R. 2, 2 (1391), "it is accorded and assented that the ordinances and statutes, made and not repealed, of them that make entries with strong hand into lands and tenements or other possessions whatsoever, and them hold with force, and also of those that make insurrections, or great ridings, riots, routs or assemblies in disturbance of the peace or of the common law, or in affray of the people, shall be holden and kept, and fully executed; joined to the same that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the King." (1 *The Statutes Revised*).

This statute was followed by that of 8 Hen. 6, c. 9 (1429), which, after reciting the 15 Ric. 2, c. 2, above, enacts "for that the said statute doth not extend to entries in tenements in peaceable manner, and after holden with force, nor if the persons which enter with force into lands and tenements be removed and voided before the coming of the said justices or justice as before, nor any pain ordained if the sheriff do not obey the commandments and precepts of the said justices, for to execute the said ordinances, many wrongful and forcible entries be daily made in lands and tenements, by such as have no right, and also divers gifts, feoffments and discontinuances, sometimes made to lords and other puissant persons, and extortioners, within the said counties where they be conversant, to have maintenance, and sometimes to such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery for ever, to the final disherison of divers of the king's faithful liege people, and likely daily to increase, if due remedy be not provided in this behalf . . . from henceforth, where any doth make any forcible entry in lands and tenements, or other possessions, or them hold forcibly after complaint thereof made within the same county where such entry is made, to the justices of peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause, the said statutes duly to be executed, and that at the cost of the party so grieved." *Ib.* See *Wilson*, p. 437, &c.

The statute goes on to direct the justices to re-seize the lands, &c., entered

upon, and to put the party out into full possession of the same. But it is also provided, "that they which keep their possessions with force, in any lands and tenements whereof they or their ancestors, or they whose estate they have in such lands and tenements have continued their possession in the same, by three years or more, be not endamaged by force of this statute." *Ib.* This proviso is enforced by 31 Eliz. 11, 3 (1588), which declares that no restitution shall be made, if the person indicted has had the occupation or been in quiet possession for the space of three whole years together, next before indictment found, and his estate therein not ended or determined.

In order to extend the remedy for forcible entries upon other estates than those of freehold, it was, by 21 Jac. 1, 15 (1623) enacted: "that such judges, justices, or justices of the peace as by reason of any Act or Acts of parliament now in force, are authorised and enabled, uppon enquiry, to give restitucion of possession unto tenants of any estate of freehold, of their land or tenements which shalbe entred upon with force, or from them withholden by force, shall by reason of this present Act have the like and the same authoritie and abilitie from henceforth (uppon indictment of such forcible entries, or forcible withholdinge before them duly found), to give like restitucion of possession unto tenants for term of yeares, tenants by copie of court-rolle, guardians by knight's service, tenants by *elegit*, statute-merchant and staple, of lands or tenements by them so holden, which shalbe entered uppon by force, or holden from them by force." (1 *The Statutes Revised*).

Upon a prosecution under these statutes the prosecutor must prove, 1, the entry or detainer; 2, that it was forcible; 3, the possession upon which the entry was made; and 4, that it was made by the defendant.

Proof of the entry or detainer.] A forcible entry or detainer "is committed by violently taking or keeping possession of lands and tenements with menaces, force and arms, and without the authority of law." 4 *Bla. Com.* 148. It must "be accompanied with some circumstances of actual violence or terror, and therefore an entry which hath no other force than such as is implied by law in every trespass whatsoever, is not within these statutes." 2 *Hawk. P. C.* Bk. 1, ch. 64, s. 25. The entry may be violent, not only in respect to violence actually done to the person of a man, as by beating him if he refuses to relinquish possession; but also in respect to any other kind of violence in the entry, as by breaking open the doors of a house, whether any person be within or not, especially if it be a dwelling-house; and perhaps "by any act of outrage after the entry, as by carrying away the party's goods." *Ib.* s. 26; see 3 *Burr.* 1702 (*n*).

But if a person "who pretends a title to lands, barely go over them, either with or without a great number of attendants armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act which either expressly or impliedly amounts to a claim to such lands," this is not an entry within the meaning of the statutes. *Hawk. ib.* s. 20. The bare drawing up of a latch or pulling back the bolt of a door is not a forcible entry, as being "inconsiderable," according to the better opinion. *Ib.* s. 26; *Bac. Abr. Forcible Entry* (*B*); 1 *Russ. Cri.* 724.

Proof of the force and violence.] "Wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession . . . just cause to fear that he will do them some bodily hurt if they will not give way to him, his entry is esteemed forcible, whether he cause such terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back

his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance." *Hawk. ib.* s. 27. But it seems that no entry is to be judged "forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage, which is not personal." *Ib.* s. 28.

It is not necessary that there should be any one assaulted to constitute a forcible entry; for, if persons take or keep possession of either house or land, with such numbers and show of force as are calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry, or a forcible detainer. *Per* Abbott C.J., *Milner* v. *Maclean*, 2 *C. & P.* 18 (1825). An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such show of force as is calculated to prevent any resistance. *Per* L. Tenterden C.J., *Smyth*, pp. 309, 438.

Proof that the detainer was forcible.] "The same circumstances of violence or terror which will make an entry forcible will make a detainer forcible also;" therefore, "whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt is made to re-enter; and it hath been said that he also shall come under the like construction, who places men at a distance from the house, in order to assault any one who shall attempt to make an entry into it . . . but . . . barely refusing to go out of a house, and continuing therein in despite of another," is not a forcible detainer. *Hawk. ib.* s. 30. So where a lessee at the end of his term, keeps arms in his house to prevent the entry of the lessor, or a lessee at will retains possession with force, after the determination of the will: these are forcible detainers. *Com. Dig. Forc. Entry* (*B.* 1).

The statute 15 R. 2, p. 435, only gave a remedy in cases of forcible *detainer* where there had been a previous forcible *entry* (p. 438); but the statute 8 H. 6, 9, p. 435, gives a remedy for forcible detainer even after a *peaceable* entry, if unlawful. *Oakley*, 4 *B. & Ad.* 307 (1832). But it does not hence follow that the statute 8 H. 6 does not apply to the case of a tenant at will, or for years, holding over after the will is determined, or the term expired; because the continuance in possession afterwards may amount, in judgment of law, to a new entry. *Per* Parke J., *ib.*, citing *Hawk.* above, s. 34.

A conviction for a forcible detainer is bad, if it only states that the prosecutor complained to the justices of an entry and unlawful expulsion and forcible detainer, and that they personally came and found the defendant forcibly detaining the premises, whereupon they convict him, &c. For the justices cannot know by their view without evidence that the detainer was unlawful, or that there had been an unlawful entry. *Semble*, that the conviction ought to show that the defendant was summoned, or had otherwise an opportunity to defend himself. Held, also, that the court was bound to award a re-restitution [see p. 439], as a consequence of quashing the conviction without enquiring into the legal or equitable claims of the respective parties. *Wilson*, 3 *A. & E.* 817 (1835); *Attwood* v. *Joliffe*, 3 *New Sess. Cas.* 116 (1848).

Proof of the possession upon which the entry was made.] "It hath been holden for a general rule, that one may be indicted for a forcible entry into

any such incorporeal hereditaments, for which a writ of entry will lie either by the common law, as for rent, or by statute, as for tythes, &c.; but I do not find any good authority that such an indictment will lie for a common or office." So no violence "offered to another in respect of a way or such like easement which is no possession," will make a forcible entry. *Hawk. ib.* s. 31. Nor can a person be convicted under 15 R. 2, p. 435, of a detainer of any tenements into which he had not made a precedent forcible entry. *Ib.* p. 437.

There seems now to be no doubt that a person may be guilty of a forcible entry, by violently and with force entering into that to which he has a legal title. *Newton* v. *Harland*, 1 *M. & G.* 644 (1840); 1 *Russ. Cri.* 718 *n*, p. 439. See also *Studd*, p. 204. In *Newton* v. *Harland*, the judges thought that a landlord might be guilty of a forcible entry after the expiration of his tenant's term both at common law and under the statutes; and doubted whether possession so obtained was legal. See *Davison* v. *Wilson*, 11 *Q. B.* 890 (1848); *Burling* v. *Read*, *ib.* 904 (1850).

"A joint tenant or tenant in common, may offend . . . either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished for it in an action of trespass, . . . yet the lawfulness of his entry no way excuses the violence." *Hawk. P. C. ib.* s. 33.

The indictment must show what estate the expelled person had for the statute on which it is founded (8 H. 6, 9; 21 J. I. 15, &c.) varies therewith. *Wannop, Sayer* 142 (1754). On a prosecution for a forcible entry on the possession of a lessee for years, it is sufficient to prove that such lessee was *possessed*, although the indictment allege that the premises were his freehold. *Lloyd, Cald.* 415 (1784). "Proof that the prosecutor holds colourably, as a freeholder or leaseholder, will suffice; the court will not on the trial, enter into the validity of an adverse claim . . . made by the defendant which he ought to assert not by force but by action." *Williams* (1828), *Talf. Dick. Sess., 5th ed.* (1841), 377.

Proof that the offence was committed by the defendant.] This offence may be committed by one person as well as by several. *Hawk. ib.* s. 29. All who accompany a man when he makes a forcible entry will be adjudged to enter with him, whether they actually come upon the lands or not. *Ib.* s. 22. So also with those who, having an estate in land by a defeasible title, continue with force in possession, after a claim made by one who has a right of entry. *Ib.* s. 23. But where several come in company with one who has a right to enter, and one of the company makes a forcible entry, that is not a forcible entry in the others. 3 *Bac. Abr. Forcible Entry* (*B*). And a person who "barely agrees to a forcible entry made to his use, without his knowledge or privity," is not within the statutes, "because he no way concurred in or promoted the force." *Hawk. ib.* s. 24.

An infant or feme covert may be guilty of a forcible entry, for actual violence done by them in person; but not for violence done by others at their command, for such command is void. A feme covert, it is said, may be imprisoned for such offence, though not an infant, "because he shall not be subject to corporal punishment by force of the general words of any statute where he is not expressly named." *Ib.* s. 35. A feme covert may be guilty of a forcible entry into her husband's house. *Smyth*, pp. 309, 437.

Award of restitution.] The court in which the indictment is found, or the Court of King's Bench upon the removal thither of the indictment by *certiorari*, has power on the conviction of the defendant to award restitution. *Hawk. ib.*, ss. 49, 50, 51. Though by the provisoes in the statutes [pp.

435–6], the defendants may set up a possession of three years to stay the award of restitution. *Ib.* s. 53. A supersedeas of the award of restitution may be granted, before it is executed, by the same court that made the award. *Ib.* s. 61. And a re-restitution may be awarded by the King's Bench. *Ib.* s. 66. See *Wilson*, p. 437.

Before conviction it is in the discretion of the judge of assize to award a restitution or not, although a true bill has been found by the grand jury for a forcible entry. *Harland*, 2 *Lew. C. C.* 170; 8 *Ad. & E.* 826; 1 *P. & D.* 93; *Moo. & R.* 141; 8 *L. J. M. C.* 60 (1838), where the facts were the same as in *Newton* v. *Harland*, p. 438.

FOREIGN STATE—ARMED INVASION OF.

See p. 217.

FORGERY,

AND OFFENCES CONNECTED THEREWITH.

Forgery at common law.] See p. 323. At common law the offence was punishable as a misdemeanor. But not with hard labour, under 14 & 15 V. 100, 29, p. 825. *Hamilton*, 1901, 1 *Q.* (or *K.*) *B.* 740; 19 *Cox C. C.* 675; 65 *J. P.* 265; *C. C. R.*, p. 323, where prisoner, having made a collection for a poor man C., had appropriated some of the money; he had not himself written the contributors' names or amounts against them in the collection-book, but had let them do so (which was said to prevent his prosecution for a statutory forgery) and had then altered the entries of the amounts to smaller sums, and in some instances tampered with the names so that they could not be recognised. It was held that forgery to conceal a fraud was not "a cheat or fraud punishable at common law." The offence is defined as "the fraudulent making or alteration of a writing to the prejudice of another man's right"; 4 *Bl. Com.* 247; and by East, as "a false making, a making *malo animo*, of any written instrument for the purpose of fraud and deceit." 2 *P. C.* 852, p. 474. Forgery consists not in "making an instrument containing that which is false, . . . but making an instrument which purports to be that which it is not." *Per* Blackburn J., in *Ritson*, *L. R.* 1 *C. C. R.* 200; 39 *L. J. M. C.* 10 (1869). "Telling a lie does not become a forgery because it is reduced into writing." *In re Windsor*, 34 *L. J. M. C.* 163; 6 *B. & S.* 522; 10 *Cox C. C.* 118 (1865).

The forgery of any document, whether public or private, with intent to defraud, is punishable as a misdemeanor at common law; for a contrast with statute law, see *Harper*, p. 460. And in *Hodgson*, *Dears. & B. C. C.* 3; 25 *L. J. M. C.* 78; 7 *Cox C. C.* 122 (1856), pp. 474, 475, the court said that whether or not the document which the prisoner was convicted of forging, a diploma of the College of Surgeons with intent to induce people to believe he was a member, was of a public nature, in order to make out the offence there must have been, at the time of the instrument being forged, an intention to defraud some person. "The intent must not be a roving intent, but a specific intent," *per* Jervis C.J.; the conviction was quashed. The distinction, therefore, as to the intent to defraud, between the forgery of public and private documents *at common law*, which has sometimes been drawn, seems to be of little importance. If any other inference is to be drawn from the passage in 2 *Hawk. P. C.* Bk. 1, ch. 70, ss. 11 and 1, 8, 9, it must be considered as overruled by this case. There are indeed many public documents the forgery of which is made punishable *by statute* without any intent. Cf. *Ogden*, p. 474. But these provisions in no way affect the general principle of law just stated; on the other hand, they impliedly recognise it, as, had it been otherwise, they would, many of them, have been unnecessary.

It is now clear that forging any document, with a fraudulent intent, and whereby another person may be prejudiced, is within the rule. Thus, it was held that forging an order for the delivery of goods, though the fraud was not effected, was a misdemeanor at common law. *Ward*, 2 *Str.* 747; 2 *L. Raym.* 1461 (1727); cf. *Goate*, p. 460. And the same was held with regard

to a document purporting to be a discharge of a prisoner from a creditor to the sheriff and the gaoler (though the order, if genuine, was a nullity). *Fawcett*, 2 *East P. C.* 862 (1793). *Ward* is considered by East to have settled the rule, that the counterfeiting of *any writing*, with a fraudulent intent, whereby another *may be* prejudiced, is forgery at common law, whether in fact he is or is not. *Ib.* 860.

Forgery at common law must be of some document or writing. See *Closs*, p. 323. So where the prisoner had wrappers printed similar to those of one Borwick who labelled his goods "Borwick's," and sold in them what he called "Borwick's Baking Powder," but without signature and the notification that without such signature no powder was genuine, which appeared on the genuine wrappers; it was held that this was not forgery (but obtaining by false pretences), though the jury found that the wrappers were intended to defraud. *Smith, Dears. & B. C. C.* 566; 27 *L. J. M. C.* 225 (1858). See now 50–1 V. 28.

It is not necessary that there should be any publication of the forged instrument. 2 *East P. C.* 855, 951; 2 *Russ. Cri.* 564.

It is not forgery fraudulently to procure a person's signature to a document, the contents of which have been altered without his knowledge; *Chadwick*, 2 *Moo. & R.* 545 (1844); or fraudulently to induce a person to execute an instrument on a misrepresentation of its contents. *Per* Rolfe B., *Collins*, 2 *Moo. & R.* 461 (1843), p. 477, a case now specially provided for by 24–5 V. 96, 90, p. 405.

Forgery by statute of his Majesty's seals.] By 24–5 V. 98, 1: "Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, her Majesty's privy seal, any privy signet of her Majesty, her Majesty's royal sign manual, any of her Majesty's seals appointed by the twenty-fourth article of the union between England and Scotland, to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression, made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter, knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life" (see p. 198).

Forging transfer of certain stock, and power of attorney relating thereto.] By s. 2: "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of England or at the bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of parliament, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to

receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony. . . ." Punishment the same as in s. 1, above. Extended to stock and other securites under the Local Authorities Loan Act, 1875, 38–9 V. 83, 32, p. 449, and to Scotland, 33–4 V. 58, 7.

Forging transfers of "(Metropolitan) Consolidated Stock."] By 32–3 V. 102, 19, all consolidated stock of the (then) Metropolitan Board of Works, now replaced by the London County Council, by 51–2 V. 41, 40, (8) is to be deemed to be capital stock of a body corporate within the meaning of 24–5 V. 98.

By s. 20: "Any person who, with intent to defraud, makes any false entry in or alters any word or figure in any of the said books for transfers, or in any manner falsifies any of the said books, or makes any transfer of any consolidated stock in the name of any person who is not the true owner thereof, shall be guilty of felony, and on conviction shall be liable to penal servitude for any term not exceeding fourteen years" (see p. 198).

By s. 21, clerks, servants, &c., of the board who, with intent to defraud, make out dividend warrants, &c., for a greater or less amount than is due, are guilty of felony.

Forging stock certificates issued under National Debt Acts.] By 33–4 V. 58, 3: "If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any stock certificate or coupon, or any document purporting to be a stock certificate or coupon, issued in pursuance of Part 5 of the National Debt Act, 1870 [33–4 V. 71], or of any former Act—or demands or endeavours to obtain or receive any share or interest of or in any stock, as defined in the National Debt Act, 1870, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered—with intent in any of the cases aforesaid to defraud, he shall be guilty of felony." Punishment the same as in 24–5 V. 98, 1, p. 441.

By s. 4: "If any person falsely and deceitfully personates any owner of any share or interest of or in any such stock as aforesaid, or of any such stock certificate or coupon as aforesaid, and thereby obtains or endeavours to obtain any such stock certificate or coupon—or receives or endeavours to receive any money due to any such owner, as if such person were the true and lawful owner, he shall be guilty of felony," &c., as in s. 1, p. 441. See p. 461.

By s. 5: "If any person, without lawful authority or excuse, the proof whereof shall lie on the party accused, engraves or makes on any plate, wood, stone or other material any stock certificate or coupon purporting to be such a stock certificate or coupon as aforesaid, or to be such a stock certificate or coupon as aforesaid in blank, or to be a part of such a stock certificate or coupon as aforesaid—or uses any such plate, wood, stone, or other material for the making or printing of any such stock certificate or coupon, or blank stock certificate or coupon as aforesaid, or any part thereof respectively—or knowingly has in his custody or possession any such plate, wood, stone, or other material—or knowingly offers, utters, disposes of, or puts off, or has in his custody or possession any paper on which any such blank stock certificate or coupon as aforesaid, or part of any such stock certificate or coupon as aforesaid, is made or printed—he shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years" (see p. 198).

By s. 6: "If any person forges, or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any certificate or duplicate certificate required by Part 6 of the National Debt Act, 1870 [33-4 V. 71], or by any former like enactment, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony." Punishment the same as in 24-5 V. 98, p. 441.

Personating the owner of certain stock, and transferring or receiving, &c., dividends.] By 24-5 V. 98, 3: "Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of England, or at the bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of parliament, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony." Punishment same as in s. 1, p. 441.

Forging attestation to power of attorney for transfer of stock, &c.] By s. 4: "Whosoever shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is in either of the last two preceding sections [p. 441 and above] mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off any such power of attorney or other authority, with any such forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years" (see p. 198). Extended to Scotland, as s. 2, p. 442.

Making false entries in the books of the public funds.] By s. 5: "Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the bank of England or the governor and company of the bank of Ireland, in which books the accounts of the owners of any stock, annuities or other public funds which now are or hereafter may be transferable at the bank of England or at the bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any such owners in any of the said books, with intent in any of the cases aforesaid to defraud, or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of England or at the bank of Ireland, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Clerks of the bank making out false dividend warrants.] By s. 6: "Whosoever, being a clerk, officer, or servant of, or other person employed or intrusted by the governor and company of the bank of England, or the governor and company of the bank of Ireland, shall knowingly make out or deliver any dividend warrant or warrant for payment of any annuity, interest,

or money payable at the bank of England or Ireland for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years" (see p. 198).

Forging East India bonds, &c.] By s. 7: "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bond commonly called an East India bond, or any bond, debenture, or security issued or made under the authority of an Act passed or to be passed relating to the East Indies, or any indorsement on or assignment of any such bond, debenture, or security, with intent to defraud, shall be guilty of felony." Punishment the same as in s. 1, p. 441. Extended to other Indian securities by 36–7 V. 32, 13, and 37–8 V. 3, 13.

In ss. 8, 9, 10, 11 following, Treasury Bills and War Bonds (1900) are included; 40–1 V. 2, 10; 63–4 V. 2, 4 (3).

Forging exchequer bills, bonds, debentures, &c.] By 24–5 V. 98, 8, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill, or exchequer bond, or exchequer debenture, or any indorsement on or assignment of any exchequer bill, or exchequer bond, or exchequer debenture, or any receipt or certificate for interest accruing thereon, with intent to defraud, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Making plates, &c., in imitation of those used for exchequer bills, &c.] By s. 9: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his custody or possession, any frame, mould, or instrument having therein any words, letters, figures, marks, lines, or devices peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills, or exchequer bonds, or exchequer debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imitate such words, letters, figures, marks, lines, threads, or devices, or any plate peculiarly employed for printing such exchequer bills, bonds, or debentures, or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, bonds, or debentures, or any plate, die, or seal intended to imitate any such plate, die, or seal as aforesaid, shall be guilty of felony." Punishment the same as in s. 6, above.

Making paper in imitation of that used for exchequer bills.] By s. 10: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or aid or assist in making, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or to be provided or used for such exchequer bills, bonds, or debentures, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall knowingly have in his custody or possession any paper whatsoever, in the substance whereof shall appear any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any parts of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall cause or assist in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid or any part of such words, letters, figures, marks, lines, threads, or other

devices, and intended to imitate the same, to appear in the substance of any paper whatever, or shall take or assist in taking any impression of any such plate, die, or seal, as in the last preceding section mentioned, shall be guilty of felony." Punishment the same as in s. 6, p. 443.

Having in possession paper, plates, or dies to be used for exchequer bills, &c.] By s. 11: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive or knowingly have in his custody or possession any paper manufactured and provided by or under the directions of the commissioners of inland revenue or commissioners of her Majesty's treasury, for the purpose of being used as exchequer bills, or exchequer bonds, or exchequer debentures, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate, die, or seal, as in the last two preceding sections mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years, with or without hard labour."

Forging bank notes and bills.] By s. 12: "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Purchasing or receiving or having forged bank notes and bills.] By s. 13: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years" (see p. 198).

Making or having mould or paper for forging notes of banks of England or Ireland.] By s. 14: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or use, or knowingly have in his custody or possession, any frame, mould, or instrument for the making of paper with the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the Governor and Company of the banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, or shall make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper whatsoever with the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any

number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, or shall by any art or contrivance cause the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, or any device or distinction peculiar to and appearing in the substance of the paper used by the Governor and Company of the banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, to appear visible in the substance of any paper, or shall cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

But by s. 15: "Nothing in the last preceding section contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of water-marks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines, or the water-marks of the paper used by the governor and company of the banks of England and Ireland respectively."

Engraving or having any plate or paper for making forged bank notes or bills.] By s. 16: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank note, bank bill of exchange, or bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or to be a blank bank note, blank promissory note, blank bank bill of exchange, or blank bank post bill of the Governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or to be a part of a bank note, promissory note, bank bill of exchange, or bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or any name, word, or character resembling or apparently intended to resemble any subscription to any bill of exchange or promissory note issued by the governor and company of the bank of England, or the governor and company of the bank of Ireland, or by any such other body corporate, company, or person as aforesaid, or shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, or knowingly have in his custody or possession

any such plate, wood, stone, or other material, or any such instrument or device, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or part of a bank note, bank bill of exchange, or bank post bill, or any name, word, or character resembling or apparently intended to resemble any such subscription, shall be made or printed, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

Engraving on a plate any part of a bank note or bill, or using or having any such plate, uttering or having any impression thereof, &c.] By s. 17: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any word, number, figure, device, character, or ornament the impression taken from which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or shall use or knowingly have in his custody or possession any such plate, wood, stone, or other material, or any other instrument or device for the impressing or making upon any paper or other material any word, number, figure, character, or ornament which shall resemble, or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper or other material upon which there shall be an impression of any such matter as aforesaid, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

Making or having mould for making paper with the name of any banker thereon, or making or having such paper.] By s. 18: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any body corporate, company, or person carrying on the business of bankers (other than and except the banks of England and Ireland respectively), appearing visible in the substance of the paper, or knowingly have in his custody or possession any such frame, mould, or instrument, or make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession any paper in the substance of which the name or firm of any such body corporate, company or person shall appear visible, or by any art or contrivance cause the name or firm of any such body corporate, company, or person to appear visible in the substance of the paper upon which the same shall be written or printed, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

Engraving plates for foreign bills or notes, or using or having such plates, or uttering or having any impression thereof.] By s. 19: "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange,

promissory note, undertaking, or order for payment of money, in whatsoever language the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order, of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of her Majesty, or shall use, or knowingly have in his custody or possession any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession any paper upon which any part of such foreign bill, note, undertaking, or order shall be made or printed, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

Forging deeds, bonds, &c.] By s. 20: "Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Forging wills.] By s. 21: "Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Forging bills of exchange or promissory notes.] By s. 22: "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement, or assignment of any such promissory note, with intent to defraud, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Forging orders, receipts, &c., for money or goods.] By s. 23: "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt [=a written acknowledgment of the receipt of money or goods to be accounted for by the receiver; *Wharton, Law Lex.*], acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Drawing, making, accepting, indorsing, or signing bills, notes, receipts, &c., without authority.] By s. 24: "Whosoever, with intent to defraud, shall

draw, make, sign, accept, or indorse any bill of exchange, or promissory note, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request so drawn, made, signed, accepted, or indorsed by procuration or otherwise, without lawful authority or excuse as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen years" (see p. 198).

Obliterating crossings on cheques.] By s. 25: "Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words 'and company,' or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony." Punishment the same as in s. 1, p. 441. Extended under 38–9 V. 83, 32, p. 442. "any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document . . . as if the said document were a cheque" is within this s., by 46–7 V. 55, 17, which for this purpose makes the Paymaster-General a banker, and "the public officers drawing on" him "customers." Such a document does not become a negotiable instrument *by this Act. Ib.*

Forging debentures.] By s. 26: "Whosoever shall fraudulently forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within her Majesty's dominions or elsewhere, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

Forging proceedings of courts of record, &c.] By s. 27: "Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognisance, cognovit actionem [p. 402], or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any court of equity or court of admiralty in England or Ireland, or any document or writing, or any copy of any document or writing used or intended to be used as evidence in any court in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years" (see p. 198).

Forging copies or certificates of records, process of courts not of record, and using forged process.] By s. 28: "Whosoever, being the clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, shall utter any false copy or certificate of any record, knowing the same to be false; and whosoever, other than such clerk, officer, or deputy, shall sign or certify any copy or certificate of any

record as such clerk, officer, or deputy; and whosoever shall forge or fraudulently alter, or offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record, or shall offer, utter, dispose of, or put off any copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged; and whosoever shall forge the seal of any court of record, or shall forge or fraudulently alter any process of any court other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged, or shall deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false, shall be guilty of felony." Punishment the same as in s. 27, p. 449.

9–10 V. 95, 57, p. 471, repealed by 51–2 V. 43, 188, contained a similar provision as to county court process.

Forging instruments made evidence by Act of parliament.] By s. 29: "Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any Act passed or to be passed, and for which offence no punishment is herein provided, shall be guilty of felony." Punishment the same as in s. 27, p. 449.

Forging court rolls.] By s. 30: "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any court roll or copy of any court roll, relating to any copyhold or customary estate, with intent to defraud, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Forging register of deeds.] By s. 31: "Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, made or issued under the provisions of any Act passed or hereafter to be passed for or relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal; or shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of any person to any such memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, which shall be required or directed to be signed by or by virtue of any Act passed or to be passed, or shall offer, utter, dispose of, or put off any such memorial or other writing as in this section before mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

Forging orders of justices, recognisances, affidavits, &c.] By s. 32: "Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any summons, conviction, order, or warrant of any justice of the peace, or any recognisance purporting to have been entered into before any justice of the peace, or other officer authorised to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the

peace, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude" (see p. 198).

Forging name of certain officers of court, or of the bank of England or Ireland.] By s. 33: "Whosoever, with intent to defraud, shall forge or alter any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing made, or purporting or appearing to be made, by the accountant-general [now paymaster-general or his deputy clerk or officer by 35–6 V. 44, 4 & 12], or any other officer of the Court of Chancery in England or Ireland, or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland, or by any cashier, or other officer or clerk of the governor and company of the bank of England or Ireland, or the name, handwriting, or signature of any such accountant-general, judge, cashier, officer, or clerk, as aforesaid, or shall offer, utter, dispose of, or put off, any such certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing, knowing the same to be forged or altered, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

Forging of marriage licence or certificate.] By s. 35: "Whosoever shall forge or fraudulently alter any licence of or certificate for marriage, or shall offer, utter, dispose of, or put off any such licence or certificate, knowing the same to be forged or fraudulently altered, shall be guilty of felony." Punishment the same as in s. 27, p. 449.

Destroying, altering, or forging registers of births, &c., and giving false certificates.] By s. 36: "Whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials, which now is or hereafter shall be by law authorised or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register, any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and unlawfully insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and unlawfully give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing such writing or the part of such register whereof such copy or extract shall be so given to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register-office, or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony." Punishment the same as in s. 1, p. 441. Cf. p. 400.

Making false entries in copies of register sent to registrar.] By s. 37: "Whosoever shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register, directed or required by law to be transmitted to any registrar or other officer any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or shall

knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or shall unlawfully destroy, deface, or injure, or shall, for any fraudulent purpose, take from its place of deposit, or conceal, any such copy of any register, shall be guilty of felony." Punishment the same as in s. 1, p. 441.

Demanding property upon forged instruments.] By s. 38: "Whosoever, with intent to defraud, shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony." Punishment the same as in s. 13, p. 445.

Forging any instrument, however designated, which is in law a will, deed, bill of exchange, &c.] By s. 39: "Where by this or by any other Act any person is or shall hereafter be made liable to punishment for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such Act by any special name or description, and such instrument or writing, however designated, shall be in law a will, testament, codicil, or testamentary writing, or a deed, bond, or writing obligatory, or a bill of exchange, or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, or an indorsement on or assignment of an undertaking, warrant, order, authority, or request for the payment of money, within the true intent and meaning of this Act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this Act, and punished accordingly."

Forging documents purporting to be made abroad, or bills of exchange, &c., payable abroad.] By s. 40: "Where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this Act expressed to be an offence, if any person shall, in England or Ireland, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing, or matter, in whatsoever place or country out of England and Ireland, whether under the dominion of her Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England or Ireland; and if any person shall in England or Ireland forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on or

assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or security, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), or any indorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory, in whatsoever place or country out of England and Ireland, whether under the dominion of her Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, authority, request, deed, bond, or writing obligatory, may be, or may purport to be, payable, and, in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, authority, or request be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England or Ireland."

Offences triable where prisoner apprehended.] By s. 41: "If any person shall commit any offence against this Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any Act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such county or place."

Descriptions of instruments in indictments.] By s. 42: "In any indictment for forging, altering, offering, uttering, disposing of, or putting off any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or facsimile thereof, or otherwise describing the same or the value thereof."

Description of instrument in indictments for engravings, &c.] By s. 43: "In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or facsimile of the whole or or any part of such instrument, matter, or thing."

Intent to defraud particular persons need not be alleged or proved.] By

s. 41: "It shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged, with an intent to defraud."

Interpretation of "possession."] By s. 45: "Where the having any matter in the custody or possession of any person is in this Act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in the actual custody and possession of any other person, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this Act."

Punishment of forgery under other statutes.] By s. 47: "Whosoever shall . . . be convicted of any offence which shall have been subjected by any Act or Acts to the same pains and penalties as are imposed by the [repealed] Act passed in the fifth year of the reign of Queen Elizabeth, intituled, *An Act against Forgers of False Deeds and Writings*, for any of the offences first enumerated in the said Act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable . . . to be kept in penal servitude for any term not exceeding fourteen years" (see p. 198). And by s. 48: "Where by any Act now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavouring to receive or have any thing, or to do or cause to be done any act upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered, would according to the provisions contained in any such Act be guilty of felony, and would, before the passing of the Act of the first year of King William the Fourth, chapter sixty-six [repealed, except s. 21], have been liable to suffer death as a felon; or where by any Act now in force any person falsely personating another, or falsely acknowledging any thing in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the said Act of the first year of King William the Fourth, have been liable to suffer death as a felon; or where by any Act now in force any person making or using, or knowingly having in his custody or possession any frame, mould, or instrument for the

making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the said Act of the first year of King William the Fourth, have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall . . . be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this Act, every such person shall be liable . . . to be kept in penal servitude for life" (see p. 198).

Principals in the second degree and accessories.] By s. 49: "In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable . . . to be imprisoned for any term not exceeding two years, with or without hard labour; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender."

Forging seal, stamp, or signature of public documents.] By 8-9 V. 113, 4: " . . . if any person shall forge the seal, stamp, or signature of any such certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or of any certified copy of any document, bye-law, entry in any register or other book, or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of or relating to any corporation or company already established, or to any corporation or company to be hereafter established, or if any person shall forge the signature of any such judge as aforesaid [in s. 2] to any order, decree, certificate, or other judicial or official document, or shall tender in evidence any order, decree, certificate or other judicial or official document, with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit, or if any person shall print any copy of any private Act or of the journals of either house of parliament, which copy shall falsely purport to have been printed by the printers to the crown, or by the printers to either house of parliament [or under the superintendence or authority of her Majesty's stationery office, by 45-6 V. 9, 2, 3], or by any or either of them; or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall, upon conviction, be liable to transportation for seven years" (see p. 198). For the proviso, see p. 135.

Forging seal, stamp, or signature of documents made evidence by statute.] By 14-15 V. 99, 17: "If any person shall forge the seal, stamp, or signature of any document in this Act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation [p. 198]

for seven years . . . and whenever any such document shall have been admitted in evidence by virtue of this Act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as to the said court or person shall seem meet; and every person who shall be charged with committing any felony under this Act," or under 8-9 V. 113 (partly repealed), "may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed in the county, district, or place in which he shall be apprehended, or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried." Cf. p. 137. Words omitted by S. L. R. Act, 1892. See also p. 781.

Forging trade marks, &c.] By 50-1 V. 28, 2—extended to customs entries by 54-5 V. 15, s. 2 of which (official prosecutions) is extended to the Board of Agriculture by 57-8 V. 19, 1—forging, falsely applying, &c., trade marks or trade descriptions is made an offence punishable on indictment. By ss. 4 and 5, trade marks, &c., are defined. Other provisions relate to prosecutions. See p. 323. A master is criminally responsible under s. 2 for the act of his shopman, servant, &c., although that be contrary to his orders, unless he can show within that s. that he was not responsible. *Coppen* v. *Moore* (No. 2), 1898, 2 *Q. B.* 306 (six judges); cf. p. 664.

Forgery in other cases.] There are innumerable provisions scattered through the statutes which relate to forgery, many of them to offences also provided for by 24-5 V. 98, above.

It is always usual, when an Act is passed which creates government securities, to provide specially against the offence of forging such securities. If this was necessary before, it is still necessary since 24-5 V. 98, with respect to exchequer bills, &c.; the s. (8, p. 444) relating to them not containing the words as to *future* Acts in s. 7, *ib.*, relating to East India securities.

As to the forging and uttering of stamps, see pp. 780-1.

As to forging stamps on gold and silver wares or dies therefor, see 7-8 V. 22, 2, but as to the punishment under which, see p. 198.

As to forgery of authorised certificates annexed to a copy of or extract from a proclamation, order, or regulation issued by the Court, the Privy Council, and other State offices, see s. 4 of 31-2 V. 37, amended, and extended to Ireland and the Boards of Agriculture by 45-6 V. 9; 58-9 V. 9; and 62-3 V. 50, 21 (3).

As to the forgery of non-parochial registers, see 3-4 V. 92, 8, extended by 21-2 V. 25, 3, p. 145; for punishment, see 7-8 G. 4, 28, 8, p. 715.

As to false affidavits, false petitions, certificates, &c., relating to the navy, see 28-9 V. 124 6; as to forgeries relating to service in the navy, 5-6 W. 4, 24, 3; 7 G. 4, 16, 25, deals with false certificates or representations as to pensions, &c. at Chelsea Hospital; s. 38 with false personation of officers and soldiers entitled to pay, forging their names, &c. Cf. p. 402. 2-3 W. 4, 53, 49, deals with personation, forgery, and perjury relating to prize-money, &c.; 2-3 V. 51, 9, with forging documents relating to pensions granted for service in the army, navy, royal marines, and ordnance. As to forgeries relating to seamen's savings banks, see 57-8 V. 60, 154; as to anchors and chain-cables, see 62-3 V. 23, 13-6.

Forging the name of any commissioner or of the comptroller-general, &c.,

of the customs, is dealt with by 39–40 V. 36, 28. Unauthorised persons making paper in imitation of excise paper, and persons forging or counterfeiting plates or types, are punished by 2–3 W. 4, 16, 3; and by s. 4, persons counterfeiting permits, or uttering forged permits.

The forgery of contracts, certificates, &c., for the redemption or sale of the land tax is provided against by 52 G. 3, 143, 6. So the forging of the names of the commissioners of woods (and forests and others) by 10 G. 4, 50, 124.

As to forging the name of the paymaster-general of the Court of Chancery, see 35–6 V. 44, 12, p. 451; as to certificate of former conviction, 7–8 G. 4, 28, 11; and as to any false certificate or declaration under the Births and Deaths Registration Act, 37–8 V. 88, 40 (2).

Forgeries of documents relating to the slave trade are provided against by 5 G. 4, 113, 10, which abolishes it; p. 701.

Forgeries relating to the post-office (money orders, &c.) are provided for by 43–4 V. 33, 3, 4. See p. 709.

Forgeries of licences, &c., for stage and hackney carriages are provided against by 6–7 V. 86. See as to forging, &c., licences and documents under 38–9 V. 17 (p. 395), s. 81; and as to certificates or warranties under the Sale of Food and Drugs Act, p. 663, 38–9 V. 63, 27, amended 62–3 V. 51, 27.

Forging any declaration, warrant, order, or other instrument, or any affidavit or affirmation required by the commissioners for the reduction of the national debt, in connection with government annuities, &c., is provided against by 2–3 W. 4, 59, 19, amended by S. L. R. Act, 1874.

Certifying as true any false copy of or extract from any of the "records," &c., in the Public Record office and certain counterfeits, are made felony by 1–2 V. 94, 19, 20. Forging, &c., many documents under the Merchant Shipping Act is made felony by 57–8 V. 60, 66; others by ss. 104, 121, 130, 154 (above), 180, 197 (8), 282, 564, 695.

Forgery of nomination papers, &c., is provided for by 35–6 V. 33, 3, p. 373, extended by 45–6 V. 50, 74, p. 374. As to forging the seal or signature of municipal corporations, see 45–6 V. 50, 235.

Fraudulently procuring an entry, erasure, or alteration to be made on registry of land under 38–9 V. 87, 100, pp. 347, 401, is a misdemeanor.

See also under the Sea Fisheries Act, 1883, 46–7 V. 22, 17 (4); the Coal Mines Regulation Act, 1887, 50–1 V. 58, 32; the Commissioners for Oaths Act, 1889, 52–3 V. 10, 8, amended by 54–5 V. 50.

What amounts to forgery.] The act of forgery consists in the making of a false document or writing: "in all forgeries, the instrument supposed to be forged must be a false instrument in itself," *Dunn*, p. 460. It will make no difference whether an entirely new document be constructed, or whether an old one be altered so as to have a different effect, pp. 477–8. Thus, in *Blenkinsop*, 1 *Den. C. C.* 276; 17 *L. J. M. C.* 62 (1847); an address was put to the name of the drawee of an accepted bill of exchange while the bill was in course of completion, with the intention of making the acceptance appear to be that of a different existing person, and it was held to be forgery. Cf. *Epps*, 4 *F. & F.* 81 (1864).

In *Autey*, *Dears. & B. C. C.* 294; 26 *L. J. M. C.* 190 (1857), the prisoner was convicted for *uttering* a dividend warrant of a railway company bearing (as he knew) a forged indorsement. The instrument was regularly drawn and signed by the secretary in favour of one J. L., and it was stated upon it that the name of J. L. must be indorsed upon the back, and it was proved that without such indorsement the bankers would not pay the dividend even to J. L. himself. The indorsement was forged, and as that forgery "amounted to a forgery of the entire document" it was held that the prisoner was rightly convicted; p. 466. In *Griffiths*, *Dears. & B. C. C.* 548; 27 *L. J. M. C.* 205

(1858), the prisoner was a station-master, and it was his duty to pay B. for collecting *and* delivering parcels for the company, who provided the prisoner with a form in which to enter the different sums. After a time he paid B. for collecting *only*, but put in items for *both* delivering and collecting, and got a receipt from B.'s servant on the paper (simply "received for B."), no sum being mentioned: afterwards he put a receipt stamp under the signature and wrote on it the amount of *both* charges. It was held that the prisoner was rightly convicted of forgery. If a person, having the blank acceptance of another, be authorised to write on it a bill of exchange for a limited amount, and he write on it a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, it has been held, by twelve judges, that it is forgery. *Hart*, 7 *C. & P.* 652 (1836). So of a blank cheque; *Bateman*, 1 *Cox C. C.* 186 (1845). It is not necessary that additional credit should have been gained by the forgery, if any person has been thereby intentionally defrauded; *e.g.* where an *unknown* person endorsed a bill in a false name when his own would have been equally accepted. *Taft*, 1 *Leach* 172 (1777); 2 *East P. C.* 954; *Taylor*, 2 *East P. C.* 960; 1 *Leach* 214 (1779), the indorsement in both cases being unnecessary. Cf. *Whiley*, p. 459.

Where a customer of a bank altered his own handwriting on a paid cheque, returned to him, so as to make it appear to be forged, and upon returning it as forged, got credit for the amount, it was held not to be forgery, but an obtaining by false pretences. *Brittain* v. *Bank of London*, 3 *F. & F.* 465 (1863).

Using one's own name.] It is essential to the crime of forgery that the document should contain a false statement. But this may be done by a person barely signing his own name to a document. Thus, where a bill of exchange payable to H. D. or order came to the hands of another H. D., who fraudulently indorsed it, this was held to be forgery. *Mead* v. *Young*, 4 *T. R.* 28 (1790); but cf. *Story*, p. 413. The indorsement of the bill amounted in fact to a statement that the indorser was *that* H. D. to whom the bill was payable. If a person uses his own name, but attaches a false description to it, it will be the same as if he used a fictitious name. See below.

Using another person's or a fictitious name.] Sometimes the only false statement in the document which is charged as a forgery is the use of a name to which the prisoner is not entitled. If the name be that of a known existing person, which is the commonest species of forgery, there is no difficulty. But it was at one time doubted whether, if the name were a fictitious one and of a non-existing person, it was still forgery. But that doubt has long been settled. *Lewis*, *Foster C. C.* 116; 2 *East P. C.* 957 (1754), p. 463. See also the judgment "after very long consideration" in *Lockett* (1774), p. 466; 2 *Russ. Cri.* 586. And the same rule applies to a signature in the name of a fictitious firm. *Per* Bosanquet J., *Rogers*, 8 *C. & P.* 629 (1838), where the fictitious "Nicholson & Co." may have been signed by an actual Nicholson. If the name be an assumed one, then it will be forgery to draw up a document in that name, if the name were assumed for the express purpose of the fraud. The prisoner was indicted for forging a bill of exchange, in the name of Thomas White, as drawer. He came to Newnham, where he introduced himself, and resided for a time, and officiated as curate under that name, another Mr. White being really expected there as curate. During his imposture he negotiated the bill in question. Dallas J. told the jury that if they thought the prisoner went to Newnham "in the fictitious character of a clergyman, with a false name, for the sole purpose of getting possession of the curacy, and of the profits, &c.," they should acquit him, the bill transaction being "no part of his original plan," but having "sprung up

incidentally and collaterally"; but if they were satisfied that he went there intending fraudulently to raise money by bills in a false name, and that this bill was made in pursuance of such intent, they should convict him—which they did, expressly on this ground. Eleven judges were of opinion (1) that where proof is given of a prisoner's real name, and no proof of any change of name until the time of the fraud committed, "it throws it upon the prisoner to show that he had before assumed the false name on other occasions, and for other purposes"; (2) that "where the prisoner is proved to have assumed a false name, for the purpose of pecuniary fraud connected with the forgery, drawing, accepting, or indorsing in such false or assumed name is forgery." *Peacock, Russ. & Ry.* 278 (1814).

Samuel Whiley was indicted for forging a bill of exchange in the name of *Samuel Milward*. He came to the shop of the prosecutor, at Bath, and ordered some goods in that name, and, a few days afterwards, said he would give a draft upon his banker in London, and gave the bill in question. No Samuel Milward kept an account with the London banker. The prisoner had always been known by the name of *Whiley;* but a day or so after his first order to the prosecutor, a brass plate with the name of "Milward," was fixed upon the door of his house. The prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know, and who was drawer, payee, and indorser; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary; and if the prisoner had come to him as "Samuel Whiley" he should have given him equal credit. The prisoner stated that in fact *Samuel Milward* was part of his real name, and that he had omitted that of *Whiley* for fear of arrest. The judge left it to the jury to say whether the prisoner had assumed the name of "Milward," &c., with intent to defraud; they found him guilty, and the judges were of opinion that the conviction was right. *Whiley*, 2 *Russ. Cri.* 593; *Russ. & Ry.* 90 (1805). Cf. *Taft* and *Taylor*, p. 458.

Where the facts were almost identical with those in *Whiley*, and it was urged that the prisoner had a right to take any name he pleased, that the prosecutrix had never known him by any other than that he signed and that he had not drawn on the banker in the name of a real customer, the judges held the conviction right, and were of opinion that, if the name were assumed for the purpose of the fraud and avoiding detection, it was as much a forgery as if the name assumed were that of any other person of known credit, though the case would have been different if the prisoner had habitually used, and become known by another name than his own. *Francis, Russ. & Ry.* 209; 2 *Russ. Cri.* 593 (1811).

So, in *Parkes and Brown*, 2 *Leach* 775; 2 *East P. C.* 963 (1796), p. 474, where a person of the name of T. Brown, dated a note at Ringhton, Salop, and made it payable at bankers in London, and got Parkes to sign it in the name of T. Brown, and passed it off as a note of his brother; and it was not proved that the prisoner had a brother of that name, but it was that there was no person of that name who resided at Ringhton, or kept an account with those bankers; this was held by the judges to be the uttering of a forgery by *Brown*, cf. p. 472, but Parkes was discharged on a point of venue. *D. Walker* (1807), 6 *Evans's Collection of Statutes*, 93, *3rd ed.*, 1829, criticises, and is sometimes quoted as an authority against, this; but there the prisoner, a pauper, unknown to the drawee, had been in the habit of drawing bills (dated Liverpool, though he lived at Manchester) in the same fictitious name, viz. "D. Walker & Co.," for some time, and they had been regularly paid, so that Chambre, J., thought that there was not sufficient evidence to go to the jury, *i.e.* presumably, of the name having been assumed for the express purpose of carrying out the forgery, which is a necessary ingredient in this class of cases. This appears from the following case:—The prisoner was charged

with forging the acceptance of a bill. The prosecutrix had a house to let; the prisoner took it, and, to pay for the furniture and fixtures, wrote the bill in question, which the prosecutrix signed as drawer, and he accepted in the name of Thomas Scott, he going at that time by the name of Thomas Scott; at various times he had gone by the name Bontien; but he called a broker, who stated that he first knew the prisoner a little before the prosecutrix, and always by the name of Scott, and that he had a nickname of *Bont* and *Bontien* at times; that he had transacted business with him as Scott; that he never knew him by any other name, and that his only knowledge of his having gone by other names was from the newspapers. The judges thought that it did not sufficiently appear that the prisoner had not gone by the name of Scott before the time of accepting the bill, or that he had assumed the name for that purpose, and that the conviction was wrong. *Bontien*, *Russ. & Ry.* 260 (1813).

The result of the cases is that where the fictitious name is assumed for the purposes of the fraud, the offence of forgery may be proved, but it is otherwise where the credit is given solely to the person without any regard to the name, as in the case of *Martin*, 5 *Q. B. D.* 34; 49 *L. J. M. C.* 11 (1879); *C. C. R.*, where Robert Martin, in payment for a pony and cart, in the presence of the prosecutor, who had long known him, drew a cheque in the name of William Martin, upon a bank at which he had then no account, and gave it to the prosecutor as his own cheque drawn in his own name. The prosecutor took it on the credit of the prisoner himself, not observing the name in which it was signed. It was held, following the resolution in *Dunn*, 1 *Lea. C. C.* 59 (1765), p. 457, that the prisoner was not guilty of forgery. But cf. the facts of *Sheppard*, p. 466.

Document need not be perfect.] It is not necessary that the document which is forged should be absolutely legally valid for the purpose for which it was intended. See as to bank-notes, p. 461; and as to bills, p. 464; and as to "orders," pp. 465 foll. Thus an indictment at common law for forging a surrender of the lands of J. S., which did not allege that J. S. had any lands (so that the conveyance, even if genuine, might have been "ineffectual at law," 2 *East P. C.* 948), upon motion in arrest of judgment was held good, as it is not necessary at common law to show any actual prejudice. *Goate*, 1 *L. Raym.* 737 (1700); cf. *Ward*, p. 440. So the making of a false instrument is forgery, though by statute such instruments ought to be in a certain form, which has not been complied with, unless the statute make the informal instrument *absolutely* void. Upon an indictment for forging a power of attorney (as a "deed" within 2 G. 2, 25, repealed) for the receipt of prize-money, the form of the forgery did not strictly comply with that in the statute (now repealed). The prisoner being convicted, a majority of the judges were of opinion that the letter of attorney was not a void instrument, but that it might be the subject of a criminal prosecution; that a payment made under it, to the use of the petty officer, would be good as against him, and that the attorney under it might bring an action for the prize-money, or execute a release. *Lyon*, *Russ. & Ry.* 255 (1813), p. 463. Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation in law; pp. 150, 576, 465. Where there was no drawer's name on a bill at any time, and the acceptor forged an indorsement, it was held that, as the document was not a bill, he could not be convicted of feloniously forging or uttering an indorsement *on a bill* (but ought to have been indicted for forgery at common law). See p. 464; and *Butterwick*, p. 465; *Harper*, 7 *Q. B. D.* 78; 50 *L. J. M. C.* 90; 14 *Cox C. C.* 574 (1881); *C. C. R.* See p. 464. Cf. p. 472. On an indictment under 33 G. 3, 30 (repealed), several points were ruled with

regard to forging a transfer of stock. *Gade* was a co-executor of a testator who had bequeathed some consols to a grandson (H.), whom he made his (G.'s) son personate at the bank, and whose name he made him forge, for the purpose of transferring the stock to W. H. had never accepted the stock, as required by law, though it had been transferred into his name. Owing to the son mis-spelling H.'s name, the fraud was unsuccessful, and prisoner was convicted of forgery. Three objections were taken on behalf of the prisoner: 1st, there was no acceptance by H. of the transfer, till which time, therefore, the transfer was incomplete, and H. could not possess the stock; 2nd, that till the stock was accepted, H. could not transfer it to any one; 3rd, that the instrument was not witnessed, which, according to the printed forms used by the bank, should have been done. After much argument, the opinion of the twelve judges was delivered by Buller J. who observed, that, as to the two first objections, two answers had been given: 1st, that the stock vested by the mere act of transferring it into the name of H., and that if he had died before he accepted it, it would have gone to his executors as part of his personal estate; 2nd, that the nature of the offence would not have been altered, if H. *had not had any stock* standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred. Neither the forgery nor the fraud would have been less complete, if H. had really had no stock. As to the third objection, the judges all thought that the entry and signatures, as stated in the indictment, were a complete transfer, without the attestation of witnesses, which was no part of the instrument, but only required by the bank for their own protection. *Gade*, 2 *East P. C.* 874; 2 *Leach* 732 (1796).

Personating owner of stock.] Under 31 G. 2, 22, 77 (repealed: see now s. 4, p. 442), the prisoner was indicted for personating one I. H., the proprietor of certain stock, and thereby "endeavouring to receive" from the bank of England the sum of, &c. The prisoner, representing himself to be I. H., received, at the bank, a dividend warrant for the sum due, on receiving which, instead of carrying it to the pay-office, he walked another way, and, being at once arrested, made no attempt to get the money. It was objected, that there was no proof of his having "endeavoured to receive" the money, but the judges held this conviction right, as the manner in which he applied for and received the warrant was a personating of the true proprietor, and he thereby endeavoured to receive the money, within the meaning of the Act. *Parr*, 1 *Leach* 434; 2 *East P. C.* 1005 (1787).

Forging a bank-note.] See p. 460. "Where the forgery," says East, "consists in counterfeiting any other [*i.e.* than a bill] known instrument, it is not necessary that the resemblance should be an exact one: if it be so like as to be calculated to deceive [persons in general, *East* 950], when ordinary and usual observation is given, it seems to be sufficient. The same rule holds, in cases of counterfeiting the seals, and coining." 2 *P. C.* 858. Thus where a bank official stated that *he* should not have been imposed upon by the counterfeits; the difference between those and the true notes being to him so apparent; yet, it appearing that others had been deceived, though the counterfeits were very ill executed, it was held that this was a forgery. *Hoost*, 2 *East P. C.* 950 (1802). Prisoner was indicted for forging a Bank of England note (which he never uttered), the instrument, though it much resembled a real bank-note, was not made upon paper bearing the water-mark of the bank; the number also was not filled up, and the word "pounds" was omitted after the word "fifty"; but in the margin were the figures £50. It was contended, that on account of these defects, this could not be held a

forgery of a bank-note; but the judges held the prisoner rightly convicted; for, first, in forgery, there need not be an exact resemblance—it is sufficient that the instrument is *primâ facie* fitted to pass for a true one; secondly, the majority inclined to think that the omission of "pounds" in the body of the note had nothing else appeared, would not have exculpated the prisoner; but it was matter to be left to the jury, whether the note purported to be for 50*l.*, or any other sum; but all agreed that the 50*l.* in the margin removed all doubt. *Elliot*, 2 *East P. C.* 951; 1 *Leach* 175; 2 *New Rep.* 93 *n.* (1777). See also *M'Connell*, 1 *C. & K.* 371; 2 *Moo. C. C.* 298 (1844), and an illustration of Buller J. at the end of *Gade* (in *Lea.*), p. 461.

The prisoner was convicted for uttering a forged note of a private bank. It appeared that he had altered a note of the Bedford Bank from "one" to "forty pound" (*sic*), but had cut off the signature of the maker, so that the words for "B. B. and G." (his firm) only were left, and had made other small obliterations. The judges were clearly of opinion that the conviction was wrong, under the then statute, but see now s. 12, p. 445. *Pateman, Russ. & Ry.* 455 (1821).

The prisoner was indicted for having uttered, &c., "a certain forged paper writing, *purporting* to be a bank-note," in the following form:—

No. F. 946.
I promise to pay John Wilson, Esq., or bearer, ten pounds.
London, March 4, 1776.

For Self and Company of
my Bank in England.

£Ten.
Entd. *John Jones.*

On the counts charging an intent to defraud the bank of England he was acquitted, but a special verdict was found, that he intended to defraud the man who gave him ten pounds for the paper, knowing that it was forged, but saying that it was good, and the question argued was, whether this paper writing purported to be a *bank-note.* The K. B. were of opinion, that the representation which prisoner had made that it was a good note, could not alter the *purport* of it, which is what appears on the face of the instrument itself; for although such *false* representations might make him guilty of a fraud or cheat, they could not make him guilty of felony. *Jones*, 1 *Leach* 204; 2 *East P. C.* 883, 981 (1779), p. 477. "Jones's crime was that of telling a falsehood," *per* Mansfield C.J., *Collicott*, 4 *Taunt.* 303 (1812), p. 473.

The prisoner was indicted for uttering a forged "promissory note." The instrument was as follows:—

| N. 6414. | Blackburn Bank. | 30 shillings. |

I promise to take this as thirty shillings, on demand, in part for a two pound note, value received.

No. 6414.
Entd. J. C. Blackburn, Sept. 18, 1821.

| Thirty shillings. | For Cunliffe, Brooks and Co.

| R. Cunliffe. |

It was doubted whether this could be called "a promissory note," and, further, whether such a genuine original instrument could have any validity, or was not a mere nullity, and the judges held that judgment ought to be arrested. *Burke, Russ. & Ry.* 496 (1822), who annotate, "It is to be observed of" this "instrument . . . that it was not payable to the bearer on demand;

that it was not payable in money, that the maker only promised to take it in payment, and that the requisitions of 17 G. 3, 30 [repealed] were not complied with."

Engraving "part of" a note.] In *Keith*, 1 *Dears. & P. C. C.* 486; 24 *L. J. M. C.* 110 (1855), the prisoner was convicted of engraving upon a plate "part of a promissory note of a bank. He cut out the centre of . . . a promissory note purporting to be the . . . note" of the B. L. Banking Company, on which the whole of the note was written, and had procured to be engraved upon a plate part of the ornamental border of the note, consisting of the royal arms. The question was, whether this amounted to an engraving upon a plate "part of a . . . promissory note, purporting," &c., within 11 G. 4 and 1 W. 4, 66, 18 (repealed). The court held that it did. Parke B. said, "To see whether an engraving purports to be part of a note you must compare it with the original note. If the forged engraving is clearly intended to imitate any part of a note, whether that part be the obligatory part of the note or not, it is, I think, an offence within the statute. There must be such a portion engraved, that you can say clearly on comparison that it is intended to imitate part or to purport to be part of a note. If a single dot or line only were engraved, there would not be enough to induce one to say, that the engraving purported to be part of a note. But the royal arms of Scotland in the position in which they are found and the Britannia in the margin, appear on comparison without any doubt to purport to be part of the ornaments of a real note": conviction affirmed.

24–5 V. 98, 16, p. 446, extends to the engraving in England of the plates of notes of banks trading exclusively in Scotland, notwithstanding that s. 55 excepts Scotland from the statute. *Brackenridge, L. R.* 1 *C. C. R.* 133; 37 *L. J. M. C.* 86 (1868).

Making a note, &c.] The taking of a "positive" impression of a note on glass by photography is a "making" within 24–5 V. 98, 19, p. 447, although such impression is evanescent, and cannot be printed or engraved from until it has been converted into a "negative." *Rinaldi, L. & C.* 330; 30 *L. J. M. C.* 28 (1863).

Forging deeds.] On an indictment against accessories before the fact to the forging of an administration bond, on administration granted for the effects of J. S., it was objected that, 22–3 Car. 2, 10 requiring the bond to be given by the person to *whom administration was granted*, and not by the person *that was entitled to administration*, the bond could not be treated as a forgery, but was a good bond within the statute, having been given by the person to whom, in fact, administration was granted. The objection was overruled. *Barber*, p. 146.

The forging of a power of attorney to receive a seaman's wages, was held to be the forgery of a deed within 2 G. 2, 25 (repealed). *Lewis*, p. 458. See *Lyon*, p. 460. So a power of attorney to transfer government stock; *Fauntleroy*, 1 *Moo. C. C.* 52; 2 *Bing.* 413 (1824); and an indenture of apprenticeship; *Jones*, 2 *East P. C.* 853, 991; 1 *Leach* 366 (1785), pp. 474, 562. And though the instrument may not comply with the subsequent directory provisions of a statute as to form, it may still be described as a "deed" under an earlier statute, "for the directory provisions do not make the deed . . . wholly void"; *Lyon*, p. 460. But a letter of orders under the seal of a bishop is not a deed within 24–5 V. 98, 20, p. 448. *Morton, L. R.* 2 *C. C. R.* 22; 42 *L. J. M. C.* 58 (1873).

Forging wills.] A will began, "I, Peter Perry," and was signed "John × Perry, his mark." It was objected on indictment for forging the will of

Peter Perry that this was not a forgery of the will of Peter Perry as laid in the indictment, but as the prisoners were executed, the judges must have considered the conviction good, though no judgment was given. *Fitzgerald*, 1 *Lea.* 20; 2 *East P. C.* 953 (1741).

It was held that at common law, it makes no difference that the testator whose will is forged is living. *Coogan*, 1 *Lea.* 449; 2 *East P. C.* 948 (1787), p. 474. So if the will is made in the name of a non-existing person. *Avery*, p. 130 (1838), under 11 G. 4 and 1 W. 4, 66, 3 (repealed), *per* Patteson J.

A probate, unrevoked, is not conclusive proof of the validity of a will. *Buttery*, *Russ. & Ry.* 342 (1818), for it may *afterwards* turn out to be a forgery. *Priestman* v. *Thomas*, 9 *P. D.* 210 (1884); *C. A.*

Forging bills of exchange.] As to imperfect instruments, see p. 460. The prisoner was indicted for forging, and also for uttering, a bill of exchange. He discounted the bill and indorsed a name not his own on it, there being another already there; but there was no indorsement of the name of the drawers, to whose order it was made payable. It was urged that as there was no indorsement by the payees, nor anything purporting to be such an indorsement, the instrument was not negotiable, and could not, therefore, effect a fraud, but the prisoner was convicted, and the judges, except Bayley J. held the conviction proper. *Wicks*, *Russ. & Ry.* 149 (1809); cf. *Moffatt*, below.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time "without acceptance" is a bill of exchange. *Per* Patteson J., *Kinnear*, 2 *Moo. & R.* 117 (1838).

But where the indictment was for forging the acceptance of a bill of exchange, and the requisitions of statutes, which expressly made bills without those requisitions void, had not been complied with, the prisoner having been convicted, the judges were unanimously of opinion that as the instrument, if real, would not have been valid or negotiable, the conviction for the *capital* forgery under 2 G. 2, 25, and 7 G. 2, 22 (both repealed as to forgery), was wrong; one essential was the attestation of a subscribing witness. *Moffatt*, 1 *Leach* 431; 2 *East P. C.* 954 (1787); cf. *Wicks*, above. This case was distinguished from *Hawkeswood*, below. What purports to be a bill of exchange, but has not a drawer's signature, is not a bill of exchange so as to support an indictment for forging the acceptance of "a bill of exchange." *Mopsey*, 11 *Cox C. C.* 143 (1868); cf. *Harper*, p. 460.

A document in the ordinary form of a bill of exchange, but requiring the drawee to pay to *his own* order, cannot be treated as a bill of exchange. *Per* Erskine J., *Bartlett*, 2 *Moo. & R.* 362 (1841). The prisoner was indicted for forging an order for the payment of money upon "the treasurers" of the navy. There was no payee named in the order, a blank being left. The judges agreed that the direction to the treasurers instead of "the commissioners" (the proper body) would not have invalidated the conviction; but they held, the want of a payee did, as it was not an order for the payment of money. *Richards*, *Russ. & Ry.* 193 (1811). They ruled the same way on the same day, with regard to a navy pay bill (of exchange) with the same defect. *Randall*, *Russ. & Ry.* 195 (1811). It has indeed been holden by a majority, that an instrument in the form of a bill of exchange with an acceptance on it is a bill of exchange, although there be no person named as drawee (cf. *Smith*, p. 477) in the bill; *Hawkes*, 2 *Moo. C. C.* 60 (1838); but this was very much doubted in *Peto* v. *Reynolds*, 9 *Exch.* 410 (1854); and now an instrument cannot be a bill of exchange unless it have a drawer, a drawee, and a payee, and be for a "sum certain." 45–6 V. 61, 3, 6, 7. Cf. p. 468.

The prisoner was convicted of forging a bill of exchange, which was unstamped, but the judges held the conviction right. *Hawkeswood*, 1 *Leach* 257 (1783); *Lee*, *ib.* 258 *n.* (1784); *Morton*, *ib.*; 2 *East P. C.* 955 (1795). In *Teague*, 2 *East P. C.* 979 (1802), p. 478; the judges, following those in these cases, said, "it had been decided that the Stamp Acts had no relation to the question of forgery; but that, supposing the instrument forged to be such, on the face of it, as would be valid provided it had a proper stamp, the offence was complete." See pp. 149, 460.

If the prisoner write another person's name across a blank stamp, on which, after he is gone, a confederate writes a bill of exchange, this (*semble*) is not a forgery of the acceptance of a bill of exchange. *Cooke*, pp. 108, 474. Where another (innocent) person, by the direction of the prisoner, had written the name of an acceptor across a blank bill, on which the prisoner some time subsequently drew a bill of exchange in his own name and that of another (apparently a firm); Parke B. held that this was not a forgery of an acceptance of a bill of exchange within 1 W. 4, 66, 4 (repealed). *Butterwick*, p. 205; see p. 460. But both these would be forgeries at common law.

In order to bring the case within the statute, the instrument in question, which is laid to be a bill of exchange, or promissory note, must purport on the face of it to be legally [cf. p. 460] such. Therefore, where it was in the following form:—"I promise to pay the bearer one guinea on demand, here in cash, or Bank of England note": the judges were of opinion, that this was not a note for the payment of money within [repealed] 2 G. 2, 25, "the guinea being to be paid in cash or a Bank of England note, at the option of the payer." 1*st ed.* of this work, citing *Wilcock* (1808), from 2 *Russ. Cri.* (now p.) 905, where, however, the case is reported somewhat differently. But it is not necessary, in order to constitute a promissory note within that statute, that it should be negotiable. The prisoner was convicted of forging a promissory note, in the following form:—

"On demand, we promise to pay to Mesdames S. W. and S. D., stewardesses for the time being, of the Provident Daughters' Society, held at Mr. Pope's' the Hope, Smithfield, or their successors in office, sixty-four pounds with 5 per cent. interest for the same, value received, this 7th day of February, 1815.

For C. F. & Co.,

64*l.* J. F."

It was moved in arrest of judgment, that this was no promissory note; but the judges were of a different opinion, saying, that it was not necessary that it should be negotiable, and though for some purposes (under the then law) it was not in legal form, yet the "stewardesses" or their executors could sue upon it, and, therefore, it was capable of being the subject of forgery. *Box*, *Russ. & Ry.* 300; 6 *Taunt.* 325 (1815); 2 *Russ. Cri.* 907. And see Smith, p. 467.

A forged indorsement of *one* of several names of executrixes, payees of a bill, was held to be within 1 W. 4, 66, 3 (repealed). *Winterbottom*, 1 *Cox C. C.* 164; 1 *Den. C. C. R.* 41; 2 *C. & K.* 37 (1844).

A seaman's advance note, promising to pay, "provided" the seaman "shall sail in the said ship, &c." cannot be described as a promissory note or order for the payment of money, as it is a *conditional* agreement. *Howie*, 11 *Cox C. C.* 320 (1869), *per* Hannen J. Cf. p. 467, and below.

Forging undertakings (by sureties, &c.), warrants, or orders for the payment of money.] An undertaking to pay a sum which is uncertain and dependent upon a contingency, is within 1 W. 4, 66, 3, above. Thus where the undertaking was to pay W. B. 100*l.*, "or such other sum . . . not exceeding

the same, as he may incur . . . by reason . . . of his becoming one of the sureties to" the sheriff of Y. for his officer (the forger), all the judges held a conviction right. *Reed*, 8 *C. & P.* 623 (1838). So under s. 23, p. 448. *Joyce*, *L. & C.* 576 (1865), p. 468.

Forging an *indorsement* upon an order for the payment of money is not within 1 W 4, 66 (above). *Arscott*, 6 *C. & P.* 408 (1838), p. 472. But cf. *Autey*, p. 457, where it was said the indictment in *Arscott* disclosed no offence known to the law.

Forging an indorsement on a cheque in order to get the cheque cashed by the credit of the name, is an offence within s. 24, p. 448, even if the cheque is valid without it. *Wardell*, 3 *F. & F.* 82 (1862).

Formerly it must have appeared, either upon the face of the instrument itself, or by proper averments, that the instrument bore the character of *an order*. The forgery was as follows:—

"Gentn., "London, April 24, 1809.
"Please to pay the bearer on demand fifteen pounds, and accompt it to
"Your humble servant,
"Charles H. Ravenscroft.
"Payable at Messrs. Masterman & Co.,
"White Hart Court,
"Wm. McInerheney."

The prisoner being convicted, a majority of the judges, on a case reserved, held that this was not "an order for the payment of money" within the (then) Act. *Ravenscroft*, *Russ. & Ry.* 161 (1809).

A paper in the following form, "Mr. Johnson, Sir, please to pay to James Jackson the sum of 13*l.* by order of Christopher Sadler, Thornton-le-Moor, Brewer—the District Bank. I shall see you on Monday. Yours obliged, Chrs. Sadler. The District Bank" was held to be an order for the payment of money; Sadler being proved to be a customer of the District Bank, whose draft, if genuine, would have been paid, although, at the time of the forgery, he had no effects in the bank. *Carter*, 1 *Cox C. C.* 170; 1 *C. & K.* 741 (1844); (in 1 *Den. C. C. R.* 65, there are some inaccuracies). See also *Vivian*, 1 *C. & K.* 719; 1 *Den. C. C. R.* 35 (1844), where it was held by the judges that "any instrument for payment under which, if genuine, the payer may recover the amount against the party signing it, may properly be considered a warrant for the payment of money, and it is equally this, whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not." A document in the following form:—

"November 21, 1870,
I. O. U. thirty-five pounds.
35*l.* Arthur Chambers,
George Wickham,"

where Wickham's name was forged, was held to be an "undertaking for the payment of money" within s. 23, p. 448. *Chambers*, *L. R.* 1 *C. C. R.* 341; 41 *L. J. M. C.* 15 (1871).

As to "warrant" and "order for payment of money,"—"instruments, which in the commercial world have peculiar denominations," may be so called if they be, in fact, orders or warrants. Thus a bill of exchange may be described as an order, &c., for every bill of exchange is, in law, an order for the payment of money, but not *vice versâ*: cf. p. 467; cheques are now bills of exchange. *Lockett*, 1 *Leach* 94 (1772), below; *Sheppard*, 1 *Leach* 226 (1781), "drafts" on bankers (cheques). See on these cases 2 *East P. C.* 940, 943, 944.

So a bill of exchange or "a post bill" or "draft" may be "a warrant for the payment of money." *Willoughby* (1783), *ib.* 581, p. 712.

A forged paper purporting to be an authority signed by three officers of a friendly society to receive the money of the club lodged in a bank, was held to be well described in some counts as a *warrant* for the payment of money, nor did the defence that prisoners were members of the society and so joint owners avail, p. 553. *Harris*, 2 *Moo. C. C.* 267 (1842). A post-dated cheque is an order for the payment of money within 1 W. 4, 66 (repealed). *Taylor*, 1 *C. & K.* 213 (1843), p. 468. And a stolen post-office order form filled up is an order to pay, though no letter of advice has been sent. *Vanderstein, &c.*, 10 *Cox C. C.* 177 (1865); *C. C. R. (Ir.)*, pp. 479, 712. Cf. *Gilchrist, C. & M.* 224, 2 *Moo. C. C.* 233 (1841), p. 712; *Howie*, p. 465 and below.

Lockett, above, and p. 458, was an early case of forging a draft by a fictitious customer on a real bank: on it, *East*, above, says, if the instrument "purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person existed in fact as the order purports to be made by, it falls within . . . the Act." This appears to have been always the law.

In *Dawson*, 2 *Den. C. C. R.* 75; 20 *L. J. M. C.* 102 (1851), the document was in the following form: "London. Mr. Lowe. Bought of C. Dawson, English and foreign fruit merchant . . . Nov. 9, two bushells of apples, 9*s*. Sir, I hope you will excuse me sending for such a trifle; but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling. Yours, &c., F. Dawson." It was proved at the trial that Lowe was indebted to one Mrs. *Frances Dawson*, who carried on business in the name of C. Dawson, in the sum of nine shillings for two bushels of apples; that the document was forged and uttered to Lowe, as a genuine instrument coming from F. Dawson, with the intent, &c. The document was held to be both a warrant and an order within 1 W. 4, 66, above. It was admitted that this was a *request* for the delivery of money; now within 24–5 V. 98, 23, p. 448.

A forged letter of credit, on receipt of which the addressees having funds of the supposed writer's in their possession, pay them to the bearer, was held by the judges to be "a warrant" for the payment of money within the Act of 1830. *Raake*, 8 *C. & P.* 626; 2 *Moo. C. C.* 66 (1838). A forged paper was in the following form:—"To M. & Co. Pay to my order, two months after date, to Mr. J. S., the sum of 80*l.*, and deduct the same out of my account—80*l.*" It was not signed, but across it was written, "Accepted, Luke Lade"; and at the back the name and address of J. S. M. & Co. were bankers, and Luke Lade one of their customers, but J. S. was not. It was held that this was a warrant for the payment of money; as, if genuine, it would have been a warrant from Luke Lade to the bankers to pay the money to J. S. *Smith*, 1 *C. & K.* 700; 1 *Den. C. C. R.* 79 (1845), p. 465.

A paper containing an order to pay the prisoner or order money, being a month's advance on an intended voyage, "as per agreement with" the signer, viz. the master (name forged) in the margin of which the prisoner had written an undertaking to sail in a certain number of hours, is an order, &c., within the 1830 Act. *Bamfield*, 1 *Moo. C. C.* 416 (1834); as this was cited with approval in *Anderson*, p. 409, it clearly depends on the *form* being unconditional. So *Howie*, p. 465, which certainly turned on the indictment, for the judge ordered another to be preferred.

The prisoner was charged in every count with forging "a certain warrant *and* order," &c., *i.e.* a cheque upon a banker. It was objected that this charged an offence with regard to *two* instruments; but Bosanquet J. was of opinion that the instrument was both a warrant and an order; a warrant

authorising the banker to pay, and an order upon him to do so. *Crowther*, 5 *C. & P.* 316 (1832); and *Taylor*, p. 467.

An indictment describing the forged order as being for the payment of 85*l.* or as "an acquittance receipt" for that sum is good, although it appears that by the course of business the bankers paid that sum *with interest*, and so a larger sum than the indictment mentioned. *Atkinson*, *Carr. & M.* 325 (1841).

Nor will an instrument be less the subject of forgery on account of its not being "available, by reason of some collateral objection not appearing on the face of it." The prisoner forged an "order for the payment of money" within 7 G. 2, 22 (repealed); the person whose name was forged was a discharged seaman, who was, in fact, at the date of the order, within seven miles of the place where his prize-money was payable, though the place in the forgery was well over that distance, which, as it had not the proper attestation, would have invalidated his *genuine* order, by virtue of a (now repealed) statute. Moreover, the forgery mentioned no "sum certain" (p. 464), but ran, "all my proportion of prize-money." The judges, however, held the conviction proper; it was an "order" [if not a bill of exchange, p. 464] and as it purported, by a false representation, by which the money was obtained, to be in order and outside the statute, there was "a false making of an order," *i.e.* forgery; cf. p. 460; the order itself on the face of it purporting to be made at another place beyond the limited distance. *M'Intosh*, 2 *East P. C.* 942, 956; 2 *Leach* 883 (1800).

In *Snelling*, 1 *Dears. & P. C. C.* 219; 23 *L. J. M. C.* 8 (1853), following *Carney* and *Pulbrook*, p. 470, the forged document was in the following form:—"Holton, Mar. 31, 1853,—Sirs, pleas to pay the bearis, Mrs. Smart, the sum of eaigth Hundred and 50 4£ ten shillings for me, James Ramsey." It was held, that, although not addressed to any one, it might be shown, by parol evidence, for whom the document was intended, and this appearing to be the banker with whom J. R. kept an account, the document was an order for the payment of money.

So it is no defence to an indictment for forging, &c., an order of a board of guardians for payments to show that the person who signed the order as chairman—which had to be done (practically) by statute—was not, in fact, chairman on the day he signed, the forgery charged being of *another* name in the order. *Pike*, 2 *Moo. C. C.* 70 (1838).

But an "indictment for forging an order for relief to a discharged prisoner, under" a repealed statute, "being in many instances ungrammatical and at variance from the Act," was held bad. *Donnelly*, 1 *Moo. C. C.* 438 (1835).

A guarantee, *i.e.* a promise to pay, by a *third* person, is within s. 3, pp. 465-6. Therefore, where the supposed maker of a forged instrument undertook, in consideration of goods to be sold to R. P., to guarantee to the vendor the due payment of such goods; this was held to be the forgery of an undertaking for the payment of money. *Stone*, 1 *Den. C. C. R.* 181 (1846); and see *Joyce*, p. 466.

A receipt for repayment of a deposit in a building society, which in fact the society accepted as an order to pay, was held to be "a warrant," "authority," or "request" for payment within s. 24, p. 448. *Kay*, *L. R.* 1 *C. C. R.* 257; 39 *L. J. M. C.* 118 (1870).

Forging receipts.] In *West*, 1 *Den. C. C. R.* 258 (1847), the majority of the judges held that an instrument professing to be a scrip certificate of a railway company was not "a receipt *and* acquittance" nor a "receipt" nor an undertaking for the payment of money within 1 W. 4, 66, 3, 10, 26 (repealed): "It was not a receipt in ordinary parlance, nor made with intent of being such, though it might be used as evidence of a payment of the deposit; but . . . any written paper capable of being so used was not a

receipt; as, for instance, a letter written by a landlord to a third person, saying that his tenant had duly paid his rent." Some thought that "it was only an undertaking to deliver shares bearing interest, not that the interest should be paid; as an undertaking to deliver a bond for the payment of money with interest would be no undertaking for the payment of money." See also *Clarke* v. *Newsam*, 1 *Exch. R.* 131; 16 *L. J. Ex.* 296 (1847), which the majority followed.

It was the practice of the treasurer of a county, when an order had been made on him for the payment of expenses of a prosecution, to pay the whole amount to the attorney for the prosecution, or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person respectively. Erle J. held, that such a signature was not a receipt within s. 10, above, but merely an authority to the treasurer to pay. *Cooper*, 2 *C. & K.* 586 (1847).

The document need not be averred as "a receipt" in the indictment, if by the evidence it appears to have been one. *Martin*, 7 *C. & P.* 549 (1836), where it was held by the fifteen judges overruling *Thompson*, 2 *Lea.* 910 (1801), that the words "settled—S. Hughes," at the foot of a bill, without any averment that they imported a receipt, were sufficient. A servant received from her mistress money to pay the bill of one Sadler. She brought the bill back to her mistress, with the words, "Paid, sadler," upon it. Sadler proved that these words were not written by him or his authority; there was a bare possibility that the money had been paid to his boy. L. Denman C.J. left it to the jury to say whether, in the circumstances, the document was intended by the servant as a receipt for the money, or merely as a memorandum (of her own) of her having paid the bill; guilty, *i.e.* the money was not paid. *Houseman*, 8 *C. & P.* 180 (1837). So where the charge was forging, &c., a receipt, and the proof was that prisoner had altered 11*l.* to 16*l.* in the following voucher, "6th Jan., 1830, 11*l.* 5*s.* 10*d.* for the high constable, J. H."; and it was objected, on the authority of *Barton*, 1 *Moo. C. C.* 141, (1826), under 2 G. 2, 25 (repealed), that the indictment was bad for not containing an averment what the words meant, as in themselves quite ambiguous, Alderson B. held the word "receipt" sufficient, and pointed out that the lapse of time made no difference as to the felonious intent. *Boardman*, 2 *Lew. C. C.* 181; 2 *Moo. & R.* 147 (1838).

A scrip receipt, with the blank for the name of the subscriber not filled up, and therefore not purporting to be a receipt of the sum therein mentioned from any person, is not a "receipt . . . for money" within 2 G. 2, 25, above. *Lyon*, 2 *East P. C.* 933; 2 *Leach* 597 (1793).

Making a false entry in what purports to be a banker's pass-book, with intent to defraud, is a forgery of an accountable receipt. *Smith, L. & C.* 168; 31 *L. J. M. C.* 154 (1862); and *Moody, L. & C.* 173 (p. 448); 31 *L. J. M. C.* 156 (1862).

A turnpike toll-gate ticket, "denoting the payment of toll," is a receipt for money. *Fitch, L. & C.* 159 (1862).

The document must be such that, if genuine, it would amount to a receipt. Thus, the forgery was as follows:—

"Wm. Chinnery, Esq. paid to × *tomson* the som of 8 pounds feb. 13, 1812."

It was uttered with a proper stamp by the prisoner as a genuine receipt, and taken as such by Mr. Chinnery's housekeeper, Chinnery, in fact, owing Thompson, 7*l.* The judges by a majority held the conviction wrong, being of opinion that this could not be considered as a receipt within 2 G. 2, 25, above; "it was an assertion that Chinnery had paid the money, but did not

import an acknowledgment thereof" from Thompson *Harvey, Russ. & Ry.* 227 (1812).

On an indictment for uttering a forged receipt for the sum of 10*l.*, it appeared that the prisoner obtained from Pritchard the sum of 10*l.*, for which he produced the following stamped receipt:—

"Received of Mr. Wm. Pritchard by the hands of Mr. Wm. Griffiths the sum of 10*l.*, being in full for debt and costs due to the said Jas. Reese, having no further claim against the said Wm. Pritchard. As witness my hand, this 15th day of October, 1842.

The mark of × James Reese."

It was clearly proved that Reese had not signed the receipt or in any way authorised the prisoner to deal with the matter, though prisoner had pretended the contrary. *Griffith*, 2 *Russ. Cri.* 926 (1843).

But the document need not be signed. In *Inder*, p. 409, an unsigned forged paper, "Received from Mr. Bendon, due to Mr. Warman, 17*s.*—Settelled," was held to be a forged receipt within 1 W. 4, 66, 10, p. 468; prisoner was Warman's servant and got the money. See *Illidge*, below.

A "clearance" ticket, issued upon the transference of a member from one branch of a benefit society to another, certifying that the member had paid all dues, is not an "acquittance" or "receipt" within s. 23, p. 448. *French*, *L. R.* 1 *C. C. R.* 217; 39 *L. J. M. C.* 58 (1870); nor an ordinary railway ticket. *Per* Cleasby B., *Gooden*, 11 *Cox C. C.* 672 (1871).

Forgery of warrants, orders, and requests for the delivery of goods.] The law is much the same as that of forging undertakings, warrants, orders, &c., p. 465, and the indictment has had much the same history. See now s. 42, p. 453. The prisoner was indicted for uttering a forged request for the delivery of goods, which was not addressed to any one; he represented himself falsely as the servant of a certain person, and so got the goods: the judges held the conviction right within 1 W. 4, 66, 10, p. 468. *Carney*, 1 *Moo. C. C.* 351 (1832), p. 468; *Pulbrook*, 9 *C. & P.* 37 (1839), p. 468. No difficulty would arise now in such a case, owing to 24–5 V. 98, 44, p. 454; see also *Rogers*, 9 *C. & P.* 41 (1839); *Walters*, *Carr. & M.* 588 (1842), where by the course of business a signed list became a request for delivery; and *Snelling*, p. 468.

An instrument may be a request, although it be also an undertaking to pay for the goods, *e.g.* "please send a hat, and I will answer for the money. E. B." *White*, 9 *C. & P.* 282 (1840).

A forged request was held to be within s. 10, although the person whose name was forged had not any authority over, or interest in the goods, neither did the request profess to charge such person, nor to specify goods, the goods being supplied on the credit of the prisoner. *Thomson*, 7 *C. & P.* 851; 2 *Moo. C. C.* 16 (1837).

So a forged paper addressed to a tradesman by a customer: "Pleas to let bearer, William gof, have spillshoul and grafting tool for me—Edward reeketts, &c." was held to be a forged request for the delivery of goods within s. 10. *James*, 8 *C. & P.* 292 (1838). See also *White*, above.

An order to taste wine in the London Docks, though invalid for want of a signature (cf. p. 460), and another on it being forged, has been held to be an order for the delivery of goods within this s. *Illidge*, 1 *Den. C. C. R.* 404; 18 *L. J. M. C.* 179 (1849): cf. *Inder*, above.

In a forged order for the delivery of goods, "it does not appear necessary that the particular goods should be specified in the order, provided it be conceived in terms intelligible to the parties themselves to whom such order is addressed." A forgery was as follows:—"Sir, please to deliver my work to the bearer. Lydia Bell, Fleet Street, London." Mrs. Bell proved that

she had sent several articles of plate to Goldsmith's hall to be marked. The form of the order was usual, but strictly, the several sorts of work, with the weight of the silver, ought to have been mentioned in it. The judges were of opinion that a conviction under 7 G. 2, 22, p. 468, was right. *Jones*, 2 *East P. C.* 941; 1 *Leach* 53 (1764); and see *Thomas*, above.

The prisoner was indicted under 24–5 V. 98, 38, p. 452, with obtaining money by means "of a certain forged instrument, to wit, a forged telegram." It appeared that he was a clerk in a post-office, and that he sent to a bookmaker a telegram offering a bet on a certain horse for a certain race. The telegram purported to have been handed in *before* the running of the race, and the bookmaker accepted and paid the bet on that understanding. In reality the telegram was despatched by the prisoner *after* he had received the news that the horse had won the race. It was held by three judges to two that the telegram was a forged instrument, and that the indictment was good. *Riley*, (1896) 1 *Q. B.* 309; 65 *L. J. M. C.* 74; 18 *Cox C. C.* 285; *C. C. R.* p. 169. Of course, *per* L. Russell C.J. the prisoner's offence amounted to forgery at common law as well probably as an obtaining of money by false pretences, and also to a misdemeanor under the Telegraph Acts. Cf. *Warner*, p. 784.

Destroying, defacing, or injuring registers.] Cf. p. 400. This subject is treated here in view of s. 36 of the Forgery Act, p. 451. The prisoner was employed in getting up a pedigree, and for that purpose searched the register of births, &c., in a parish. On one occasion, whilst the curate was looking for another book, and had his back turned, the prisoner tore off the lower portion of one of the leaves of one of the registers. The part torn off was not destroyed, and the book was subsequently repaired, and was then as legible as before. The jury found that the prisoner tore the book wilfully, and the Court for C. C. R. affirmed the conviction, which was under 1 W. 4, 66, 20 (repealed). *Bowen*, 1 *Den. C. C.* 22 (1844). Where the prisoner uttered a forged certificate of ordination, with a forged signature of the registrar, Kennedy J. held that this was not within s. 28, p. 449, as the register of ordinations (it was proved) had nothing to do with the "records" of the consistory or any court, being kept for the registrar's personal convenience, and not under any statutory (or even ecclesiastical) authority (but that it was a common law forgery). *Etheridge*, 19 *Cox C. C.* 676; 65 *J. P.* 761 (1901).

Forging county court process.] See p. 449, and cf. pp. 321, 460. In *Evans*, *Dears. & B. C. C.* 236; 26 *L. J. M. C.* 92 (1857), the prisoner being a creditor of R., sent him a letter, not in any way resembling county court process, but headed with the royal arms, and purporting to be signed by the clerk of the county court, threatening county court proceedings. He afterwards told the wife of R. that he had ordered the county court to send the letter, upon which she paid the debt. Held, that the prisoner was rightly convicted under 9–10 V. 95, p. 450, with forging county court process. In *Castle*, *Dears. & B. C. C.* 363 (1857), the prisoner wrote out and sent by post a paper very much resembling a county court notice to a witness to produce books, heading it, "*Castle*, plaintiff. *Charles*, defendant," probably to defraud Charles. It was held that a conviction under that Act was wrong, inasmuch as the paper did not purport to be a copy of a summons or of any other process. In *Richmond*, 1 *Bell C. C.* 142; 28 *L. J. M. C.* 188 (1859), the prisoner had obtained a blank printed form for plaintiff's instructions to issue county court summons, which he filled up with particulars of the names and addresses of himself as plaintiff, and of S. as defendant, and of the nature and amount of the claim. He then, without any authority, signed it with the name of the registrar, and indorsed upon it a notice in his name, that

unless the amount claimed was paid by a certain day, an execution warrant would issue against him. This paper he sent to S., with intent to get his (just) debt; it was held that this was a forgery of county court process within s. 57 of that Act.

Uttering, disposing of, or putting off.] It is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law. The prisoner was indicted for forging and uttering a testimonial to his character as a schoolmaster, and was found guilty (only) of knowingly uttering the forged document with intent to obtain the place as schoolmaster, and to deceive; it was held that he was properly convicted. *Sharman*, *Dears. & P. C. C.* 285; 23 *L. J. M. C.* 51 (1854); overruling *Boult*, 2 *C. & K.* 604 (1848).

The general formula in the Forgery Act, see pp. 444, 448, &c., is "offer, utter, dispose of, or put off."

The proof is very similar to that of uttering, &c., counterfeit coin; see p. 341, and *Welch*, *ib.*

Where the prisoner presented a bill of exchange for payment with the forged indorsement, "Received, R. Aikman" (the payee), and on its being objected that the spelling of the name in the bill was "Aickman," he altered the indorsement into "Received, for R. Aickman, G. Arscott," it may be that the presenting the bill *before* the objection was a sufficient uttering. *Arscott*, p. 466.

The only evidence of uttering a forged acceptance to a bill was that the bill came enclosed in a letter in the prisoner's handwriting, and that the day before the bill became due he wrote a letter acknowledging that it was a forgery; it was held not to be necessary to prove either that the prisoner put the letter into the post himself, or commissioned anybody else to do so, but to be a question of fact for the jury. *M'Quin*, 1 *Cox C. C.* 34 (1843).

It has been said that handing forged instruments to an accomplice or to one knowing the forgery is not "uttering." *Heywood*, 2 *C. & K.* 352 (1847), under 1 W. 4, 66, 20 (repealed), where a forged marriage certificate was given by the pretended husband to the pretended wife, to deceive a third person. But a different decision has been come to on the words, "offer or dispose of or put away," in (repealed) 15 G. 2, 13, 11. Palmer had been in the habit of putting off forged bank of England notes, and had employed the other prisoner, Hudson, as an accomplice in putting them off. The latter having offered one in payment, in the evening of the same day Palmer went with her to the person who had stopped it, and said, "This woman has been here to-day, and offered a two-pound note, which you have stopped, and I must either have the note or the change." The jury (having acquitted Hudson on a direction that on that indictment they could not find *both* guilty) found Palmer guilty on two counts, (1) for uttering and publishing the note as true to *Hudson* (under another statute); (2) for *disposing of and putting away* the note. On the first, "it seemed to be the general opinion" of the judges that had Hudson been an innocent agent (see p. 423), the evidence would have supported the conviction; but as she was not, there was no need to discuss the point, in view of their decision on the second, by "a considerable majority," that the conviction was right. He could not have recovered the note back from Hudson by an action at law; it was out of his legal power, and when it was actually uttered by her, she had effected the purpose for which he had given it her, and it was *disposed of*, and *put away* by him through her means. "As delivering an instrument to another is a step towards uttering it, it seems most consonant to the intention of the legislature to hold that a delivery to another for a fraudulent purpose is an offence

within the words *disposed of* or *put away*." (In other words, constructive possession (pp. 388, 545) was here enough. The minority thought that he was an accessory before the fact.) *Palmer and Hudson*, 2 *Leach* 978; 1 *Bos. & P. N. R.* 96; *Russ. & Ry.* 72 (1804).

This was followed in *Giles*, 1 *Moo. C. C.* 166 (1827), where the jury found the prisoner had given the note to one Burr, who being ignorant of its being forged, paid it away. The judges thought that Burr knew it was forged; but were of opinion that the conviction was right. Had the prisoner been charged without *uttering* instead of *disposing* of the note, it seems that (according to the judges' view), Burr being cognisant of the forgery, the prisoner could not have been convicted, as his offence would have been that of accessory before the fact. See *Soares*, pp. 151, 341, 478; and *Davis*, p. 341. Cf. pp. 151, 423, 478.

The mere showing of a false instrument, the uttering of which would be criminal, with intent thereby to gain credit, was not an uttering or publishing within 13 G. 3, 79, 2 (repealed). The prisoner was indicted for uttering and publishing a promissory note containing the words, &c. In order to persuade an innkeeper that he was a man of substance, he one day pulled out a pocket-book, and showed him the note in question, and others, all got up to imitate a bank of England note, especially at a little distance, the printing being to a great extent identical. He said he did not like to carry so much property about him, and begged the innkeeper to take charge of them, which he did in a sealed cover. This being opened some time afterwards the notes were found to be forged, as stated. The judges held that this did not amount to an uttering. In order to make it such, "they seemed to be of opinion that it should be parted with, or tendered, or offered, or used in some way to get money or credit"; *i.e.* "by means of it," as explained in *Ion*, below. *Shukard*, *Russ. & Ry.* 200 (1811).

But if A. exhibit a forged receipt (within 1 W. 4, 66, 10, p. 468) to B., the person whom he fraudulently pretends to have signed it, this is an uttering, although A. refused to part with it out of his hand. *Radford*, 1 *C. & K.* 707; 1 *Den. C. C.* 59 (1844), where Pollock C.B. said, "In all these cases reference must be had to the subject. A purse is of no use except it be given. Not so a receipt, or turnpike ticket. A promissory note must be tendered to be taken. Not so a receipt, as the person who has it is to keep it." In *Ion*, 2 *Den. C. C. R.* 475; 21 *L. J. M. C.* 166 (1852), distinguishing *Shukard*, above, the prisoner placed a forged receipt for poor-rates in the hands of the prosecutor for inspection only, in order that by representing himself as one who had paid the rates he might—fraudulently, as the jury expressly found—induce him to advance money to G., for whom Ion was to be a surety. This was held, after much argument, to be an uttering, under that s.

The prisoner was indicted in London (at the Old Bailey) for uttering forged medicine stamps. Having an order to supply medicines to certain persons of Bath, he delivered them at his house in Oxford Street, Middlesex, to a porter, to carry them to Aldersgate Street, in the City, to go by the Bath waggon, as they did. It was objected that this was not an *uttering* by the prisoner in London; there was a difference of opinion upon the subject; the majority (six to five) held the uttering and vending complete in Middlesex. *Collicott*, *Russ. & Ry.* 212; 2 *Leach* 1048; 4 *Taunt.* 300 (1812), pp. 462, 781.

In *Fitchie*, *Dears. & B. C. C.* 175; 26 *L. J. M. C.* 90 (1857), a pawnbroker was indicted, under s. 10, above, for uttering a forged "accountable receipt for goods." The uttering proved was that the prisoner being called upon to produce a pawn-ticket (the subject of proceedings before magistrates), his attorney, in his presence, produced and handed up a forged ticket as the

genuine one in the case. The jury found that the prisoner did this knowingly, and it was held that this was an uttering by the prisoner, and of an "accountable receipt," p. 448.

"A conditional uttering of a forged instrument is as much a crime as any other uttering." Where a person gave a forged acceptance, knowing it to be so, to the manager of a bank with which he kept an (overdrawn) account, saying that he hoped the bill would satisfy the bank as a security for the debt he owed, and the manager replied that that would depend on the result of inquiries respecting the acceptors, Patteson J. held it to be a sufficient uttering. *Cooke*, pp. 465, 108.

Where an engraving of a forged note was given as a pattern or specimen of skill, but with no intention that that particular note should be put in circulation, Littledale J. held that this was not an uttering. *Harris, &c.*, 7 *C. & P.* 428 (1836), p. 478.

The intent to defraud.] See p. 80 and p. 440. The definition of the crime by Grose J. is "the false making of a note or other instrument *with intent to defraud*." *Parkes*, p. 459. So it was defined by Eyre B. "the false making [of] an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, *with a design* to defraud any person or persons." *Jones*, pp. 463, 562. In *Coogan*, p. 464, "Buller J. said it is 'the making a false instrument with intent to deceive.' . . . In the word *deceive* must doubtless be intended to be included an intent to *defraud*." 2 *East P. C.* 853. Cf. p. 268. In *Tylney and Tuffs*, 1 *Den. C. C.* 321 (1848), the judges were evenly divided whether the prisoner could be convicted of forging a will without proof that the forgery (which was proved) was capable of effecting a fraud on *some* one—he having been found guilty (only) on a count "with intent to defraud a certain person unknown": he was recommended for a pardon.

But this doubt is settled by *Hodgson*, pp. 440, 475; but there are *statutory* forgeries where no intent is necessary; *ib.*, and *Ogden*, 6 *C. & P.* 631 (1834), under 13 G. 3, 52, and 38 G. 3, 69 (hallmarks on plate). And it has been said that "the common law definition of forgery," *i.e.* an allegation of an intent to defraud "must be imported into s. 28," p. 449 (where no such intent is mentioned)—so far as the word "forge" is concerned only, and not as to other offences in that s. *Per* Quain J., *Powner*, 12 *Cox C. C.* 235 (1872).

If A. put the name of B. on a bill, as acceptor, without B.'s authority, expecting to be able to meet it when due, or expecting that B. will overlook it, this is a forgery; but if A. either had authority from B., or, from the course of their dealing, *bonâ fide* believed that he had authority from B., to use his name, it is not forgery. *Forbes*, pp. 81, 479; *Parish*, 8 *C. & P.* 94 (1837). And the fact that the person in whose name the bills were accepted had paid or recognised such bills before, would afford fair ground for the belief of such authority existing. *Beard*, 8 *C. & P.* 143 (1837). The prisoner, a solicitor, being applied to for a loan of money by T., got E. to advance the money, upon proper security. The prisoner handed him a bond, purporting to be signed by T. and D., the brother-in-law of T., whose execution professed to have been witnessed by the prisoner; and the money was paid to T. Both the signatures were forged by the prisoner, in his own handwriting. Great intimacy was admitted to have existed between all the parties, and T. and D., though they denied that the prisoner had any authority to sign in their names, admitted that, if they had been applied to for that purpose, they would themselves have executed it. Channell B. said that (only) if the jury thought the prisoner intended to defraud E. when he delivered to him the bond, they should convict, which they did. *Trenfield*, 1 *F. & F.* 43 (1858). As to authority to sign, see p. 5, and cf. *Wilcox*, p. 477. So where

a clerk received a blank cheque signed with directions to fill in a certain amount, and he filled in a larger amount and appropriated that sum, it was held to be forgery, although he claimed—and, perhaps, justly—the larger amount as due to him for salary. *Wilson*, 1 *Den. C. C.* 284; 17 *L. J. M. C.* 82 (1847).

The intent to defraud may be presumed from the general conduct of the defendant; and if the necessary consequence of the prisoner's acts be to defraud some particular person, the jury may convict, notwithstanding that that person states his belief, on oath, that the prisoner did not intend to defraud him. *Sheppard*, *Russ. & Ry.* 169 (1810); *Hill*, 8 *C. & P.* 274 (1838): the fifteen judges. Cf. p. 20. Despite 24–5 V. 98, 44, p. 454, the general intent to defraud, which it is necessary to prove, cannot exist unless the circumstances are such that the natural consequence of the prisoner's act would be to defraud some one or other. See *Hodgson*, pp. 440, 474, under 14–15 V. 100, 8 (repealed), which is in similar terms to s. 44.

Nash, p. 146, on the other hand, shows that if the prisoner had an intent by forgery to defraud a particular person, it is immaterial whether there was in fact any person capable of being so defrauded. Maule J. put the case of forging a cheque on a bank at which the forger *wrongly* supposed some one to keep an account; in such a case there would be an intent to defraud, although no person could be defrauded. See, too, *Holden and five others*, *Russ. & Ry.* 154; 2 *Lea.* 1019; 2 *Taunt.* 334 (1809), where detectives asked the forgers to supply them with the forged notes, in order to entrap them. The conviction was upheld—"the intent is the essence of the crime which exists in the mind, although from circumstances which he is not apprised of, the prosecutor cannot be defrauded by the act of the prisoner."

The falsity of the instrument.] If the forgery is of the name of an existing person, it is necessary to disprove the handwriting, and circumstances must be shown from which it may be inferred that the prisoner, in assuming to use the name, acted fraudulently. See p. 5. But if there be more than one person who might be meant, it is necessary to show, either directly or by inference, that the prisoner did not use the name of any one of these honestly. Thus, where the bill had been sent to one W. Pearce, the payee and indorser, by his intimate friend, D., the drawer; but it never came to his hands, and it was proved to have been uttered by the prisoner with the indorsement, "William Pearce," upon it; D. was not called, and the letter of advice from him to P. was held insufficient, and the testimony of Pearce was rejected; for although it might not be *his* handwriting, yet it might be the handwriting of a *William Pearce*, and as he had not been proved to be the intended payee, it might be the handwriting of the William Pearce to whom the bill was made payable. The prisoner was accordingly acquitted. *Sponsonby*, 1 *Leach* 332; 2 *East P. C.* 996 (1784). This decision is doubted by East on the ground of the intimacy and that no evidence of the existence of any other W. Pearce was given, and it may be considered as much shaken by the following case. The prisoner was convicted of forging a promissory note, purporting to be made by one William Holland payable to the prisoner or order. He had offered it in payment to the prosecutor, who at first refused to take it, upon which the prisoner said he need not be afraid, for it was drawn by William Holland, who kept the *Bull's Head* at Tipton. He was called, proved that it was not his handwriting, and also that there was no other publican of his name at Tipton, but that there was another *William Holland* living there who, for distinction, was called *Gentleman Holland*. The latter was not called, and it was contended that there was not sufficient evidence of the note having been forged. The judges held, that as the prisoner had stated that William Holland, of the *Bull's Head*, was the maker (and from being

payee of the note he must have known the particulars), it was sufficient for the prosecutor to show that he was not, and that it lay upon the prisoner to prove that it was the genuine note of another William Holland. *Hampton*, 1 *Moo. C. C.* 255 (1830).

But that the witness is the person whose name is forged may also be established by the admission of the prisoner himself. The prisoner was charged with forging, &c., a bill of exchange in the name of Andrew Helme, and also with forging an indorsement in the name of John Sowerby, on a bill purporting to be drawn by the same A. Helme. Some letters written by the prisoner, after his apprehension, to A. Helme, who was his uncle, were produced (as in *Forbes*, pp. 474, 479), from which it clearly appeared that the names of the drawer and of Sowerby were forged, and that the latter was the son of a person at Liverpool. A witness proved that the prisoner offered him the bill with the indorsement upon it, informing him that A. Helme was a gentleman of credit at Liverpool, and the indorser a cheesemonger there who had received the bill in payment for cheeses. Sowerby, the father, was then called, who swore that the indorsement was not his handwriting; that he knew of no other person of the same name at Liverpool, except his son who had been a cheesemonger there, but had now gone to Jamaica, and that he did not believe that the indorsement was in his son's handwriting—which was corroborated by another witness; prisoner had known his son. It was objected that Helme, the drawer, was not called to prove which Sowerby the payee was; but the prisoner was convicted, and the judges held the conviction right. They said, the objection supposed that there was a genuine drawer, who ought to have been called, but to this there were two answers, 1st, that the drawer's name was forged, which the prisoner himself had in his own writing acknowledged—"if no real drawer existed, and the objection allowed, it would be to excuse one forgery because another had been committed"; and 2nd, that the prisoner himself had "ascertained" who was intended by the John Sowerby, whose indorsement was forged, for he represented him as a cheesemonger at Liverpool (and that he meant Sowerby the son also appeared from one of his letters); moreover, the indorsement was proved not to be in Sowerby's, the son's, handwriting, "and so evidence of the forgery was complete." *Downes*, 2 *East P. C.* 997 (1789).

If the false assertion on which the charge of forgery is founded be the use of a *fictitious* name, the evidence that will be necessary will depend much on the particularity with which the fictitious person is described. In order to prove that the name "Samuel Knight, Market-place, Birmingham," was fictitious, the prosecutor was called, and stated that he went twice to Birmingham and to Nottingham to make inquiries about the acceptor and drawer respectively, and inquired at a bank and at a place where the overseers usually met, without success. The prosecutor was a stranger in both of these towns. It was objected that this evidence was not sufficient, but the judges were of opinion, that there was evidence to go to the jury, though neither the best nor the most usual to prove non-existence, no one from those towns being called; on the other hand, prisoner called nobody to prove the existence of the acceptor—which the judge commented on—though he did call two witnesses who knew the drawer and his handwriting: not guilty. *King*, 5 *C. & P.* 123 (1832). Upon an indictment for uttering a forged cheque purporting to be drawn by G. Andrewes, it was held sufficient *primâ facie* evidence of the drawer's name being fictitious to call a clerk of the bankers, who stated that no person of that name kept an account with their house. *Backler*, 5 *C. & P.* 118 (1831); *Brannan*, 6 *C. & P.* 326 (1834).

Form of indictment.] A material alteration was made by 14–15 V. 100 8, p. 475, now reproduced in 24–5 V. 98, 44, p. 454.

When the nature of the forged instrument—a bill for coals with certain particulars—was not stated, though it was set out in the indictment, judgment was arrested. *Wilcox*, *Russ. & Ry.* 50 (1803, common law forgery); but now such a variance would be amended under 14–15 V. 100, 1, p. 177. In *Wilcox*, too, the indictment was bad as it did not state what authority (p. 474) the person signing it had to sign it.

By 24–5 V. 98, 42, p. 453, it is sufficient to describe any instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *facsimile* thereof; and in s. 43, *ib.*, there is a similar provision with respect to indictments for engraving, &c. See *Jones*, p. 462. But s. 1, above, makes this and the following cases only of historic interest.

Where a receipt was signed "C. Ollier," and the indictment stated it as "purporting" to be signed by *Christopher* Ollier, the court were inclined to think there was no "absolute repugnance upon the face of the indictment," and they reserved the case for the judges, but no opinion was ever given on this point, as prisoner was convicted on a similar indictment stating the "tenor" only, "without any purporting." *Reeves*, 2 *Leach* 808; 2 *East P. C.* 984 *n.* (1798); cf. the note to *Williams*, below, as to "tenor" and "description." An indictment charged the forgery of "Bartw. Browne"; the forgery was in fact "Bartholomew Browne"; the variance was held fatal even after verdict, and the prisoner was discharged. *Taylor*, Annual Register, 1800, March 30.

A fictitious signature should be described as *purporting* to be that of the real party. Thus, where the instrument was described as "a certain bill of exchange . . . signed by *Henry Hutchinson* . . . which bill is as follows," &c., and the signature to the bill, "Henry Hutchinson," was a forgery, it was objected that that averment, which was a substantial allegation, was disproved, and so the judges held, after conviction. *Carter*, 2 *East P. C.* 985 (1800).

A bank post bill could not be described as a *bill of exchange*, but was sufficiently described as a *bank* bill of exchange. *Birkett*, *Russ. & Ry.* 251 (1813).

Where an indictment charged that the prisoner "did forge a certain promissory note for the payment of 50*l.*," without stating it to be of that or any value; Patteson J. said that the court must take judicial notice of what a promissory note is, and held the description sufficient. *James*, 7 *C. & P.* 553 (1836), p. 479. It was held that an instrument payable to the order of A., and directed "Messrs. P. & Co., bankers," but without drawee or acceptor (called in other counts a promissory note, an order for payment of money and a warrant for payment), may be described as a bill of exchange; *Smith*, 2 *Moo. C. C.* 295 (1843); cf. *Hawkes*, p. 464; that "a deed purporting to be a lease of certain premises," is a sufficient description without setting it out verbatim; *Davies*, 2 *Moo. C. C.* 177 (1840); as is "a request for the delivery of goods"; *Robson*, 2 *Moo. C. C.* 182 (1840); that the instrument may be described as a deed, without setting it out or averring that it is one which may be the subject of larceny; *Collins*, p. 441—the three last cases being under 2–3 W. 4, 123, 3 (repealed), by which a description good in larceny (p. 74) was good in forgery; that a count charging that the prisoner "did forge a writing as a certificate of W. N. with intent, &c.," was good at common law. *Toshack*, 1 *Den. C. C.* 492 (1849).

If an instrument is set out in full and described by several designations in the indictment, the description of its legal character would appear to be surplusage. *Williams*, p. 203; see the reporter's (Den.) note. But if there is only one designation, and that is wrong (*e.g.* promissory note for bill of exchange) though the instrument is set out, the indictment is bad; *Hunter*,

Russ. & Ry. 511 (1823); but, perhaps, this is not reconcilable with *Williams*. It will be no variance, if the instrument described as a "forged" instrument, was originally a genuine one, but has been fraudulently *altered* by the prisoner; for every alteration of a true instrument for a fraudulent purpose makes it, when altered, a forgery of the whole instrument. *Teague*, p. 465; *Dawson*, 1 *Stra.* 19; 2 *East P. C.* 978 (1717); cf. p. 457. In practice, however, forgeries of this kind are stated, in one count, at least, as alterations; see *e.g.*, 2 *East P. C.* 986; 2 *Russ. Cri.* 566.

Principals and accessories.] Cf. p. 473. In some forgeries, *e.g.* of bank-notes, there are a series of distinct acts at intervals of time, each of which may be a complete act in itself. Hence the doctrine that presence is necessary to constitute a *principal*, p. 151, applies to each part of the whole, very much as in *Coining*, p. 341; and see *Completion of Crimes* in the Index. Thus where one prisoner impressed the water-marks, the date, line, and number, on forged bank-notes, another the signature, another printed them, &c., &c., not always in the presence of each other, the judges were of opinion that a conviction was right; that each of the offenders acted in pursuance of the common plan, completed some part, and was a principal. *Bingley and others, Russ. & Ry.* 446 (1821). Nor does it make any difference that prisoners were ignorant of the exact part the others were to perform; it is sufficient if they know that the forgery is to be completed by somebody. *Kirkwood, &c.*, 1 *Moo. C. C.* 304 (1831); *Dade, Kirkwood, &c.*, *ib.* 307 (1831). Most of the intermediate acts in the series are now statutory offences in themselves.

But where three persons were jointly indicted under 1 W. 4, 66, 19 (repealed), for feloniously using plates containing impressions of foreign notes, it was held that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using, or assisted in such one act, as by two using and one watching at the door to prevent the others being disturbed, or the like, "if one were to find the plate, and one the paper, and one to do the work, I should say it was a joint using"; and that it was not sufficient to show that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. *Harris, &c.*, p. 474; verdict, Not guilty, but acting in concert.

Where three persons were indicted under that s. for feloniously engraving and making two parts of a Russian promissory note, the plates were engraved by an Englishman, who was an innocent agent; two of the prisoners only were present at the time when the order was given for the engraving of the plates; but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two subsequently; it was held that, in order to find all three guilty, the jury must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and all three concurred in the employment of the engraver. *Mazeau, &c.*, 9 *C. & P.* 676 (1840); criticised in 2 *Russ. Cri.* 957; the third man was acquitted.

Uttering forged instruments, however, is not a series of acts. See *Soares*, pp. 151, 341, 473. It was held on a charge of uttering forged orders for the payment of money, and obtaining goods from a shop by means of such orders, that the two prisoners who remained in a cab outside the shop in which the third uttered the orders, and assisted him in taking away the goods, were properly convicted with him of the uttering, though they were not there to assist in the actual uttering, and could not in fact be seen from the shop.

Vanderstein, p. 467. Where a wife, with her husband's knowledge, and by his procurement, but in his absence, uttered a forged order and certificate for prize-money, it was held that the presumption of coercion on the part of the husband did not arise; that she was properly convicted of the uttering as principal, and her husband of procuring, as accessory before the fact. *Sarah and John Morris, Russ. & Ry.* 270; 2 *Leach* 1096 (1814): p. 816. So an assent afterwards does not render the party guilty as a principal. 1 *Hale P. C.* 684; 2 *East P. C.* 973. "In forgery it is laid down generally in the books that all are principals; and that whatever would make a man accessary before in felony will make him a principal in forgery. But this must, I think, be understood of forgery at common law, and where it is considered only as a misdemeanor." *East, ib.*

Guilty knowledge.] To prove guilty knowledge, the uttering or having possession of similar forgeries is admissible. See p. 80.

On an indictment for forging and uttering a forged bill, a letter written by the prisoner, after he was in custody, to a third person saying that such person's name is on *another* bill, and desiring him not to say that the latter is a forgery, is receivable in evidence (as in *Downes*, p. 476) to show guilty knowledge, but the jury ought not to consider it as evidence that the other bill is forged, unless such bill is produced, and the forgery of it strictly proved. *Per* Coleridge J., *Forbes*, pp. 81, 474. So it was held by Patteson J. that evidence of what the prisoner said respecting other bills of exchange, which are not produced, is not admissible. *Cooke*, p. 81. *Cooke* was doubted by Crompton J. in *Brown*, p. 81, where it was proposed to put in evidence statements made by the prisoner with reference to other notes supposed to be forged. There seems to be some doubt as to what is the mode of proving such other instruments to be forgeries, as the jury cannot be asked to find whether they are or not. See *Moore*, 1 *F. & F.* 73 (1858). As to the proof of guilty knowledge generally, see *Francis*, pp. 1, 81, 85, 421.

Venue.] It was formerly necessary to lay the venue in the county where the forgery was committed; but now by 24–5 V. 98, 41, p. 453, the prisoner may be tried where he is apprehended.

Patteson J. held it to be sufficient under 1 W. 4, 66, 24 (repealed), to prove that the prisoner was in custody in the county where he was tried, and that the indictment need not contain any averment of his being in custody there. *James*, p. 477. So in *Smythies*, pp. 220, 279, though the prisoner was not shown to have been in custody till he surrendered just before the trial, and the jury found that there was no evidence of the forgery having been committed within the jurisdiction of the court, the judges held he was triable there.

On an indictment for forging and uttering a cheque, it appeared that the cheque had been dated abroad and drawn by the prisoner abroad, and that he had caused it to be presented to a banker abroad, through whom it was presented in this country without a stamp; held, that the prisoner might be convicted of uttering in this country if he set other persons in motion in another country as his agents (see Index, *Innocent Agent*), by whom the cheque was presented in this country. *Taylor*, 4 *F. & F.* 511 (1865).

Husband and wife.] See above and pp. 816, 819.

FURIOUS DRIVING.

This,—as L. Ellenborough C.J. said that putting an inflammable cargo on board without notice, "considering the probable danger to the lives of" the public, "amounts to a species of delinquency . . . punishable as for a misdemeanor at least,"—would seem to be an indictable offence at common law; *Williams* v. *East India Co.*, 3 *East* 192 (1802); and now by 24–5 V. 100, 35, replacing 1 G. 4, 4 (repealed except as to Scotland), "Whosoever having the charge of any carriage or vehicle, shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

Under 5–6 W. 4, 50, 78, it was held that a person riding a bicycle on a highway, may be summarily convicted of furiously driving a "carriage." *Taylor* v. *Goodwin*, 4 *Q. B. D.* 228; 48 *L. J. M. C.* 104 (1879). And by 51–2 V. 41, 85, "bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highway Acts,'' for which see Index.

Offences under 3 E. 7, 36, the Motor Car Act, 1903, are dealt with summarily. Cf. *Elwes* v. *Hopkins*, 21 *Cox C. C.* 133 (1906).

As to death caused by negligent driving, see p. 596.

GAME—OFFENCES AS TO.

All offences with regard to game, which are the subject of indictment, are statutable offences, not known to the common law. Such animals being *feræ naturæ*, are not, alive, the subjects of larceny; p. 427.

The principal enactments are 9 G. 4, 69; 7–8 V. 29; and 24–5 V. 96, 17.

Taking or killing hares or rabbits in the night.] By 24–5 V. 96, 17: "Whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit, in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor."

Taking or destroying game or rabbits by night.] By 9 G. 4, 69, 1: "If any person shall, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter, or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour, and, at the expiration of such period, shall find sureties by recognisance . . . himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall thereof be convicted before two justices of the peace, he shall be committed to the common gaol or house of correction, for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance . . . as aforesaid, himself in twenty pounds and two sureties in ten pounds each, or one surety in twenty pounds, for his not so offending again for the space of two years next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time he shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas [see p. 198] for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding two years."

Power to apprehend offenders.] By s. 2: "Where any person shall be found upon any land, committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right of free warren or free chase thereon, or for the lord of the manor or reputed manor, wherein such land may be situate, and also

for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, crossbow, firearms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor; and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas [see p. 198] for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding two years." See also 7–8 V. 29, 1, below. Cf. p. 223.

Limitation of prosecutions.] By s. 4: ". . . the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence."

Proof of previous convictions.] By s. 8: "On every conviction under this Act for a . . . second offence, the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence."

Three armed persons entering land by night.] By s. 9: "If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond the seas [see p. 198] for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years . . ."

Definition of night.] By s. 12: "For the purposes of this Act, the night shall be considered, and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise."

Definition of game.] By s. 13: "For the purposes of this Act, the word 'game' shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards."

Destroying game or rabbits on a public road.] By 7–8 V. 29, 1: "From and after the passing of this Act [4th July, 1844] all the pains, punishments, and forfeitures imposed by" 9 G. 4, 69, above, "upon persons by night unlawfully taking or destroying any game or rabbits, in any land, open or inclosed, as therein set forth, shall be applicable to, and imposed upon any person by night, unlawfully taking or destroying any game or rabbits on

any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path, where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all persons authorised by" 9 G. 4, 69, above, "to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said Act or this Act; and the said Act and all the powers, provisions, authorities and jurisdictions therein or thereby contained or given, shall be applicable for carrying this Act into execution as if the same had been herein specially set forth."

Night poaching after two previous convictions.] The previous convictions under s. 1, p. 481, must be convictions under *that* s. Where there was a conviction on indictment after two previous convictions, one of which was under s. 9, p. 482, the Court for C. C. R. quashed the conviction, pointing out that the instruments or weapons mentioned in s. 9 are not (as are those in s. 1) for taking game, but for doing violence (though it might be that an offence under s. 9 was the offence under s. 1, aggravated by the presence of an armed party). *Lines*, 20 *Cox C. C.* 143 (1901); cf. *Ball*, p. 486. Under s. 1, Hawkins J. ruled, the opinion of the jury should be taken on the facts of the case before the two previous convictions were proved. *Woodfield*, 16 *Cox C. C.* 314 (1887).

The taking or killing.] Where the prisoner had been seen to set wires one night, in one of which a rabbit was caught, and as he was about to take it the next morning, was stopped by the keeper, this was held by the judges to be a *taking*; the word *taking* meaning *catching*, and not *taking away*. *Glover*, p. 430, under 5 G. 3, 14, 6 (repealed): "take or kill."

The entering or being in the place specified.] The words of the statute, p. 482, are, "shall unlawfully enter or be" by night. It will not, therefore, be necessary to show that the prisoners *entered* by night, provided they *be* in the place "by night," p. 482, which the indictment must state. Where one under 57 G. 3, 90 (repealed) stated that the defendants on, &c., did by night enter divers closes, and were then and there in the closes armed, for the purpose of destroying game, &c., on error, the judgment was reversed, on the ground that the indictment did not contain a sufficient averment that the defendants were by night in the closes armed, for that purpose, &c., neither branch of the sentence alleging the whole statutory offence. *Davies* v. *R*, 10 *B. & C.* 89 (1829); see also *Kendrick and others*, 7 *C. & P.* 184 (1835), under 9 G. 4, 69, which, it was held, made the *entering* and the *being* distinct offences; *Wilks and another*, *ib.* 811 (1837); *Fletcher* v. *Calthrop*, 6 *Q. B.* 880 (1848). On an indictment for perjury on information alleging that the defendant did enter and was on certain land there, called A. close, &c., for the purpose of taking and destroying game contrary to the statute, &c., but not saying "for the purpose of destroying game *there*," was held to be sufficient to give jurisdiction to the justices before whom the information was laid. *Western*, *L. R.* 1 *C. C. R.* 122; 37 *L. J. M. C.* 81 (1868). It is not necessary to prove positively that the prisoners were on the land without the permission of the occupier or landlord; the jury may infer that they were there "unlawfully" and "not by permission for a day's shooting," from their being "found at night armed and knocking down the keepers." *Wood*, *Dears. & B. C. C.* 1; 25 *L. J. M. C.* 96 (1856). See p. 6. If persons go out with the general intent of taking game where they can find it, "they

are in pursuit of game in every field that they pass over," where game might be expected to be found; they are guilty of unlawful entering, even although they pass through the particular field alleged without attempting to poach. *Per* Willes J. in *Higgs and others*, 10 *Cox C. C.* 527 (1867), where prisoners were lost sight of for two hours, and then found three miles off with game in their possession: not guilty. (This was held a "fresh pursuit.") Cf. p. 224. *Sutton*, p. 485, is to the same effect.

Where only one prisoner was seen in the place charged in the indictment under s. 9, p. 482 (though the others were quite near and rescued him), Patteson J. directed an acquittal. *Dowsell and another*, 6 *C. & P.* 398 (1834); 1 *Russ. Cri.* 957, strongly disapproved by Alderson B. in *Lockett*, 7 *C. & P.* 300 (1836), and overruled in *Whittaker and others*, 1 *Den. C. C.* 310 (1848), p. 486, where a majority (seven to five) held, that all who were aiding and assisting those who entered the field, were guilty of the same (statutable) misdemeanor, though they themselves were never in the field—they were "constructively" present, p. 152. And see *Scotton*, 5 *Q. B.* 493 (1844), p. 679. In *Whittaker*, a particular close was alleged in the indictment, but in the subsequent case of *Uezzel and others*, 2 *Den. C. C. R.* 274; 20 *L. J. M. C.* 192 (1851); Campbell C.J. (*Den.* 275) observed: "Some confusion seems to have arisen on this matter, from not attending sufficiently to the provisions of the Act of Parliament: it has been treated as though the word *close* occurred in the Act, whereas it only specifies '*any land . . . open or inclosed*'; a practice has consequently prevailed of naming a certain close in the indictment, which is quite needless. It would certainly be requisite to designate *some land*, &c." In *Uezzel*, therefore, a prisoner was held to have been properly convicted, he being one of three, armed with guns, one of whom was in a close (alleged) occupied by C. W., in which were pheasants, and all of whom were found to have been in another adjoining close of C. W., in which there was not any game, passing on their way; one count charged the prisoners with being "in inclosed land occupied by C. W.," and as to this count the judges had no doubt.

Merely sending a dog to drive the game in a field while his owner stands in the road is not an entry by the owner; *Nickless*, 8 *Car. & P.* 757 (1839); *Pratt*, *Dears. & P. C. C.* 502; 24 *L. J. M. C.* 133 (1855); *Q. B.*, under 1-2 W. 4, 32, 30: but the soil of the high-road frequently belongs to the owner of the adjoining close, and in that case perhaps the defendants might be convicted though they never left the road. In *Pratt*, where the defendant had been summarily convicted for "entering and being in the daytime upon land in . . . pursuit of game," the conviction was upheld by the Q. B. in such circumstances. Where a man standing on his own land shot a grouse on another's, and some hours later went on that land to get the dead bird (which, however, had been removed), the Q. B. D. ordered justices to convict under this s. as the shooting and the entering were sufficiently connected to form one transaction. *Horn* v. *Raine*, 19 *Cox C. C.* 119 (1898). Cf. *Pickering* v. *Rudd*, p. 303.

The situation and occupation of the land.] See *Uezzel*, above. Under 24-5 V. 96, 17, p. 481, it must be proved that the offence was committed in some warren or ground lawfully used for the breeding of hares or rabbits, *i.e.* in some place which is either a warren, or where rabbits are exclusively kept. *Garratt*, 6 *C. & P.* 369 (1834), under 7-8 G. 4, 29, 30 (repealed), where the place was a rick-yard.

The indictment must particularise, in some manner, the place in which the offence was committed; for, the majority of the judges said, being "substantially a local offence [see p. 210], the defendant was entitled to know to what specific place the evidence was to be directed." *Ridley*, *Russ. & Ry.*

515 (1823). "A certain cover in the parish of A." is too general a description. *Crick*, 5 *C. & P.* 508 (1832). Otherwise, "entering, &c., certain land in the occupation of A. B., in the parish of, &c.," without specifying whether it is inclosed or not. *Andrews*, 2 *Moo. & R.* 37 (1837), both under s. 9, p. 482.

Where there was a variance between the occupation of the land alleged, and that proved, Lindley J. held that the indictment could, if necessary, be amended *if the prisoners were not misled thereby*. *Sutton*, &c., 13 *Cox C. C.* 648 (1877).

Where the allegation was an entry into a particular close, "with the intent *then and there* to kill" game, it was held that the entry was confined *by the indictment* (under 57 G. 3, 90, repealed) to the close specified, and the intent as to that close must be proved. *Barham*, 1 *Moo. C. C.* 151 (1826); *Capwell*, 5 *C. & P.* 549 (1833), under s. 9, p. 482; *Gainer*, 7 *C. & P.* 231 (1835). Where the prisoners were in Shutt Leasowe, a place named in one count, which adjoined Short Wood (which was in another count), and were apparently going into the Wood, Patteson J. said, "The intent was evidently to kill game in the wood, into which none of the parties ever got for that purpose; it is true that they are charged with being in Shutt Leasowe, but they had no intention of killing game there"; they "must be acquitted." He also held that an allegation that A. & B. were armed is not supported by proof, that C. only who was with them, was armed; "constructive arming" is not sufficient under s. 9, p. 482. *Davis and another*, 8 *C. & P.* 759 (1839). But see below, and *Higgs*, p. 484.

Prosecution to be commenced within the time limited.] The offence (under s. 9, p. 482) was committed on the 12th January, 1844, the indictment was preferred on the 1st March, 1845, the warrant of commitment was dated the 11th December, 1844. It was held that the prosecution was commenced "within twelve calendar months after the commission" of the offence within s. 4, p. 482. *Austin*, 1 *C. & K.* 621 (1845). So where the offence was committed on the 4th December, 1845, the information and warrant were on the 19th December: one prisoner was apprehended on the 5th September, 1846, and the other on the 21st of October, 1846; and the indictment was preferred on the 5th of April, 1847: it was held, on the authority of *Willace*, (1797) 1 *East P. C.* 186, that the prosecution was commenced in time. *Brooke*, 1 *Den. C. C.* 217 (1847). Cf. p. 724.

In order to prove that proceedings were commenced within the proper time a warrant for defendant's apprehension was produced, but not the information on which it was founded, nor did the warrant show that it was grounded on an information in writing; the conviction was quashed. *Parker*, *L. & C.* 459; 33 *L. J. M. C.* 135 (1864); cf. p. 679.

Being armed.] 57 G. 3, 90, above, did not require that it should appear that each was armed with a gun or "other offensive weapon," "any one of the party being armed was sufficient to bring the others within the statute." *Smith and others*, *Russ. & Ry.* 368 (1818). But it is otherwise where one does not *know* that another is armed. *Southern*, *R. & Ry.* 444 (1821): same statute. It is not necessary under that statute that the gun should be found upon any of them. The prisoners were shooting in a wood in the night, and the flash of one gun was seen by a keeper; but before they were seen they abandoned their guns, and were caught creeping away on their knees. Being convicted, the judges held this a being "found" armed. *Nash*, *Russ. & Ry.* 386 (1819). See also *Goodfellow and others*, 1 *C. & K.* 724; 1 *Den. C. C. R.* 81 (1845), where it was held, overruling *Davis*, above, that if one of the party (of three or more) has a gun, all are armed within

s. 9, p. 482. See also *Whittaker*, p. 484. The weapon must be taken out with the intent of being unlawfully used. The prisoner was indicted, under s. 9, for being out at night for the purpose of taking game armed with a bludgeon. He had with him a thick stick, large enough to be called a bludgeon, but he was in the constant habit of using it as a crutch, being lame. Taunton J. ruled, that it was a question for the jury with what intent he took out the stick; and he was acquitted. *Palmer*, 1 *Moo. & Rob.* 70 (1831). So *Williams*, 14 *Cox C. C.* 59 (1878). A walking-stick of ordinary size was ruled (under a totally different statute) to be an offensive weapon. *Johnson*, *Russ. & Ry.* 492 (1822), p. 775. The prisoners were indicted, under s. 9, for entering, &c., armed with bludgeons, with intent to destroy game; there was also a count for a common assault. The only weapons proved to have been used by the prisoners were sticks. One of these was produced, with which one of the prisoners, on being attacked by the gamekeepers, had defended himself, and knocked one down. The stick, however, was a very small one, fairly answering the description of a common walking-stick. Gurney B. said that if a man went out with a common walking-stick, and there were circumstances to show that he intended to use it for purposes of offence, it might, perhaps, be called "an offensive weapon" within s. 2, p. 481; but if he had it in the ordinary way, and upon some unexpected attack or collision was provoked to use it in his own defence, "it would be carrying the statute somewhat too far to say it was an offensive weapon within" its meaning. The prisoners were convicted of a common assault only. *Fry*, 2 *Moo. & Rob.* 42 (1837), p. 775; *Sutton*, p. 485. Large stones are such "offensive weapons" if the jury are satisfied that the stones are of a description capable of inflicting serious injury if used offensively, and that they were brought and used for that purpose. *Grice*, 7 *C. & P.* 803 (1837).

Joinder of offences.] See p. 174. It has been ruled that a count on 9 G. 4, 69, 9, p. 482, may be joined with a count on s. 2, p. 481, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault. *Finacane*, 5 *C. & P.* 551 (1833). Where a prisoner was indicted (not under that statute) for shooting at a gamekeeper, and in another indictment, under s. 9, p. 482, for night poaching in the same transaction, it was held that the prosecution need not elect between the two, the offences being quite distinct, and not being able "by any possibility (to) merge in" one another. *Handley*, *ib.* 565 (1833).

Apprehension of offenders.] Cf. pp. 636–7, 642. Although 9 G. 4, 69, 2, p. 481, is confined to the offences specified in s. 1, *ib.*, yet offenders under s. 9, p. 482, may also be apprehended; for what is punishable under s. 9 is none the less an offence under s. 1, because it is an aggravation of that offence and liable to a more "heinous punishment." *W. Ball*, 1 *Moo. C. C.* 330 (1832); cf. *Lines*, p. 483.

A gamekeeper and his assistants warned a party of poachers, including the prisoner, off his master's grounds, and followed them into the highway, where the poachers rushed upon the keeper and his men, and blows ensued on both sides. After the keeper had struck several blows, a shot was fired by one of the poachers, which wounded the prosecutor. The prisoner was indicted, under (repealed) 9 G. 4, 31 (so stated in the first edition of this work, p. 636, and obviously correct, but not in the report), for shooting at the prosecutor with intent to kill, to disable, &c. It was urged for the prisoner that as the keeper had knocked down three of the men before the shot was fired, it would have been manslaughter only if death had ensued; but Bayley B. was of opinion that if the keeper struck, "not vindictively,

or by way of punishment, or for the purpose of offence, but in self-defence only, and to diminish the violence which was illegally brought into operation against him," it would have been murder: even if the keeper and his men had no right to apprehend, they had full right to follow the party, in order to discover who they were, and that the prisoner, &c., and the rest were not warranted in attempting to prevent them; and that if the latter had attempted to apprehend them, which they did not, they would have been warranted, by 9 G. 4, 69, 2, p. 482, in so doing. The prisoner being convicted of the intent to do grievous bodily harm to prevent his and their apprehension, the judges were of opinion that the keeper had power to apprehend (see above), and that notwithstanding the blows given by the keeper, it would have been murder had the keeper's man died. *Ib. W. Ball* above confirmed *J. Ball*, *ib.* 333 (1832). A gamekeeper and his assistants rushed in upon poachers, who ran away, and then ranged themselves in a row. One of the men exclaimed, "The first man that comes out, I'll be damned if I don't shoot him." The poachers then ran away again followed by the prosecutor, who cocked and drew his pistol. At length several stopped, and the same prisoner put his gun to his shoulder, fired at and wounded the prosecutor at five or six yards—the latter also fired; it was objected that it was incumbent on the prosecutor, as his authority to apprehend is derived from s. 2, above, creating the offence, to give notice to the poachers by calling upon them to surrender (and it was argued that this default would have made the crime manslaughter only); but the judges were all of opinion that the circumstances constituted sufficient notice, and that the conviction was right. *Payne*, 1 *Moo. C. C.* 378 (1833). The deceased attempted to apprehend the prisoner who was poaching at night in a wood. He was not the servant either of the owner or of the occupier of the wood, or of the lord of the manor, but only of one who had the permission of the owner to preserve the game there: he was killed by one of the prisoner's party in the attempt to apprehend him, and it was held to be manslaughter only. *Addis*, p. 110. Gamekeepers who were out watching in the night heard firing of guns in the preserves of their employer, and they waited in a turnpike road, expecting the poachers to come there, which they did, and an affray ensued between the gamekeepers and the poachers. Wightman J. held, that if the gamekeepers were there endeavouring to apprehend the poachers they were not justified in so doing. *Meadham*, 2 *C. & K.* 633 (1848).

In these cases, it will be observed, the prisoner is identified with his companions of the party. Eight prisoners were charged with shooting J. M., with intent to murder. It appeared that the prisoners, each having a gun, were out at night in the grounds of J. M.'s master for the purpose of poaching, and J. M. and others went to apprehend them. The poachers formed into two lines, and, pointing their guns at the keepers, threatened to shoot them. A gun was fired, and J. M. was wounded. Some of the keepers were also severely beaten, but no other shot was fired. It was objected that as there was no common intent to murder, the poacher who fired could alone be convicted; but Vaughan B. said, "I am of opinion that when this Act of parliament [57 G. 3, 90, repealed by 9 G. 4, 69] empowered certain parties to apprehend persons who were out at night armed for the destruction of game, it gave them the same protection in the execution of that power which the law affords to constables in the execution of their duty. . . . With respect to the . . . point, it is rather a question of fact for the jury; still, on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the gamekeepers, and they are all giving their countenance and assistance to the one of them who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they

were doing, the objection would have much weight in it." *Edmeads and others*, 3 *C. & P.* 390 (1828). See *Skeel*, p. 614. So when two prisoners had been seized by gamekeepers, and, while standing still, called to the third, who, coming up, rescued the two men, and beat the keepers and killed one, Vaughan B. ruled that all the three men were equally guilty, though if the two had acquiesced and remained passive and not called to the other, it would not have been so: not guilty. *Whithorne and others*, 3 *C. & P.* 394 (1828).

If a person having only a right of shooting over land empowers keepers to apprehend persons trespassing in search of game, and the latter resist such apprehension with no excess of violence, no assault is committed under 9 G. 4, 69, 2, p. 481. *Wood*, 1 *F. & F.* 470 (1859). But if the offence is committed in the night any person has authority to arrest under 14–15 V. 19, 11, p. 223—despite the fact that "night" is different in the two Acts—and where the poachers resisted and killed a keeper (not of the owner, &c.), it was murder. *Sanderson and others*, *ib.* 598 (1859).

By the Game Act, 1–2 W. 4, 32, 31, trespassers in search of game may be required to quit the land, and to tell their names and abodes, and, in case of refusal, may be apprehended and taken before a justice. See *Long*, 7 *C. & P.* 314 (1836). Foxes are not game, and, therefore, a person engaged in fox-hunting is not justified in entering the land of another against his will. *Paul* v. *Summerhayes*, 3 *Q. B. D.* 9; 48 *L. J. M. C.* 33 (1878).

By 25–6 V. 114, 2: "It shall be lawful for any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing, and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace assembled in petty sessions, as provided in" 18–19 V. 126, 9, as far as regards England and Ireland, ". . . and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines; and the justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the amount of the penalty, to be paid to the treasurer of the county or borough where the conviction takes place; and no person who, by direction of a justice in writing shall sell any game so seized shall be liable to any penalty for such sale; and, if no conviction takes place, the game or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized."

It is not necessary to prove from what particular land the game was taken; under s. 2, above, circumstantial evidence is enough to prove poaching (but merely being in the company of poachers is not enough). *Brown*, &c., v. *Turner*, 13 *C. B. N. S.* 485 (1863); *C. P.*; *Evans* v. *Botterell*, 33 *L. J. M. C.* 50 (1863). Under this s. (2) a policeman has no power to apprehend, but only to stop and search. *Spencer and another*, 3 *F. & F.* 854 and 857

(1863). In order to justify a policeman even in doing that, it is necessary to prove the existence of reasonable grounds of suspicion, but for this purpose *general* evidence of bad character (see p. 87) cannot be given. *Spencer, ib.* Therefore, resistance to apprehension in such a case is justifiable, and if one of a party alone uses excessive violence he alone is guilty. It seems, however, it would be sufficient for the policeman to state in chief that he had reasonable grounds, and to leave it to the defendant to inquire into the nature of those grounds. See *Tuberfield*, p. 224. In order to give the magistrates jurisdiction under this s., the game, &c., must be found by the constable on the person of the accused on the highway. *Clark* v. *Crowder and others*, 38 *L. J. M. C.* 118 (1899); *C. P.*

GAMING.

"GAMING is permitted in England, upon every possible subject, except where it is accompanied with circumstances repugnant to morality or public policy, or where, as in certain special cases, it is restrained by positive statutes." 2 *Hawk. P. C.* Bk. 1, ch. 92, s. 1. But "when the playing is from the magnitude of the stake, excessive, and such as is now commonly understood by the term 'gaming,' it is considered by the law as an offence, being in its consequences most mischievous to society." 1 *Russ. Cri.* 455, *3rd ed.* (Greaves).

The principal statute against gaming, is 8–9 V. 109, of which s. 17 is set out, p. 323.

Persons playing or betting at any game or pretended game of chance in the "street, highway, or other open and public place to which the public have access," &c., are rogues and vagabonds: it must be some game or pretended game of chance. See 36 7 V. 38, 3, p. 87, and *Ridgeway* v. *Farndale*, 1892, 2 *Q. B.* 309; 61 *L. J. M. C.* 199. A railway carriage in transit on a railway is within this s. *Langrish* v. *Archer*, 52 *L. J. M. C.* 47; 10 *Q. B. D.* 44 (1882), p. 659. As to what amounts to a lottery (pp. 491, 662), see *Stoddart* v. *Sagar* and *Sagar* v. *Stoddart*, 1895, 2 *Q. B.* 474; 64 *L. J. M. C.* 234; cf. p. 491.

It must be proved not only that the defendant won the money, but that he won it by some "fraud or unlawful device or ill-practice" during the game, and it is not sufficient that fraud was used to induce the prosecutor to play. *Bailey*, 4 *Cox C. C.* 390 (1850), where prisoner feigned drunkenness and lost every game, and he and his confederates lured the prosecutor to play at skittles for money; it was held, however, to be an indictable conspiracy. "Tossing with coins" for a wager is within s. 17, above. *O'Connor*, p. 323. The indictment need not state the name of the person to whom the money belonged. *Moss*, p. 323.

Gaming-houses.] Keeping a common gaming-house for gain, and causing and procuring idle and evil-disposed persons to come there and play (at "rouge et noire") for large sums of money—which of itself makes any game unlawful—is an indictable offence at common law, and perhaps an indictment merely charging the defendant with keeping a common gaming-house—generally or as a nuisance, p. 661—would be good. *Rogier*, 1 *B. & C.* 272 (1823), p. 661; *Taylor*, p. 169. Cf. p. 662. As to what is a gaming-house, see 8–9 V. 109, 2, p. 661.

Betting-houses.] Gaming-houses include betting-houses by 16–17 V. 119, 2. s. 1. is: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner or occupier or keeper thereof or any person using the same or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner,

occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing in any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purpose aforesaid or any of them is hereby declared to be a common nuisance and contrary to law."

It is usual to resort to the summary mode of procedure given as to betting-houses by 16–17 V. 119, amended by 37–8 V. 15, and as to gaming-houses generally by 17–18 V. 38; see pp. 661–2. But trial by jury under 42–3 V. 49, 17, pp. 69, 161, is often demanded. *Davis* v. *Stephenson*, 24 *Q. B. D.* 529 (1890), decided that the mere deposit by a bookmaker in a house of packets of money, with instructions, &c., for bets received outside the house was not such a using of the house as to bring it within 16–17 V. 119, but see *Bond* v. *Plumb*, 1894, 1 *Q. B.* 169 (occupier (i.) betting with persons "resorting thereto"; (ii.) receiving deposits on bets there); *Worton*, 1895, *Q. B.* 227; 64 *L. J. M. C.* 74; *C. C. R.* (deposits received by bookmaker inside); *Downes* v. *Johnson*, 1895, 2 *Q. B.* 203; 64 *L. J. M. C.* 238 (bets made between members only at a club). The relations between the occupier of a public-house and a bookmaker frequenting it are conveniently summarised in *Deaville*, two cases, and in *Simpson*, 1903, 1 *K. B.* 468; 20 *Cox C. C.* 389; 72 *L. J. K. B.* 272; *C. C. R.*; unless the landlord knows of and permits the betting, the bookmaker cannot be convicted under this Act, but the landlord may be convicted if he knew without giving any explicit permission. See *Belton* v. *Busby*, p. 492. Using a place for the purpose of paying bets made elsewhere is not within that Act. *Bradford* v. *Dawson*, 1897, 1 *Q. B.* 307; *L. J. Q. B.* 191: five judges. Defendant owned a newspaper, each number of which included a coupon giving the possessor the right to take part in a competition for money-prizes for naming the winners of horse races, all guesses after the first being paid for by him. It was held that he was properly convicted on indictment (he having claimed to be so tried, p. 161) of keeping and using the newspaper office for receiving money as a consideration for undertaking to pay money on the subsequent event of the races. *Stoddart*, 1901, 1 *Q. B.* 177; 19 *Cox C. C.* 587; 70 *L. J. Q. B.* 189; *C. C. R.*; distinguishing *Stoddart* v. *Sagar*, p. 490. Advertisements of information as to bets not to be made in any office or place, &c., are not within this Act or 37–8 V. 15. *Cox* v. *Andrews*, 12 *Q. B. D.* 126 (1883). A sweepstake on a horse race is not betting within 16–17 V. 119 (though it may be a lottery (p. 409), and therefore illegal). *Hobbs*, 1898, 2 *Q. B.* 647; 19 *Cox C. C.* 154; 67 *L. J. Q. B.* 928; *C. C. R.*

See on this point and that of the next paragraph, *Stoddart* v. *Hawke*, 20 *Cox C. C.* 111 (1901), *K. B.*; *Mackenzie* v. *Hawke*, *ib.* 305; *Hawke* v. *Mackenzie*, *ib.* 314, 324 (1902); *Fielding* v. *Turner*, *ib.* 513; *Ashley* v. *Hawke*, *ib.* 559 (1903); *Thompson* v. *Mason*, *ib.* 641 (1904); *Derby* v. *Bloomfield*, *ib.* 674 (1904).

"*House, office, room, or other place.*"] The meaning of "place" was fully considered, and the controversy relative to its application to racecourse enclosures finally closed by the House of Lords (by a majority of eight to two) in *Powell* v. *The Kempton Park Racecourse Company, Limited*, 1899, *A. C.* 143; 68 *L. J. Q. B.* 392; 19 *Cox C. C.* 265; 80 *L. T.* 538; 47 *W. R.* 585; 63 *J. P.* 260, which decided: "An inclosure on a racecourse to which bookmakers, in common with the rest of the public, and on the same

terms, are admitted and carry on their business, and the owners of which have no interest in any betting, is not a place which the Betting Act, 1853, forbids to be opened, kept, or used for the purposes therein mentioned. To constitute such a place there must be a business of betting conducted by an owner, occupier, manager, keeper, or some other person vested with the authority of an owner. . . . *Eastwood* v. *Miller* (43 *L. J. M. C.* 139; *L. R.* 9 *Q. B.* 440) [1874], *Haigh* v. *Sheffield Corporation* (44 *L. J. M. C.* 17; *L. R.* 10 *Q. B.* 102) [1874], and *Hawke* v. *Dunn* (66 *L. J. Q. B.* 364; 1897, 1 *Q. B.* 579) overruled" (*L. J.*). These three cases were overruled by the Court of Appeal, 1897, 2 *Q. B.* 242, &c.—*per* L. James of Hereford in H. L. above—by five to one, and so by the House of Lords confirming the judgment of the Court of Appeal, to the effect that the "place" contemplated by the Act is a place which is analogous in its character and use to a betting "*house, office,* or *room.*" See also *Doggett* v. *Catterns,* 19 *C. B. N. S.* 765 (1865), *Ex. Ch.*—habitual use of a spot in a public park does not make it a "place"; *Shaw* v. *Morley,* *L. R.* 3 *Exch.* 136 (1868)—temporary desks outside an enclosure are "places"; *Bows* v. *Fenwick,* *L. R.* 9 *C. P.* 339 (1874)—umbrella on a racecourse is a "place"; *Humphrey,* 1898, 1 *Q. B.* 875; 67 *L. J. Q. B.* 534; *C. C. R.*—an archway in a street is a "place." Since *Powell* v. *Kempton Park,* &c., "sufficient localisation of the business" has been taken as the test, *Brown* v. *Patch,* and *Belton* v. *Busby,* both in *Q. B. D.* in 1899; 19 *Cox C. C.* 330 and 392; *Deaville,* p. 491.

It has been doubted whether under 8–9 V. 109, 17, p. 323, it must be proved that the money was actually paid. "Suppose the loser did not pay?" *Per* Bramwell B., *Moss,* p. 323. The statute, however, seems to contemplate actual payment by the use of the word "obtaining" in the s. If the money was not actually paid, the prisoner might be convicted of the attempt to commit the statutable misdemeanor. See 14–15 V. 100, 9, pp. 69, 170, 257.

It is unnecessary on an indictment under 16–17 V. 119, p. 490, to show that there has been a physical "resorting," if it be shown that the house was kept opened and advertised as a betting-house. But where the only evidence of the purpose for which it is kept is that of *resorting* it is not enough to show that letters and telegrams were sent to the house; there must be evidence of physical resorting. *Brown,* p. 161. The question whether a particular game is unlawful is a question for the judge. *Davies,* 1897, 2 *Q. B.* 199; 66 *L. J. Q. B.* 513; 18 *Cox C. C.* 618; *C. C. R.*; a man casually using his rooms to play even an unlawful game with friends is not unlawful gaming within 17–18 V. 38, 4.

As to the liability of a visitor or a spectator at a raided betting-house, see p. 661.

Inciting infants to bet or borrow.] By 55–6 V. 4, 1: (1) "If any one for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person, or at any place with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanor, and shall be liable if convicted on indictment to imprisonment with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine. . . .

(2) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to any one as a person to whom any payment may be made, or from whom information may be obtained for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of the sending of such document."

By s. 2: (1) "If any one for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant, any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money or to enter into any transaction involving the borrowing of money, or to apply to any person, or at any place, with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanor, and shall be liable if convicted on indictment to . . ." the same punishment as in s. 1.

(2) "If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made as to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in, or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to, and was wholly ignorant of the sending of such document." See on s. 3, below.

S. 3 provides that if any such document as is mentioned in the former sections is sent to an infant "at any university, college, school, or other place of education . . . the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age." This presumption is made against a person charged under s. 2 above, by 63-4 V. 51, 5. See p. 609.

By s. 4: "If any one, except under the authority of any court, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connexion with any loan, he shall be liable . . . if convicted on indictment to imprisonment with or without hard labour for a term not exceeding three months, or to a fine not exceeding one hundred pounds."

GRIEVOUS BODILY HARM.

In numerous instances the words "grievous bodily harm" occur in statutes; sometimes the words are slightly varied, *e.g.* 24–5 V. 100, 11, p. 651; s. 18, p. 249; s. 20, *ib.*; s. 23, p. 704; s. 26, "bodily harm," p. 517; s. 28, p. 394; s. 29, p. 395; s. 30, "bodily injury," p. 394; s. 31, p. 779; s. 35, "bodily harm," p. 480.

The prisoner was indicted, under 7 W. 4 and 1 V. 85, 2 (repealed), for causing "a bodily injury dangerous to life, with intent to commit murder." Intending to cause the death of her infant child she exposed it in an open field on a cold wet day, where it was found after some hours nearly dead from congestion of the lungs and heart caused thereby, but was restored. In view of the character of the other offences provided for by that s. (poisoning, stabbing, wounding, &c.) and seeing that there had been no lesion of any of the child's organs, the conviction for "a bodily injury" was quashed. *Gray, Dears. & B. C. C.* 303; 26 *L. J. M. C.* 203; 7 *Cox C. C.* 326 (1857). See 24–5 V. 100, 27, p. 329.

It is not necessary to prove malice in the prisoner against the particular person injured; or that any grievous bodily harm was in fact inflicted, if there was an intent to inflict it on some one, as the judges held in *Hunt*, pp. 21, 222, apparently under 43 G. 3, 58 (repealed). The prisoner having been apprehended (p. 222) by one Headley, in an attempt to break open his stable in the night, was taken into Headley's house where he threatened him with vengeance and endeavoured to carry his threats into execution with a knife which lay before him; in so doing he cut one of Headley's servants, who was assisting him; the cut was not serious. The jury found that the thrust was made with intent to do grievous bodily harm upon any body on whom it might alight, though the particular cut was not calculated to do so. See p. 495. This case also appears to have resolved the doubts of Bayley J. in *Akenhead, Holt N. P. C.* 469 (1816), under that (repealed) statute, whether the wound must not be in a vital part. The same construction, with regard to general malice, was put upon the (repealed) Coventry Act, 22–3 C. 2, 1. See *Carrol*, 1 *Lea.* 55; 1 *East P. C.* 394, 396 (1765); *Latimer*, p. 21.

Where the prisoner, in attempting to commit a robbery, threw down the prosecutor, kicked him, and produced blood; Denman C.J. left it to the jury to say, whether his intent was to disable the prosecutor, or to do him some grievous bodily harm, under 9 G. 31, 12 (repealed); adding that nothing was more likely to accomplish the robbery which he had in view "than the disabling which such violence would produce." *Shadbolt*, 5 *C. & P.* 504 (1833).

The intent to do grievous bodily harm may be inferred, although the prisoner had also an intent to commit another felony—in this case probably rape. The judge held that though not eventually dangerous, the harm may be "a grievous bodily injury," and added that the intention of the prisoner might be inferred from the act. The judges held a conviction right. *Cox Russ. & Ry.* 362 (1818), under 43 G. 3, 58, above, under which, too, a prisoner charged with shooting, with intent to do A. B. some grievous bodily

harm, when the jury found that the prisoner's [primary] motive was to prevent his lawful apprehension, but that, in order to effect that purpose, he had also the intention of doing A. B. the harm, was held rightly convicted by the judges as, if both the intents existed, it was immaterial which was principal and which subordinate (both being specified in the statute). *Gillow*, 1 *Moo. C. C.* 85 (1825). So if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with intent to do grievous bodily harm. *Bowen*, *Carr. & M.* 149 (1841), where, it being uncertain who actually struck the blow, the doctrine of common design, p. 152, was ruled to apply.

Where the prisoner's intention was to injure one person, but he has in fact injured another, the following points have been decided:—

1. If the prisoner meant to, and did in fact, inflict grievous bodily harm when he struck, a mistake on his part as to the *identity* of the person injured makes no difference, and he may be convicted of wounding that person with intent, &c., against that person. Thus A., desiring to murder C., and supposing B. to be C., shoots at and wounds B., A. may be convicted of wounding B. with intent to murder B. *Smith, Dears. & P. C. C.* 559; 7 *Cox C. C.* 51 (1855), p. 618; and see *Stopford*, below. These cases appear to be inconsistent with (and if so, the former overrules) *Holt*, 7 *C. & P.* 518 (1836), p. 651, which was mentioned to the court in *Smith*.

2. If the prisoner had a *general* intention to inflict grievous bodily harm on any one of a group, &c., and in pursuance thereof did inflict grievous bodily harm on A., without any *specific* intention, he may be convicted of wounding A. with intent to do grievous bodily harm to A.

The prisoner fired a loaded pistol at a group of boys, of whom A. was one, who had been annoying him, and hit A. Held, that he was rightly convicted of wounding A. with intent to do A. grievous bodily harm. *Fretwell*, *L. & C.* 443 (1864). So *Martin*, pp. 22, 590, 618, under 24–5 V. 100, 20, p. 249.

3. If the prisoner intends to inflict grievous bodily harm on A., and in endeavouring to wound or poison A. such harm is accidentally inflicted on B., he cannot be convicted of wounding B., with intent, &c. *Ryan*, 2 *M. & R.* 213 (1839); and see *Hewlett*, 1 *F. & F.* 91 (1858), where an acquittal was directed for injury to a person interposing between prisoner and his intended victim. See, however, *Stopford*, 11 *Cox C. C.* 643 (1870), where from the report it would appear that Brett J. thought that all these cases were not distinguishable from (and ought to have followed) *Smith*, above; and see also *Latimer*, p. 21; and *Hunt*, p. 494.

All these cases are reducible to the single principle that the criminal intent referred to by the statutes is an intention to injure the person actually injured, whether the mind which forms that intention is mistaken or not. Intention is the direction (*intendere*) of the mind towards a certain result, and is altogether a different thing from motive. (This point is discussed in a note in ch. 2 of Mill's *Utilitarianism*.) If I level a loaded gun at a man and fire it, I intend to shoot that man. If I desire to do so, my motive and intention coincide. My belief, again, that he is the man I desire to hurt is a state of mind quite independent of my intention to do so. On the other hand, if I take A. for B., and shoot at A. on that supposition, and accidentally shoot B., though my desire to hurt B. was the motive of my shooting, I can hardly be said to have shot B. intentionally, and it may be doubted whether a wounding of B. in such circumstances would be within the statute, but the distinction would probably be considered too subtle to be allowed to prevail. See p. 618.

A constable was employed to guard a copse from which wood had been stolen, and for this purpose carried a loaded gun; from this copse he saw W.

come out, carrying wood which he was stealing, and called to him to stop; W., however, running away, the constable having no other means of bringing him to justice, fired and wounded him in the leg. The constable was not aware at the time that W. was (as he in fact was) committing a felony. It was held that a conviction for wounding with intent, &c., was right, upon the ground that he was not justified in firing as "the fact that W. was committing a felony was not known to the prisoner at the time." *Dadson*, 2 *Den. C. C. R.* 35; 4 *Cox C. C.* 358; 20 *L. J. M. C.* 57 (1850), pp. 642–3; cf. pp. 223, 636, 772.

Where a person who is being assaulted, and who is entitled to defend himself *unnecessarily* resorts to the use of a deadly weapon, he may be convicted of wounding, &c., if his intent was to do grievous bodily harm. *Odgers*, 2 *Moo. & R.* 479 (1843), p. 603.

As to a verdict of "unlawful wounding," see 14–15 V. 19, 5, p. 799; and see *Miller and others*, 14 *Cox C. C.* 356 (1879), p. 800, where a felonious shooting only being charged, and 14–15 V. 19, 5, not applying thereto, upon a verdict of unlawful wounding all the prisoners were discharged. Upon an indictment for the misdemeanor of inflicting grievous bodily harm, a prisoner may be found guilty of a common assault, pp. 249, 255; cf. pp. 72, 725, 731; and see s. 47, p. 250. See p. 799.

See as to the form of indictment, *Cruse*, 8 *C. & P.* 541; 2 *Moo. C. C.* 53 (1838), pp. 632, 651, 817, where on an indictment under 7 W. 4 and 1 V. 85, 20, a common assault was found, pp. 171–2.

GUNPOWDER—OFFENCES AS TO. *See* EXPLOSIVES, p. 394.

HIGHWAYS—NUISANCE TO.

Upon prosecutions for nuisances to a highway, the prosecutor must prove: 1st, that the way in question is a common highway; 2nd, the obstructing of it, or other nuisance.

What is a highway.] Every way which is common to the public is a highway. Thus a bridge may be a common highway. *Sainthill*, 2 *L. Raym.* 1174 (1706). As to *Bridges*, see p. 289. So a footway. *Logan* v. *Burton*, 5 *B. & C.* 513 (1826); for it is a public highway for foot passengers. *Allen* v. *Ormond*, 8 *East* 4 (1806). So a public bridle-way. *Salop, Inhabs. of*, p. 292. So a towing-path, used only by horses employed in towing vessels, is a common highway for that purpose. *Per* Bayley J., *Severn and Wye Railway Co.*, 2 *B. & Ald.* 646 (1819). And a railway made under statutory authority, which provides that the public shall have the beneficial enjoyment of it, is also a highway to be used in a particular manner. *Ib.* A river which is common to all the king's subjects has been frequently held to be a highway; and if its course change, the highway is diverted into the new channel. 1 *Rolle Ab.* 390, *Chimin Common* (translated by *d'Anvers*, vol. i. p. 782); *Hammond*, 10 *Mod.* 382 (1717); 2 *Hawk. P. C.* Bk. 1, ch. 76 (*i.e.* that on "Highways," not that on "Turnpike Roads"), s. 1.

It must appear that the highway was a way common to all the king's subjects; for, though numerous persons may be entitled to use it, yet if it be not common to all, it is not a public highway. Thus a private way set out by commissioners under an inclosure Act "for dividing, &c., the estates of certain individuals," for the use of the inhabitants of nine parishes, and directed to be repaired by six of them, does not concern the public, nor is it of a public nature, but merely concerns the individuals—though they be numerous—who have a right to use it, and consequently cannot be the subject of indictment. *Richards*, 8 *T. R.* 634 (1800). In general, the proof of any particular way being a highway, is from the use of it by the public as such for such a number of years as to afford evidence of a dedication by the owner of the soil to the public. Cf. p. 291. "The particular manner in which it has been used, as where it has been used for some public purpose, as for conveying materials for the repairs of other highways (*Wandsworth, Inhabs. of*, 1 *B. & Ald.* 63 (1817), p. 506), or upon any occasion likely to attract notice, is very material; for such instances of user would naturally awaken the jealousy and opposition of any private owner, who was interested in preventing the acquisition of any right by the public, and consequently, acquiescence affords a stronger presumption of right than that which results from possession and user in ordinary cases." 2 *Stark. Ev.* 380, *2nd ed.* A road may be dedicated to the public *for a certain time only*, as by the provisions of an Act, and upon the expiring or repeal of the Act its character as a public highway will cease, and the parishioners will no longer be bound at common law to repair. *Mellor*, 1 *B. & Ad.* 32 (1830). With reference to this case, however, Patteson J. in *Lordsmere, Inhabs. of*, 15 *Q. B.* 689; 19 *L. J. M. C.* 215 (1850), said, "At the trial I was pressed with *Mellor*, but there the turnpike Act had expired, and I cannot help thinking that the court decided

on the old doctrine of adoption by the parish through which the road passes, which has been now quite abandoned." In *Lordsmere*, a turnpike road, made under a local Act, which was to be in force for a limited time, and which had been used by the public both during that time and after its expiration, was held to be a highway which the township, having by prescription the liabilities of a parish, was bound to repair. Where commissioners for setting out roads have exceeded their authority, in directing that certain private roads, which they set out, shall be repaired by the township, if the public use such roads, originally intended to be private, it is a question for the jury whether they have not been dedicated to and adopted by the public. *Wright*, 3 *B. & Ad.* 681 (1832), p. 503, where L. Tenterden held, that when a road runs through a space of fifty or sixty feet, between inclosures set out under an Act, it is to be *presumed* that the whole of that space is public, though "from economy" the whole may not be kept in repair. *The United Kingdom Electric Telegraph Co.*, 2 *B. & S.* 647 *n.*; 31 *L. J. M. C.* 166 (1862); see p. 503.

Unless there be some one who was capable of dedicating the road to the public, it seems that a use of it as a highway by them, and repairs done by the parish under a mistaken idea of their liability, will not create such liability, though it would be otherwise if the repairs were done with a full knowledge of the facts, and with an intention of taking upon themselves the burthen. *Edmonton, Inhabs. of*, 1 *Moo. & R.* 24 (1831). Trustees, in whom land is vested for public purposes, may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. *Leake, Inhabs. of*, 5 *B. & Ad.* 469; 2 *Nev. & M.* 583 (1833), p. 507. See also *Grand Surrey Canal* v. *Hall*, p. 292; and *East Mark, Inhabs. of*, 11 *Q. B.* 877 (1848). As to inferring a dedication from user before a lease, although the lands have been let on lease, see *Winterbottom* v. *L. Derby*, *L. R.* 2 *Ex.* 316; 36 *L. J. Ex.* 194 (1867).

In determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered. If it appear only that he has suffered a continual user, that *may* prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a licence resumable in a particular event. Thus where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land in such hamlet should be open to carriages, that the company should pay him 5*s.* a year, and find cinder to repair the way, and that the inhabitants of the hamlet should lead and lay down the cinder, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time a dispute arising, the passage was interrupted, and the interruption acquiesced in for five years, it was held that the evidence showed no dedication, but a licence only, resumable on breach of the agreement. *Barraclough* v. *Johnson*, 8 *A. & E.* 99 (1838), p. 511; and see *Chorley*, 12 *Q. B.* 515 (1848), p. 515. Cf. *Piggott* v. *Goldstraw*, 19 *Cox C. C.* 621 (1901).

There may be a partial dedication, as in the case of a footpath through a field which is constantly ploughed across the footpath. Cf. p. 503. See *Mercer* v. *Woodgate*, *L. R.* 5 *Q. B.* 26; 39 *L. J. M. C.* 21 (1869); *Arnold* v. *Blaker*, *L. R.* 6 *Q. B.* 433; 40 *L. J. Q. B.* 185 (1871); *Arnold* v. *Holbrook*, *L. R.* 8 *Q. B.* 96; 42 *L. J. Q. B.* 96 (1873).

Now, by the Highway Act, 5–6 W. 4, 50, 23, "no road or occupation way, made, or hereafter to be made by . . . any individual or private person, body politic or corporate, nor any roads already set out, or to be hereafter set out as a private driftway or horsepath, in any award of commissioners under an inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless

the person, &c., proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner, and of the width required by this Act, and to the satisfaction of the said surveyor, and of any two justices . . . who are hereby required on receiving notice from such person, &c., to view the same, and to certify that such highway has been made in a substantial manner, &c. . . . which certificate shall be enrolled at the next quarter sessions . . . then, and in such case, after the said highway shall have been used by the public, and duly repaired by the said person, &c., for . . . twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: provided nevertheless that, on receipt of such notice as aforesaid, the surveyor . . . shall call a vestry meeting . . . and if such vestry shall deem such highway not to be of sufficient utility . . . to justify its being kept in repair at the expence of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway, to appear before the justices at the next special sessions for the highways . . . and the question as to the utility of such highway . . . shall be determined at the discretion of such justices." This s. is not retrospective in respect of roads completely public by dedication at the time of its passing, but applies to roads then made and in progress of dedication. *West Mark, The Tithing of*, 2 *Moo. & R.* 305 (1840), p. 508.

On an indictment for obstructing a passage which led from one part of a street by a circuitous route to another part of the same street, and which had been opened to the public for a great many years, and lighted by a public authority, L. Ellenborough held this to be a highway: though it was not in general of use to those walking up and down the street, but was only of convenience when the street was blocked with a crowd. *Lloyd*, 1 *Camp.* 260 (1808). Whether a street which is not *a thoroughfare* can be deemed a highway has been a subject of considerable discussion. In *Lloyd*, L. Ellenborough said, "I think that if places are lighted by public bodies, this is strong evidence of the public having a right of way over them; and to say that this right cannot exist, because a particular place does not lead conveniently from one street to another, would go to extinguish all highways where (as in Queen's square) there is no thoroughfare." The same doctrine was recognised by L. Kenyon in the case of *The Rugby Charity* v. *Merryweather*, 11 *East* 375 *n.* (1790), where he says, "As to this not being a thoroughfare, that can make no difference. If it were otherwise, in such a great town as this, it would be a trap to make persons trespass." The opinions of L. Kenyon and L. Ellenborough on this point have, however, been questioned. In *Woodyer* v. *Hadden*, 5 *Taunt.* 125 (1813), two judges expressed their dissatisfaction with the *dictum* of L. Kenyon in the *Rugby case;* and in *Wood* v. *Veal*, 5 *B. & Ald.* 454 (1822), Best J. did the same. Abbott C.J. said, "I have great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the use of it." There is now, however, no doubt that a way may be a highway, though it be what is commonly called a cul-de-sac. *Bateman* v. *Bluck*, 18 *Q. B.* 870; 21 *L. J. Q. B.* 406 (1852), which "has not since been doubted," *Pratt* on *Highways*, p. 7, 15*th ed.*; *Campbell* v. *Lang*, 1 *Macq. H. L. Ca.* 451 (1853); *Young* v. *Cuthbertson*, *ib.* 455 (1854). Cf. *Attorney-General* v. *Richmond, Mayor of, &c.*, 20 *T. L. R.* 131 (1903).

A way ceases to be a public highway where the access to it at either end has been stopped by (legally) stopping up the roads leading to it. *Bailey* v. *Jamieson*, *L. R.* 1 *C. P. D.* 329 (1876).

As to whether there can be a public right of walking over a close in every direction, though there be but one entrance, see 1 *Russ. Cri.* 761, who says "there certainly may be such a private right."

Stopping and diverting.] Cf. p. 502. Where justices in petty sessions have made an order for stopping a highway under a local Act giving a power of appeal, and the time for appeal has elapsed, it cannot be contended, on an indictment for obstructing such way, that the order was bad, because the justices were not properly summoned to the petty session. But an order made under (repealed) 55 G. 3, 68, 2, which enacts, "that when it shall appear upon the view of any two or more" justices, that a highway is unnecessary, the same may be stopped by order of such justices, is not valid if it state only that the justices *having viewed* the public roads within the parish, &c. (in which the road lies), *and being satisfied* that certain roads are unnecessary, do order the same to be stopped up, and the objection may be taken at the trial of such indictment. *Marquis of Downshire*, pp. 163, 514. And see further as to stopping highways, *Cambridgeshire, Inhabs. of, ib.* 111 (1835).

By an Act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c., should be deemed part and parcel of the townships respectively in which the messuages, &c., were situate. And the commissioners under the Act were directed in their award to make such orders as they should think necessary and proper concerning all public roads, "and in what township and parish the same are respectively situate," and by whom they ought to be repaired. The commissioners by their award directed that there should be certain roads. One of these, called the Sandtoft Road, passed between two allotments. The road was ancient. The part of the common over which it ran before the award was in the township of H., and the road was still in that township, unless its situation was changed by the local Act and the award. The new allotments on each side were declared by the award to be in other townships than H. The award did not say in what townships the road was situate, nor by whom it was repairable. It was held that the Act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of the road, and, therefore, that the road in question continued to be in H. It was also held by L. Denman C.J. that where the herbage of a road becomes vested by the General Inclosure Act (41 G. 3, 109, 11, repealed) in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors. *Hatfield, Inhabs. of*, 4 *A. & E.* 156 (1835).

By 5–6 W. 4, 50, 88, 89, persons aggrieved by the decisions of the justices in stopping or diverting highways, may appeal to the sessions, where a jury is to determine whether the highways stopped, &c., are unnecessary, or the new one nearer or more commodious, &c.

By s. 92, where a highway is turned or diverted, the parish or other party liable to repair the old highway shall repair the new highway, "without any reference whatever to its parochial locality."

Evidence.] Where, on an indictment for obstructing a highway, a principal question was whether the way was public or private, and evidence was offered that a person since deceased had planted a willow on a spot adjoining the road, on ground of which he was tenant, saying at the same time that he planted it to show where the boundary of the road was when he was a boy; it was held that such declaration was not evidence either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest. *Bliss*, 7 *A. & E.* 550; 7 *L. J. Q. B.* (1837); cf. p. 26.

But on an indictment against a township for non-repair of a road, an

indictment against an adjoining township for non-repair of a portion of the highway in continuation of the road in question, either submitted to, or prosecuted to conviction, is admissible as evidence to prove the whole road in question to be a highway. *Brightside Bierlow, Inhabs. of*, 13 *Q. B.* 933; 19 *L. J. M. C.* 50 (1849), p. 506. The decision by a court of summary jurisdiction under 55–6 V. 57, 6–8, that a street is a highway repairable by the inhabitants at large is a judgment *in rem* and the question afterwards is *res judicata*. *Wakefield, Mayor, &c., of*, v. *Cooke*, 1904, *A. C.* 31; 73 *L. J. K. B.* 88; *H. L.*

Continuance of nuisance—evidence.] On an indictment for *the continuance* (p. 515) of a nuisance, the conviction on a former indictment (cf. p. 190) for the same nuisance, against the same defendant, is conclusive evidence that the way is a highway, and that the obstruction is a nuisance. *Maybury*, 4 *F. & F.* 90 (1864). This does not conflict with the general rule, p. 3, for the indictment was for a continuance since the previous conviction, as to which the learned editors, after pointing out that it has long been settled that an action on the case lies for a *continuance* after a recovery for an erection, say, "The same principle applies to indictment and, indeed, the only remedy at common law after the real actions became obsolete was an indictment, as an action only gave damages. . . . Indictment was substituted, and in an indictment for continuing a nuisance, the proper judgment is that it be abated. But if the court is satisfied that the nuisance is abated it will not give that judgment [p. 665]. And the common practice pursued in this very case is to respite judgment until it is seen whether the nuisance is abated, and then, if it is not, to inflict a fine. Hence it is that in *substance* in such cases, the indictment is a civil proceeding [pp. 107, 201], being *remedial* in its object, although, no doubt in form criminal." Another reason given (*T.* s. 1683) for proof of a previous conviction being admitted (*Haughton*) *exceptionally* in highway cases, is that it is evidence of "reputation." Cf. *St. Pancras, Inhabs. of*, 1 *Peake N. P. C.* 220 (1794), p. 513, where L. Kenyon said, a record of acquittal (see p. 3) would not have been evidence *for* another parish "because some other parties might have indicted them, and those parties could not be bound by this record. There are many cases where a record is evidence against a person though it is not so for him"; and *Haughton, Inhabs. of*, p. 510; and cf. p. 512. Cf. *Fairie*, p. 664. See now 7 E. 7, 20 (3), p. 842.

Proof of the highway as set forth.] The highway in question must be proved as set forth in the indictment; but if the description be too general and indefinite, advantage must be taken of that defect by plea in abatement, and not under the general issue. *Hammersmith, Inhabs. of*, 1 *Stark. N. P. C.* 357 (1816); and see *Waverton, Inhabs. of*, 2 *Den. C. C. R.* 340; 21 *L. J. M. C.* 7; 17 *Q. B.* 562 (1851). But an indictment describing a way as "from A. towards and unto B.," is satisfied by proof of a public way leading from A. to B., though it turns backward between A. and B. at an acute angle, and though the part from A. to the angle be an immemorial way, and the part from the angle to B. be recently dedicated. B. was a church: the path from A., after passing the point at which the obstruction took place, reached the churchyard, but not the church, before reaching the angle: it was held by L. Denman C.J., and *semble*, *per* Coleridge J., that this proof would not have supported an indictment describing the whole as an immemorial way. *Marchioness of Downshire*, 4 *A. & E.* 232 (1835).

An indictment for obstructing a highway (by placing a gate across it) stated the way to be "from the town of C." to a place called H., and charged the obstruction to be "between the town of C." and H. By a local paving Act, the limits of the town of C. were defined, and the *locus in quo* was within these limits, and the prosecutors relied on the local turnpike Acts, which prohibited the erection of gates within the town. It was held, that there

was a variance, and the indictment could not be sustained, as the terms "from" and "between" excluded the town; and according to the limits defined by the Act on which the prosecutors relied, the obstruction was shown to be within the town. *Fisher*, 8 *C. & P.* 612 (1838). So, where the indictment described the highway as "leading from the township of D. unto the town of C.," and a gate was put up in the township of D. Coleridge J. held, that the defendant must be acquitted, as the words "from" and "unto" excluded the *termini*. *Botfield, Carr. & M.* 151 (1841); see also *Upton-on-Severn, Inhabs. of*, 6 *C. & P.* 133 (1833), and *Steventon, Inhabs. of*, 1 *C. & K.* 55 (1843). Where the way was stated to be "for all the liege subjects, &c., to go, &c., with their horses, coaches, carts and carriages," and the evidence was that carts of a particular description, and loaded in a particular manner, could not pass along the way, it was held to be no variance. *Lyon, Ry. & Moo. N. P. C.* 151 (1824). Where the way is stated to be a *pack and prime way* (*i.e.* so called "vulgarly . . . because it is both a foot way, which was the first or *prime way*, and a *packe* or *drift way* also" [=one restricted to foot passengers, horsemen, and cattle], Co. Litt. 56 *a*), and appears to be a carriage way, the variance is fatal. *St. Weonard's, Inhabs. of*, 6 *C. & P.* 582 (1834). But where the indictment alleged an immemorial way, and the evidence proved that the way had been made within legal memory, the variance was held to be immaterial. *Turweston, Inhabs. of*, 16 *Q. B.* 109; 20 *L. J. M. C.* 46 (1850); and now see 14–15 V. 100, 1, p. 176.

Proof with regard to the termini.] Although it is unnecessary to state the *termini* of the highway, yet if stated they should be proved as laid. Cases of *Waverton*, above (*Q. B. note*); *St. Weonard's*, above; *Great Canfield*, 6 *Esp.* 136 (1810). See also *Turweston*, above, and pp. 76, 177.

Proof of changing.] "It seemeth to be agreed that an ancient highway cannot be changed without the king's licence first obtained upon a writ of *ad quod damnum* [addressed to the sheriff to inquire what damage, &c.], and inquisition thereon found that such a change will not be prejudicial to the publick. . . . Also it is said that the inhabitants are not bound to keep watch in such new way, or to make amends for a robbery therein committed, or to repair it. An owner of land, over which there is an open road, may inclose it of his own authority; but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. . . . A private Act of parliament for inclosing lands, which vests a power in commissioners to set out new roads by their award, is equally strong, as to these consequences, as a writ of *ad quod damnum*. . . ." 2 *Hawk. P. C.* Bk. 1, ch. 76 (*Highways*), s. 3. Cf. 1 *Burr.* 465, p. 509.

The power of widening and changing highways is given to justices of the peace under certain modifications, by 5–6 W. 4, 50, 82, 84, &c. See also p. 500 and 25–6 V. 61, 44; 27 8 V. 101, 21 (discontinuance of maintenance), 47, 48.

A statute giving authority to make a new course for a navigable river, along which there is a towing-path, will not take away the right of the public to use that path, without express words for that purpose. *Tippett*, 3 *B. & Ald.* 193 (1819).

What acts amount to a nuisance.] "There is no doubt but that all injuries whatever to any highway, as by digging a ditch or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the king's people, are public nuisances at common law . . . it is no excuse for one who layeth such logs . . . that he laid them only here and there, so that the people might have a passage, by windings and turnings through the logs." *Hawk.* above, ss. 144, 145. So erecting a gate across a highway is a nuisance, for it not only interrupts

the public in their free and open passage, but it may in time become evidence in favour of the owner of the soil. *Ib.* ch. 75, s. 9. It is also a nuisance "to suffer the ditches adjoining to a highway to be foul, by reason whereof it is impaired, or to suffer the boughs of trees growing near the highway to hang over the road in such a manner as thereby to incommode the passage." *Ib.* ch. 76 (*Highways*), s. 147; and see 5–6 W. 4, 50, 67; *Attorney-General* v. *Waring*, 63 *J. P.* 789 (1899). Cf. *Walker* v. *Horner*, 1 *Q. B. D.* 4; 45 *L. J. M. C.* 4 (1875). "There can be no doubt that any contracting or narrowing of a public highway is a nuisance; it is frequently, however, difficult to determine how far in breadth a highway extends, as where it runs across a common, or where there is a hedge only on one side of the way, or where, though there are hedges on both sides, the space between them is much larger than what is necessary for the use of the public; in these cases it would be for a jury to determine how far the road extended." 1 *Russ. Cri.* 790; *Brownlow* v. *Tomlinson*, 1 *M. & Gr.* 484 (1840); *Wright*, p. 498; *London and Birmingham Railway*, 1 *Railw. C.* 317 (1839); *The United Kingdom Electric Telegraph Co.*, p. 498, whence it seems that, in ordinary cases, where a road runs between fences, not only the part which is maintained as solid road, but the whole space between the fences is to be considered as highway. Now, however, by 27–8 V. 101, s. 51, any obstruction therein mentioned, which is within fifteen feet of the centre of the highway, may be removed. Where a waggoner occupied one side of a public street in a city, before his warehouses, in loading and unloading his waggons, for several hours at a time, by night and by day, having one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street; this was held to be a nuisance, although there was room for two carriages to pass on the opposite side. *Russell*, 6 *East* 427 (1805). So excavations made close to a highway are a nuisance. *Barnes* v. *Ward*, 9 *C. B.* 392 (1850); *Hardcastle* v. *S. Yorkshire Railway*, 4 *H. & N.* 67 (1859); *Hounsell* v. *Smyth*, 7 *C. B. N. S.* 731 (1860); *Hadley* v. *Taylor*, *L. R.* 1 *C. P.* 53 (1865). So keeping stage-coaches at a stand in a street plying for passengers is a nuisance. *Cross*, 3 *Camp.* 226 (1812), p. 657; *Wilkins* v. *Day*, 12 *Q. B. D.* 110 (1883); *Attorney-General* v. *Brighton and Hove, &c., Association*, 1900, 1 *Ch.* 276. So exhibiting effigies at a window, and thereby attracting a crowd. *Carlile*, 6 *C. & P.* 636 (1834); *Lewis*, *Law Times newspaper*, Dec. 17, 1881. Ploughing up a footpath is a nuisance, *Griesly*, 1 *Vent.* 4 (1669); *Wellbeloved* on *Highways*, 443, both on the ground of inconvenience to the public, and of injuring the evidence of their title by obliterating the route; but there may be a limited dedication of a footpath subject to the right to plough it up; see p. 498. Where some defendants were householders, and one defendant was a company (employed by those householders), established for the purpose of lighting the streets of a town with gas, and had opened a trench in one of the streets for the purpose of laying down their mains along the middle of the street, and this had been done under contract with the town commissioners for lighting the *streets*, who had and exercised their statutory authority to confer on them the right to dig up the soil, &c., for their purposes, and they also had with all necessary consents dug and broken the soil to supply gas to private houses, and it was admitted that they had used reasonable despatch in laying down the pipes and restoring the road, but during the execution of the works the street was impassable; it was held, that inasmuch as the acts of the defendants were in no respect done in the necessary or proper use of the highway, they were guilty of a nuisance, and a householder who had employed them was convicted with them. *Longton Gas Company*, 29 *L. J. M. C.* 118; 8 *Cox C. C.* 317 (1860), *Q. B.*; Cf. *Ellis* v. *Sheffield Gas Consumers' Company*, 2 *E. & B.* 767; 18 *Jur.* 146 (1853). See also *Train*, 31 *L. J. M. C.* 169; 9 *Cox*

C. C. 180 (1862), *Q. B.* Provision is made by 5-6 W. 4, 50, 64, 65, 66, and 27-8 V. 101, 51, p. 502, for the removal of many such nuisances as are above mentioned, and for imposing a penalty.

The obstruction of a navigable river is likewise a public nuisance, as by diverting part of the water, whereby the current is weakened, and made unable to carry vessels of the same burthen as before. 1 *Hawk. P. C.* Bk. 1, ch. 75, s. 11. The building of a bridge partly in the bed of a navigable river will be a nuisance if it obstruct the navigation, but not otherwise. *Betts*, 16 *Q. B.* 1022; 4 *Cox C. C.* 211 (1850). See also *York and North Midland Railway Co.* v. *R.* (*in error*), 7 *Railw. Cas.* 459 (1852). In *Russell*, pp. 201, 515, the jury found that an embankment, "although a nuisance, was not sufficiently so to render the defendant criminally liable," upon which the judge directed a verdict of acquittal, and the Queen's Bench held, that the jury must be understood as finding that the obstruction in question was so insignificant as not to constitute a nuisance, and refused to disturb the verdict. But if a vessel sink by accident in a navigable river, the owner is not indictable for a nuisance in not removing it. *Watts*, 3 *Esp.* 675 (1798). Where on an indictment for a nuisance by erecting and continuing piles and planking in a harbour, and thereby obstructing it and rendering it insecure, a special verdict was found, that by the defendant's works the harbour was in some extreme cases rendered less secure; it was held, that the defendant was not responsible criminally for consequences "so slight, uncertain and rare," and that a verdict of not guilty must be entered. *Tindall*, 6 *A. & E.* 143 (1837). On an indictment for a nuisance in a navigable river and common king's highway, viz. the harbour of Cowes, by erecting an embankment in the water-way, the jury found that the embankment was a nuisance, but was counterbalanced by the public benefit arising from the alteration. It was held by the King's Bench, that this finding amounted to a verdict of guilty, and that it is no defence to such an indictment, that although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port. *Ward*, 4 *A. & E.* 384 (1836), p. 656, but cf. p. 657; and see *L. Grosvenor*, 2 *Stark.* 511 (1819); *Morris*, 1 *B. & Ad.* 441 (1830), p. 659; *Randall*, *Car. & M.* 496 (1842); and *Atty.-Gen.* v. *Terry*, *L. R.* 9 *Ch. App.* 423 (1873), *per* Jessel M.R. Where the crown has no right to obstruct the whole passage of a navigable river, it has no right to erect a weir to obstruct a part, except subject to the rights of the public, and therefore the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. *Williams* v. *Wilcox*, 8 *A. & E.* 314 (1838). See *The United Kingdom Electric Telegraph Co.*, p. 498, and *Train*, above. Where the defendant's workmen stacked the refuse of the colliery so as to obstruct a navigable river, it was held that the defendant's orders to the contrary and his absence—due to old age—from personal superintendence did not relieve him from liability. *Stephens*, 1 *L. R.* 1 *Q. B.* 702; 35 *L. J. Q. B.* 251; 10 *Cox C. C.* 340 (1866), p. 664.

Nuisance authorised by Act of parliament.] By an Act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway according to a plan, &c. By a subsequent Act, the company or persons authorised by them were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some cases came within five yards of it. It did not appear whether or not the line could have been made in those instances to pass at a greater distance. The engines on the railway frightened the horses on the highway. On an indictment it was held, that this interference with the rights of the public

must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorising the use of the engines were unqualified. *Pease*, 4 *B. & Ad.* 30 (1832), p. 659; *Canadian Pacific Railway Co.* v. *Roy*, 1902, *A. C.* 220; 71 *L. J. P. C.* 51.

But where a railway company are authorised by Act of parliament to obstruct public or private roads only on conditions which they have not performed, they may be indicted for a nuisance on the old highway. *Scott*, 3 *Q. B.* 543 (1842), where Maule J. laid it down that the company were not bound to go to an enormous disproportionate expense to secure absolutely the same convenience as before, if the difference was slight, and left the point to the jury; and see *Rigby*, 14 *Q. B.* 687 (1850). So also where water authorities or others interfere lawfully with the highway, they are bound to see that they do not create a nuisance. *White* v. *Hindley*, *L. R.* 10 *Q. B.* 219; 44 *L. J. Q. B.* 114 (1875): *Blackmore* v. *Mile End Old Town*, 9 *Q. B. D.* 451; 51 *L. J. Q. B.* 496 (1882): *Thompson* v. *Brighton, Mayor of*, 1894; 1 *Q. B.* 332; 63 *L. J. Q. B.* 181; 58 *J. P.* 297; *C. A.*

Where an Act of parliament authorises alterations in a highway, they must be made with reasonable care, and a nuisance must not be kept up an unreasonable time; otherwise the contractor is liable to be indicted for obstructing the highway. *Burt*, 11 *Cox C. C.* 399 (1870).

Nuisance justifiable from necessity.] It not unfrequently becomes a question, whether the obstruction complained of is justifiable by reason of the necessity of the case, as when it occurs in the usual and necessary course of any one's lawful business. The defendant, a timber-merchant, occupied a small timber-yard close to the street; and from the smallness of his premises, he was obliged to deposit the long logs in the street, and to have them sawed up there. L. Ellenborough said, "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. . . . He is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business." *Jones*, 3 *Camph.* 230 (1812); *Fritz* v. *Hobson*, 14 *Ch. D.* 542; 49 *L. J. Ch.* 321 (1880). So although a person who is rebuilding a house is justified in erecting a hoarding in the street, which serves as a protection to the public, yet if it encroach unreasonably upon the highway, it is a nuisance. *Per* Eyre C.J. in *Bush* v. *Steinman*, 1 *Bos. & Pul.* 404 (1799), and *per* Cockburn C.J. in *Longton Gas Co.*, p. 503; cf. *Russell*, p. 503. Cf. *Hoare* v. *Kearley*, 1 *T. L. R.* 426 (1885). See now 53–4 V. 59, 34.

Judgment.] Where a defendant indicted for a nuisance to a navigable river allowed judgment to go by default, and was under no recognisances to appear in the Queen's Bench for judgment, the court would not, in his absence, give judgment that the nuisance should be abated, although notice had been left at his residence of the intention of the crown to pray for judgment, the proper course being to sue out a writ of *capias* and proceed to outlawry. *Chichester*, 2 *Den. C. C. R.* 458 (1851). Cf. p. 501.

LIABILITY TO REPAIR HIGHWAYS.

Cf. generally, *Bridges*, pp. 289–96.

Upon an indictment for not repairing a highway, to which the general issue

is pleaded, it must be proved: 1st, that the way in question is a public highway, p. 497, and that it agrees with its description in the indictment, p. 501; 2ndly, that it is within the parish or other district charged; 3rdly, that it is out of repair; and 4thly, where the charge is not upon the parish, but against common right (*i.e.* not by law, but by agreement, see *Sweet, Law D., Right*), as upon an individual *ratione tenuræ*, the liability of the defendant to make the repairs.

Liability of parish.] Cf. p. 292. Parishes of common right are bound to repair their highways [but by prescription one parish may be bound to repair the way in another parish—but this dictum was very much doubted and disregarded in *Ashby-Folville, Inhabs. of*, p. 510]. *Per* Holt C.J., *Rayley, Parish of*, 12 *Mod.* 409 (1700); 2 *Hawk. P. C.* Bk. 1, ch. 76 (*Highways*), ss. 5–8; cf. *Midville, Inhabs. of*, 4 *Q. B.* 240 (1843), p. 510; "and no agreement with any person whatever can take off this charge which the law lays upon them [the parish]." *Austin*, 1 *Ventr.* 90, 183, 189 (1672). The parish generally, and not the overseers, are liable; and an indictment against the latter was quashed. *Dixon*, 12 *Mod.* 198 (1698). If particular persons are made liable by statute to repair, and become insolvent, the parish again becomes liable; *per* Holt C.J., *Anon.* 1 *Ld. Raym.* 725 (1698). And where a township, bound by prescription to repair its own ways, is exempted by Act of parliament from the repairs of new roads within it, the liability necessarily falls on the rest of the parish. *Sheffield, Inhabs. of*, 2 *T. R.* 106 (1787). The parish will remain liable, though the duty of repairing may likewise be imposed upon others. Thus where a statute enacted, that the paving of a particular street should be under the care of commissioners, and provided a fund for that purpose, and another statute passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held, that the inhabitants of the parish were not exempted from their common-law liability to keep the street in repair; and that the parish was under the obligation, in the first instance, of seeing that the street was properly repaired, and might seek a remedy over against the commissioners. *St. George Hanover Square, Inhabs. of*, 3 *Camph.* 222 (1812), p. 513. The proprietors of a navigation were required by their Act to keep a road in repair, on pain of indictment. Coleridge J. held that this did not relieve the parish or township from their common-law liability. *Brightside Bierlow*, p. 501. So where the trustees of a turnpike road are required by statute to make the repairs, the parish, or other district, is not exonerated, but is liable to be indicted. In such cases, the tolls, granted by the Act, are only an auxiliary and subordinate fund, and the persons whom the public have a right to look to are the inhabitants of the district, who may apply for relief against the trustees under (repealed) 13 G. 3, 84, 33, *Netherthong, Inhabs. of*, 2 *B. & Ald.* 179 (1818), p. 510; see also *Oxfordshire*, pp. 292–3; *Preston, Inhabs. of*, 2 *Lew. C. C.* 193 (1838); *Lordsmere*, p. 497. Nor can others render themselves liable to indictment for not repairing by *agreement*. Thus an indictment against the corporation of Liverpool, stating that they were liable to repair a certain highway, by reason of an agreement with the owners of houses alongside of it, was held bad, because the inhabitants of the parish, who are *primâ facie* bound to repair all ways within their boundaries, cannot be discharged from their liability by an agreement with others. *Liverpool, Mayor, &c., of*, 3 *East* 86 (1808), p. 511.

If the repairs are done by a parishioner, under an agreement with the parish, in consideration of his being excused his statute duty, that is virtually a repair by the parish. *Per* L. Ellenborough, *Wandsworth*, p. 497.

Where by Act of parliament trustees are authorised to make a road from one point to another, the making of the entire road is a condition precedent

to any part of it becoming a highway repairable by the public. An indictment charged a township with the non-repair of a highway; and it appeared that the road in question was begun six years before, under a local Act; that the trustees had finished it all but about 300 yards at one end of the line, and one mile at the other (both out of the township), fenced what they had made, put up two turnpike-gates, and taken toll; that the road was convenient, much used by the public, and leading at each end into old, open, and public highways; Hullock B. held that the indictment was premature, the trustees not having finished the road according to the Act, and consequently that it was no public highway. So where trustees, empowered by Act to make a road from A. to B. (being in length twelve miles), completed eleven miles and a half of such road to a point where it intersected a public highway, it was held, that the district in which the part so completed lay was not bound to repair it. *Hepworth*, 1 *Lewin, C. C.* 160 (1829). *Cumberworth, ib.*; 3 *B. & Ad.* 108 (1832); and see *Paddington Vestry*, 9 *B. & C.* 456 (1829); *Hatfield, Inhabs. of*, p. 500; *Edge Lane, Inhabs. of*, 4 *A. & E.* 723 (1836); *Cumberworth, ib.* 731 (1836: branch road also must be finished).

It was for some time a matter of doubt whether, where an individual dedicated a way to the public, and the public used such way, the parish in which it was situated was bound to repair it, without any adoption of it on their part. In the case of *St. Benedict, Inhabs. of*, p. 293, an opinion was expressed by Bayley J. that the parish was not liable; but this doctrine was overruled, and it was held that no distinct act of adoption was necessary, in order to make a parish liable to repair a public road; but that, if the road is public, the parish is of common right bound to repair it. *Leake, Inhabs. of*, p. 498. *Lordsmere*, p. 497; see also *The Paddington Vestry*, above; *Bradfield, Inhabs. of, L. R.* 9 *Q. B.* 552; 43 *L. J. M. C.* 155 (1874). See now, p. 498, 5-6 W. 4, 50, 23. The effect of the *Southampton case*, p. 292, "is understood to be that public user and public utility are now important only as evidence of adoption by the county." *Pratt* on *Highways*, 15*th ed.*, p. 92 *n.*

S. 23 does not prevent the way from becoming public, but only exempts the parish from repair where its conditions are not complied with. A person obstructing a public road not within the s. would still be liable for so doing, though no one would be liable for a mere want of repair. *Roberts* v. *Hunt*, 15 *Q. B.* 17 (1850); *Wilson*, 18 *Q. B.* 348 (1852).

Where a parish is situated partly in one county and partly in another, and a highway, lying in one of those parts, is out of repair, the indictment must be against the whole parish, and must be preferred in that county in which the ruinous part lies. *Clifton, Inhabs. of*, 5 *T. R.* 498 (1794). By 5-6 W. 4, 50, 53, where a highway lies in two parishes, justices of the peace are to determine what parts shall be repaired by each; and by s. 59, parishes are bound to repair their allotted part. These ss. apply to highways repairable by bodies politic or corporate, or private persons, *ratione tenuræ*.

Where a question arises as to the road being within the boundaries of the parish, it is sometimes necessary to prove these boundaries by giving in evidence the award of commissioners appointed to set them out. In such case it must be shown that the award of the commissioners pursues their authority. By an inclosure Act, commissioners were directed to fix the boundaries of a parish, and to advertise in a provincial newspaper such boundaries. The boundaries were also to be inserted in the award of the commissioners, and to be conclusive. The boundaries in the award varying from those in the newspaper, it was held that the commissioners had not pursued their authority, and the award was not binding as to the boundaries of the parishes. *Washbrook*, 4 *B. & C.* 732 (1825). By a similar Act,

commissioners had power to settle the boundaries of certain parishes, upon giving certain previous notices to the parishes to be affected by the award. The highway in question never having been repaired by the parish to which it was allotted, but, on the contrary, by the defendants, the judge refused to admit the award (allotting to the *other* parish) in evidence until the requisite notices were proved to have been given, as the usage, he thought, rebutted the presumption (*omnia rite*, &c.), p. 17; and upon an application for a new trial, it was refused. *Hastingfield, Inhabs. of*, 2 *M. & S.* 558 (1814). Where two parishes are separated by a river, the *medium filum* is the boundary. *Landulph, Inhabs. of*, 1 *Moo. & R.* 393 (1834).

On the trial of an indictment for the non-repair of a highway, a map of the parish produced from the parish chest, which map was made under an inclosure Act (private and not printed), is not receivable in evidence to show the boundaries of the parish, without proof of the inclosure Act. *Milton, Inhabs. of*, 1 *C. & K.* 58 (1843), pp. 26, 146, where it was proved by the surveyor, who made the map in 1809, that he laid down the boundaries of the parish from the information of a man, then apparently about sixty, who went round and showed them to him. Erskine J. held, that the map would have been receivable as evidence of reputation, if it had been also proved that the man was dead, but that, without that proof, it was not admissible. A map attached to an old enclosure award showing an ancient highway in existence in 1814 when the award was made, although (as being made by one of the public) good evidence of reputation that the road shown there was a *public* road, is no evidence of the *boundaries* of the highway against a defendant whose property lies adjacent to the highway, and was not subject to the jurisdiction of the Inclosure Commissioners in making their award. *Berger*, pp. 26, 515; cf. p. 511.

Where a highway crosses the bed of a river which washes over it and leaves a deposit of mud, it seems the parish is not bound to repair that part. *Landulph*, above. On an indictment for the non-repair of a highway, in the ordinary form, a parish cannot be convicted for not rebuilding a sea-wall washed away by the sea, over the top of which the alleged way used to pass. *Paul, Inhabs. of*, 2 *Moo. & R.* 307 (1840), p. 514.

Upon an indictment for non-repair of a public carriage road, it appeared that the way was an ancient highway. Eighteen years before, the indicted parish wherein the road was situate was inclosed under 6–7 W. 4, 115. Before the award (in which the road was described) the commissioners made an alteration in the original road by straightening and widening it, but the whole of the original road was comprehended in the existing road as set out in the award. Both before and since the award the parish had repaired the road, but no steps had ever been taken by the commissioners for putting the road into complete repair (under (repealed) 41 G. 3, 109, 8, 9): nor was there any declaration by justices that it had been fully completed and repaired, and no proceedings had been taken under 5–6 W. 4, 50, 23, p. 498. It passed through allotable land on both sides, except as to a small portion on one side, which was an old inclosure. It was held that the parish was not liable to repair this road. *East Hagbourne, Inhabs. of*, 1 *Bell C. C.* 135; 28 *L. J. M. C.* 71 (1859).

Evidence that a parish did not put guard fences at the side of a road, is not receivable on an indictment which charges that the king's subjects could not pass as "they were wont to do," if no such fences existed before. *Whitney, Inhabs. of*, pp. 190, 290.

An indictment for non-repair of a highway, describing the way as immemorial, is not supported by proof of a highway extinguished as such sixty years before by an inclosure Act, but since used by the public and repaired by the district charged. *West Mark*, p. 499.

Highway authority may be indicted.] By 41–2 V. 77, 10, an indictment for non-repair, &c., may be preferred against a highway authority (now by the county council, p. 296). See *Wakefield, Mayor of, &c.*, 20 *Q. B. D.* 810; 57 *L. J. M. C.* 52 (1888); *Southport Corporation*, 65 *J. P.* 184 (1901); *Crompton Urban Dist. Cl.*, 20 *Cox C. C.* 243; 86 *L. T.* 762, *K. B.* (1902).

Inclosers' liability to repair.] "Where the owner of lands not inclosed, next adjoining to the highway, incloses his land on both sides of the way . . . he is bound to make a *perfect good way*, and shall not be excused for making it as good as it was at the time of the inclosure, if it were then any way defective; because, before the inclosure, the people used, when the road was bad, to go, for their better passage, over the fields adjoining . . . which liberty was taken away by the inclosure. . . . Also land if one inclose on one side which hath been anciently inclosed of the other side, he ought to repair all the way; but if there be not such an ancient inclosure of the other side he ought to repair but half that way, and . . . wherever one is bound to repair a highway in respect of an inclosure and lays it open again as it was before, he shall be freed from the charge of repairing it." 2 *Hawk. P. C.* Bk. 1, ch. 76 (*Highways*), ss. 6, 7; 4 *Bac. Ab. Highways* (*E.*); 1 *Russ. Cri.* 803; *Wellbeloved* on *Highways*, 90, who says, "This branch of the law is peculiarly applicable to footpaths." Cf. 2 *Saund.* by *Wms.* 160 *a*, *n.* (12), p. 513. But where a highway is inclosed under the directions of an Act of parliament for dividing and inclosing common fields, the person inclosing the way is not bound to repair. *Flecknow, Inhabs. of*, 1 *Bur.* 461 (1758). And so also with regard to a road made in pursuance of a writ of *ad quod damnum*. *Ex parte Vennor*, 3 *Atk.* 766 (1754). See p. 502.

As to the liability of an individual to repair a highway *ratione clausuræ* (*i.e.* where land, on which there is an immemorial right to deviate if the way is impassable, is inclosed), see *Ramsden*, p. 295, where it was held that the liability fell upon the occupier and not upon the owner. It seems also that it only arises in the case of land inclosed abutting on an immemorial highway, and which but for the inclosure might have been used as a highway. See now 25–6 V. 61, 46.

Liability of particular districts to repair by custom or prescription.] Although *primâ facie* the parish is bound to repair all the ways within the boundaries, yet other bodies or individuals may be liable to such repairs, to the exoneration of the parish. Thus a township, or other particular district, may, by custom, be liable to repair; and it is sufficient to state in the indictment that the township has been used and accustomed to repair, and of right ought to repair. *Ecclesfield, Inhabs. of*, 1 *B. & Ald.* 348 (1818), p. 292, and below; *West Riding of Yorkshire, Inhabs. of*, 4 *B. & Ald.* 623 (1821); *Heage, Inhabs. of*, 2 *Q. B.* 128 (1841). But where an indictment charged that the inhabitants of the townships of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland in the parish of St. Andrew, Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew, Auckland, and no consideration was laid for such liability; the indictment was held bad in arrest of judgment as not showing that the highway was within the defendants' district. But it was held to be no objection that the inhabitants of the three townships were charged conjointly. *Bishop Auckland, Inhabs. of*, 1 *A. & E.* 744 (1834).

Where it appears that a township has been used immemorially to repair all roads within it, which would otherwise be repairable by the parish, such township is placed, as to repairs, in the same situation as a parish, and

cannot discharge itself from its liability without showing that some other persons, in certainty (p. 513), are liable. *Hatfield*, 4 *B. & Ald.* 75 (1820); *Ardsley, Inhabs. of*, 3 *Q. B. D.* 255, p. 511; 47 *L. J. M. C.* 65 (1878); *C. C. R.*; *Ashby-Folville*, *L. R.* 1 *Q. B.* 213; 35 *L. J. M. C.* 154 (1866); p. 506. Where a new way is made within the limits of the township, and which, had the parish been bound to repair, must have been repaired by the parish, such way must be repaired by the township. *Ecclesfield, Inhabs. of*, p. 292, and above. *Netherthong, Inhabs. of*, p. 506. It appears that the liability of a township, &c., has its origin in *custom* rather than in *prescription*. "A prescription always is alleged in the person," a custom in the land or place; and the custom "is of a local, and not of a personal nature." "There cannot be a custom in one place to do something in another . . . custom will not apply to matters out of it. . . . If, therefore, the inhabitants of one district can be charged at all for a matter out of their district . . . the only mode of charge will be that of prescription," *per* L. Ellenborough. *Ecclesfield, Inhabs. of*, above. So it is said by Bayley J. that a parish cannot be bound by prescription without showing a consideration; for the inhabitants of a parish cannot (like a corporation) bind their successors. *St. Giles, Cambridge, Parish of*, 5 *M. & S.* 260 (1816), p. 511. See case of *Ashby-Folville*, above. The *Cambridge case* was followed in *Machynlleth*, p. 292. But now, by 56–7 V. 73, 3 (9), 19 (6), and 24 (7) respectively, a parish council, the chairman of the parish meeting and the overseers of the parish, and a rural district council are corporations.

To charge a township with liability by custom to repair all highways within it, which would otherwise be repairable by the parish comprising such township, it is not necessary to prove that there are, or have been, ancient highways in the township. Without such proof a jury may infer the custom from other evidence. As that the parish consists of five townships, one of which is the township in question; that four have always repaired their own highways; that no surveyor has ever been appointed for the whole parish, and that the township in question has repaired a highway lately formed within it. *Barnoldswick, Inhabs. of*, 4 *Q. B.* 499 (1843). See also *Midville*, p. 506.

Upon an indictment in 1852 against the inhabitants of the township of H., for the non-repair of a highway, a judgment of quarter sessions in 1787 upon a presentment on his own view by a justice under 13 G. 3, 78 (repealed, see p. 515), for non-repair of the same highway by H., which alleged that the highway was in H., and that H. was liable to repair it—it appearing by the record that two of the inhabitants of H. (cf. p. 296) had appeared and pleaded guilty, and that a fine was imposed—was held to be conclusive evidence that the highway was in H., and that H. was liable to repair it, the conviction being an estoppel, pp. 500, 512. *Haughton, Inhabs. of*, 1 *El. & Bl.* 501; 22 *L. J. M. C.* 89 (1853). On appeal against an appointment by two justices of surveyor of highways for the township of K. N., the sessions found that the parish of M. consisted of two townships, M. and K. N.; that surveyors had been appointed for each from the earliest period within living memory to 1799; but, from 1799, to save expense, there had been two surveyors—one from each—appointed for the parish *at large*; that each acted as surveyor in his own township; that distinct rates had been made for each township, and applied distinctly to the repairs of the highways in each; that the surveyors kept distinct accounts (which, however, and the rates were examined by the general parish vestry before being allowed by the justices), and that the occupiers of lands had been rated, in respect of their occupation, to the repair of the highways of that township in which the houses they resided in were situate, and quashed the appointment. The K. B. held the appointment good and quashed the order of sessions, as each

town was immemorially bound to repair *its* roads. L. Tenterden said, that if there had been an indictment against either township, and an allegation that each township had immemorially repaired the roads within it, these facts would be sufficient evidence to support the averment: the irregularity of levying the rate on residents instead of on occupiers of lands did not prevent there being two rates in fact, and each township was entitled to appoint its own surveyor. *King's Newton*, 1 *B. & Ad.* 826 (1831). Cf. *Thomas*, 11 *Q. B. D.* 282 (1883). On an issue, whether or not certain land, in a district repairing its own roads, was a common highway, it is admissible evidence of reputation (though slight) that the inhabitants held a public meeting to consider of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway, there being at the time no litigation on the subject. *Barraclough* v. *Johnson*, p. 498.

It seems that the inhabitants of a district, not included within any parish, cannot be bound to repair the highways within such district. This point arose, but was not decided in *Kingsmoor, Inhabs. of*, 3 *D. & R.* 398; 2 *B. & C.* 190 (1823), which was an indictment against an extra-parochial hamlet. The court held that it should have been shown on the face of the indictment that the hamlet neither formed part of any parish nor was connected with any larger district that was liable to repair its own roads. Best J. observed, "I can find no authority for saying that anything but a parish can be charged. If the law authorises no charge except on parishes, places that are extra-parochial are not, by the general rule of law, liable." See the criticisms on this judgment in *Wellbeloved* on *Highways*, 81.

Liability of corporations.] A corporation, sole or aggregate, may be bound by prescription or usage to repair a highway, without showing that it is in respect either of tenure or of any other consideration. 2 *Hawk. P. C.* Bk. 1, ch. 76 (*Highways*), s. 8; *St. Giles, Cambridge, Parish of*, p. 510. A corporation may be indicted in its corporate name for non-repair of a highway. *Liverpool, Mayor, &c., of*, p. 506; *Birmingham & Gloucester Railway Co.*, pp. 172, 294; but see *Poole Corporation*, p. 296.

Liability of private individuals.] A person cannot be bound to repair a highway merely "by a general prescription," but only in respect of some consideration, "because no one," it is said, "is bound to do what his ancestors have done, unless it be for some special reason, as the having land descending from such ancestors which are holden by such like service, &c." *Hawk.* above, s. 8; 13 *Rep.* 33; *St. Giles, Cambridge, Parish of*, p. 510; *Nicholl* v. *Allen*, 31 *L.J. Q. B.* 43 (1862, tolls on bridge), p. 295; cf. p. 510; *Ardsley, Inhabs. of*, p. 510. "Yet . . . an indictment charging a tenant in fee simple with having used of right to repair such a way, *ratione tenuræ terræ suæ*, is certain enough without adding that his ancestors or those whose estate he hath, have always so done, for that is implied in saying 'that he has always used to do it, *ratione tenuræ suæ*.'" *Hawk. ib.* In order to exempt a parish it must be shown that "this burden is cast upon some other persons, under an obligation equally durable with that which would have bound the parish, which obligation must arise in respect of some consideration of a nature as durable as the burden." *Per* L. Ellenborough, *St. Giles, Cambridge, Parish of*, p. 510. Where lands, chargeable with the repairs of a common bridge or highway, are conveyed to different persons, each of such persons is liable to the charge of all the repairs, and may have contributions from the others; for the law will not suffer the owner to apportion the charge and thus to render the remedy for the public more difficult. Therefore, where a manor thus charged was conveyed to

several persons, it was held that a tenant of any parcel, either of the demesnes, or of the services, was liable to the whole charge. And the grantees are chargeable with the repairs, though the grantor should convey the lands discharged from the burthen, in which case the grantee has his remedy over against the grantor. *Duchess of Buccleuch*, 1 *Salk.* 358 (1705); 2 *Saund. by Wms.* 159 (*n.* 9); *Buckeridge*, 4 *Mod.* 48 (1691), where the original grant was from the Empress Maud. Where a canal company was bound under an Act of parliament to repair a highway, on an indictment for non-repair, a count alleging the liability to repair *ratione tenuræ* was held bad; but one alleging liability under the Act was held good. *Sheffield Canal Co.*, 13 *Q. B.* 913; 19 *L. J. M. C.* 44 (1849).

Repairing a highway for a length of time will be evidence of a liability to repair *ratione tenuræ*. Thus, if a person charged as being bound to repair *ratione tenuræ*, pleads that the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant at different times for twenty-five years since the removal of the alleged encroachment, that is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to show that it was an encroachment; but if he could have shown that when he removed it he left the road in perfect repair, the future liability might have been on the parish. *Skinner*, 5 *Esp.* 219 (1805); 1 *Russ. Cri.* 803. In determining whether the act of repairing a way is evidence to prove a liability to repair *ratione tenuræ*, the nature of the repairs must be regarded. Thus *per* Hullock B.: "An adjoining occupier occasionally doing repairs for his own convenience to go and come, is no more like that sort of repair which makes a man liable *ratione tenuræ*, than the repair by an individual of a road close to his door is to the repair of the road outside his gate." *Allanson*, 1 *Lewin, C. C.* 158 (1828). In *Blakemore*, 2 *Den. C. C. R.* 410; 21 *L. J. M. C.* 60 (1852), evidence was given of the conviction in 1801 of a former owner and occupier of the same lands as those in respect of which the liability was charged, which showed that he had pleaded guilty to a presentment against him, alleging his liability to repair *ratione tenuræ*. Repairs by occupiers of the same lands after 1800 were also proved; and evidence was given that the defendant purchased these lands after public notice of the liability to repair the highway; it was held that there was evidence to go to the jury of immemorial usage and liability *ratione tenuræ*. Cf. pp. 510, 511. An indictment for the non-repair of a highway in the parish of A., alleging the liability by reason of the tenure of certain lands in the said parish, is not supported by proof of a liability to repair a road extending through A. and other parishes by reason of the tenure of a farm made up of land in A. and the other parishes. *Mizen*, 2 *Moo. & R.* 382 (1841). See also *Haughton*, p. 510; *Maybury*, p. 501; *Nether Hallam, Inhabs. of*, 6 *Cox C. C.* 435 (1854); *Q. B.* An owner of land who does not occupy it cannot be charged *ratione tenuræ*; only the occupier is liable. *Barker*, 25 *Q. B. D.* 213; 59 *L. J. M. C.* 105; 17 *Cox C. C.* 26 (1890); *C. C. R.*, p. 514; *Cuckfield Rural District Council* v. *Goring*, p. 295. As to previous conviction in the case of an adjoining township, see *Brightside Bierlow, Inhabs. of*, pp. 501, 513.

By 5-6 W. 4, 50, 62, highways repairable *ratione tenuræ*, &c., may be made parish highways on payment of an annual sum, to be fixed by the justices. And see now also 25-6 V. 61, 34, 35 (amended by 27-8 V. 101, 23), as to highway districts.

Proof for the defence—parish.] Upon an indictment against a parish for not repairing, the defendants may show under the plea of not guilty, either that the way is not a highway, or that it does not lie within the

parish, or that it is not out of repair; for all these are facts which the prosecutor must allege in the indictment, and prove on the plea of not guilty, see below. 2 *Saund.* by *Wms.* 158, *n.* (3), 159*a*, *n.* (10) on *Stoughton* (1669); 1 *Russ. Cri.* 813. But where a parish seeks to discharge itself from its liability, by imposing the burthen of repair upon others, *i.e.* by prescription or *ratione tenuræ*, these defences must be specially pleaded, and cannot be given in evidence under the general issue, p. 172. In such special plea, the parish must show with certainty (p. 510) who is liable to the repairs. *St. Andrews, Holbourn, Parish of*, 1 *Mod.* 112; 3 *Salk.* 183; 1 *Vent.* 256 (1675); *Hornsey, Inhabs. of, Carth.* 212; *Fort.* 254 (1714), p. 514; 2 *Hawk. P. C.* Bk. 1, ch. 76 (*Highways*), s. 9. In *Eastrington, Inhabs. of*, 5 *A. & E.* 765 (1836), a plea alleging that a particular township in a parish had been accustomed and ought to repair all roads within it, "which otherwise would be repairable by the parish at large," was, on verdict for defendants, held bad, in arrest of judgment, because it did not aver that the highway was one which but for custom would be repairable by the parish at large, and so did not show what person other than the defendants was liable to repair. But where the burthen of repairs was transferred from the parish by Act of parliament, L. Ellenborough held that this might be shown under a plea of not guilty. *St. George, Hanover Square, Inhabs. of*, p. 506. Where defendant pleads specially that others are bound to repair, the plea admits the way to be a highway, and under such plea evidence cannot be given that it is not. *Brown*, 11 *Mod.* 273 (1710). As to a previous conviction, see *St. Pancras, Inhabs. of*, p. 501, and *Whitney, Inhabs. of*, p. 190, &c., and *Index*. But *fraud* will be an answer to such previous conviction. *St. Pancras case*, which see also as to an *acquittal*. *Ib.*, and see p. 3. But where an indictment has been preferred against a parish consisting of two townships, and a conviction has been obtained, but it appears that the defence was made and conducted entirely by the district in which the way lay, without notice to the other, the indictment will be considered as in substance an indictment against that district only, and if the fine be levied on an inhabitant of the other, the court will grant a special mandamus for a rate to be levied on the district bound to repair the indicted part, and give the other leave to plead the prescription to a subsequent indictment for not repairing the highways in that parish. 2 *Saund.* by *Wms.* 160 (*n.* 10); *Townshend, Doug.* 421 (1780). On an indictment against the parish of Eardisland, consisting of three townships, Eardisland, Burton, and Hardwicke, where there was a plea on the part of the township of Burton, that each of the three townships had immemorially repaired its own highways separately, it was held that the records of indictments against the parish generally, for not repairing highways situate in the townships of Eardisland and Hardwicke, with the general pleas of not guilty, and convictions thereupon, were *primâ facie* evidence to disprove the custom for each township to repair separately, but that evidence was admissible to show that these pleas of not guilty were pleaded only by the inhabitants of the townships of Eardisland and Hardwicke, without the privity of Burton. *Eardisland, Parish of*, 2 *Campb.* 494 (1810).

Proof for the defence—district or private individual.] Where a particular division of a parish, or a particular person by reason of tenure "or the like which are obligations against the common law," is indicted for not repairing a highway, as the prosecutor is bound to prove their liability, so, under the plea of not guilty, the defendants are at liberty "to throw the burden either on the parish or even on an individual," above. "However, if they will, though unnecessarily, *plead* the special matter, it is held not to be enough to say *that they ought not to repair*, but they must go further and show *who ought*." 2 *Saund.* by *Wms.* 159*a*, *n.* (10); citing *Yar(n)ton*,

Inhabs. of, 1 *Sid.* 140; 1 *Keb.* 498, 514 (1664); *Hornsey, Inhabs. of*, p. 513. Where a parish contained four townships each accustomed immemorially to maintain its highways, but one included a hamlet immemorially unaccustomed to pay highway rates or do "team work," or pay any composition whatever, and now there were no public roads in it which it could repair, the Q. B. held by a majority that enough was not shown here to establish a custom exempting the hamlet as to roads without its limits. As to the evidence of custom to exempt a district from liability, see *Rollett, L. R.* 10 *Q. B.* 469; 44 *L. J. M. C.* 190 (1875). As to *ratione tenuræ*, see *Hayman*, p. 294, and *Bedfordshire, Inhabs. of*, p. 295. Where the land over which the road passed was washed away by the sea, the liability of the defendant, charged *ratione tenuræ*, was held to have ceased; *Bamber*, 5 *Q. B.* 279 (1843); and so where the road by statutory authority is so altered in its nature and course as to be practically a different road; *Barker*, p. 512; but for exemption the road must be substantially destroyed, which is a question of fact. *Greenhow, Inhabs. of*, 1 *Q. B. D.* 703; 45 *L. J. M. C.* 141 (1870), where there was a landslip.

Particulars of the highways obstructed, &c.] On an indictment for obstructing divers ways, footpaths, &c., Parke J. upon the production of an affidavit from the attorney for the defendant, that he was unable to understand all the precise tracks indicted, made an order for the delivery of particulars of all the ways in question, with liberty to the prosecutor to go once with his attorney and one surveyor "on the premises." *Marquis of Downshire*, pp. 163, 500.

Husband and wife] are *compellable* witnesses by 61–2 V. 36, 6, (1), p. 831, see p. 107.

Costs, &c.] By 5–6 W. 4, 50, 95, the costs of the prosecution upon an indictment for non-repair of highways shall be directed to be paid out of the rates by the judge of assize, or by quarter sessions, before whom the indictment *is tried*, and it was long thought that a judge could not give costs when the defendants pleaded guilty, but that opinion is now overruled. (*Haslemere, Inhabs. of*, 32 *L. J. M. C.* 30; 3 *B. & S.* 313 (1862), below.) But this power is confined to the judge of assize, &c., that is, the judge sitting under the commission of oyer and terminer; and where the indictment is removed by *certiorari*, and a verdict is found for the defendants, the court has no power *under this section* to award costs to the prosecutor. *Ipstones, Inhabs. of, L. R.* 3 *Q. B.* 216; 37 *L. J. M. C.* 37 (1868). See p. 165.

By 5–6 W. 4, 50, 98, the court before whom any such indictment is preferred may award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that *the defence* made to such indictment was frivolous and vexatious. But under this section there is no power for the court to award costs where the defendants plead guilty. *Denton, Inhabs. of*, 34 *L. J. M. C.* 13 (1864), distinguishing *Haslemere, Inhabs. of*, above. By s. 99, presentments (see p. 510) on account of highways or turnpike roads (but *not* bridges) being out of repair are abolished. See, as to costs, *Hickling, Inhabs. of*, 7 *Q. B.* 890; 15 *L. J. M. C.* 23 (1845); *Down Holland*, 15 *L. J. M. C.* 25 (1845); *Clark*, 5 *Q. B.* 887 (1844). See *Yarkhill, Inhabs. of*, 9 *C. & P.* 218 (1839); *Chedworth, Inhabs. of*, 9 *C. & P.* 285 (1840); *Preston, Inhabs. of*, 2 *M. & R.* 137 (1838); *Merionethshire, Inhabs. of*, 6 *Q. B.* 343 (1844); *Heanor, Inhabs. of*, 6 *Q. B.* 745 (1845); *Pembridge, Inhabs. of*, pp. 139, 296, overruling the *Preston case*, 3 *G. & D.* 5; *Paul, Inhabs. of*, p. 508, and *Challicombe, Inhabs. of* (1841), there cited, at 311;

Great Broughton, Inhabs. of, 2 *Moo. & R.* 444 (1843); *Bayard*, p. 165. See also *Buckland, Inhabs. of*, 12 *L. T. N. S.* 380 (1865); *Heath, ib.* 492 (1866); *Lee*, 1 *Q. B. D.* 198; 45 *L. J. M. C.* 54 (1876), as to costs—the first two under 25–6 V. 61, 19.

The amount of costs must be ascertained *and* ordered by the same sessions; they cannot refer the costs to be taxed by their officer after the sessions. *Lambeth, Surveyors of*, 3 *C. L. R.* 35 (1854), *Q. B.* See generally *Glen* or *Pratt* on *Highways* (Index: *Costs*).

New trial.] It is now conclusively settled that where there has been an acquittal on an indictment for nuisance to a highway, the court will not grant a new trial. *Russell*, pp. 201, 501, below; *Johnson*, p. 201; *Duncan*, pp. 200, 201; *Southampton, Inhabs. of*, pp. 292, 507. But in very special circumstances the court may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised on a fresh indictment. *Wandsworth, Inhabs. of*, 1 *B. & Ald.* 63 (1817). But where a rule *nisi* was obtained to stay entry of judgment on the ground that the verdict for the defendants was due to the judge's misdirection, the K. B. discharged them, because, whether the direction was right or wrong, the entry could not prevent a second indictment for a continuance (p. 501), and, therefore, prosecutor's rights would not be altered. *North Eastern Railway Company*, 19 *Cox C. C.* 682 (1901), p. 160.

But where the defendant is found guilty a new trial may be granted on the grounds of misdirection, misreception of evidence, or verdict against evidence. *Berger*, pp. 26, 508.

The practice of suspending the judgment, on application by the prosecution, as in the *Wandsworth case*, above, in preference to granting a new trial, was long followed, *Sutton*, pp. 201, 292 (1833), where it is considered necessary that a new indictment should be preferred. But the present practice is, instead of resorting to this indirect method, to grant a new trial in similar cases. See *Russell*, above. In one case, *Chorley*, p. 498, a new trial was granted after an acquittal, but that decision is explained in *Russell*, as resting on the consideration, that there the matter had resolved itself into a pure question of civil right. Perhaps it can scarcely now be considered as an authority; p. 201. See 7 E. 7, 20 (3), p. 842.

Indictment by justices.] Where under 25–6 V. 61, 19, the justices direct an indictment, their jurisdiction is limited to admitted highways; but if the fact of the road being a highway is *bonâ fide* denied, though the liability to repair highways is admitted, the justices have no jurisdiction. *Farrer, L. R.* 1 *Q. B.* 558; 35 *L. J. M. C.* 210; 10 *Cox C. C.* 261 (1866), *Q. B.* See 41–2 V. 77, 10, p. 509.

Indictment, forms of.] For precedents (including those as to bridges), see 3 *Chitty, Crim. L.*, 2*nd ed.* ch. 13, p. 576; and *Saunders's Precedents*, under *Nuisance.*

Pleas, forms of.] See 4 *Chitty, Crim. L.*, 2*nd ed.* ch. 23, pp. 540–567 (including some, as to bridges); for *distringas* against the inhabitants of a parish, *ib.* 213. See, generally, 1 *Glen's Public Health*, 13*th ed.*, p. 536.

HOMICIDE.

Homicides which are felonies are murder and manslaughter.

Homicides not felonious may be divided into three classes: justifiable homicide, excusable homicide, and homicide by misadventure.

Justifiable homicide "must arise from an imperious duty prescribed by law, or be owing to some unavoidable necessity induced by the act of the person killed [p. 602], without any manner of fault in the party killing." 1 *East P. C.* 219; 1 *Hawk. P. C.* Bk. 1, ch. 28, ss. 1, 22. One instance is the killing by a gaoler of a prisoner attempting to escape from lawful custody. *East* 330; *Hawk. ib.* ss. 11, 13 (p. 642); cf. s. 17. But cf. p. 393. For death of arrester or arrested, see pp. 636–7.

Homicide is "only *excusable* where the party killing is not altogether free from blame; but the necessity which renders it excusable may be said to be partly induced by his own act." *East, ib.* 220. Cf. p. 593. Formerly it was the practice for the jury to find the fact specially, and upon certifying the record into chancery, a pardon issued, of course, under 6 E. 1, the (repealed) statute of Gloucester, c. 9 (1278), and forfeiture was thereby saved. But latterly it was usual for the court to direct the jury to find the prisoner not guilty. *East, ib.* And now by 24–5 V. 100, 7, "No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony." Cf. p. 124. "The ancient legal notion of homicide by *chance-medley* was when death ensued from a combat between the parties upon a sudden quarrel; but it has since been frequently confounded with misadventure or accident." *Ib.* 221. Thus in *Chichester*, p. 594, the court refused to accept the verdict of *chance-medley*; cf. pp. 595, 603, 605.

"Homicide by *misadventure* is when a man doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. . . . The act upon which the death ensues must be lawful in itself; for if it be *malum in se*, the case will amount to felony, either murder or manslaughter, according to the circumstances. If it be merely *malum prohibitum*, as shooting at game by an unqualified person, that will not vary the degree of the offence. The usual examples under this head are—1st, where death ensues from innocent recreations; 2ndly, from moderate and lawful correction *in foro domestico*; and, 3rdly, from acts lawful or indifferent in themselves, done with proper and ordinary caution." 1 *East P. C.* 221.

HOUSEBREAKING. *See* Dwelling House.

ILL-TREATING APPRENTICES, SERVANTS, LUNATICS AND HELPLESS PERSONS.

In cases of apprentices or servants.] By 24–5 V. 100, 26 (p. 494): "Whosoever, being legally liable either as a master or a mistress to provide for any apprentice or servant, necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude . . ." (see p. 198).

By 38–9 V. 86, 6: "Where a master being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall, on summary conviction, be liable either to pay a penalty not exceeding 20*l.*, or to be imprisoned for a term not exceeding six months with or without hard labour." For s. 9 (indictment), see p. 362.

See as to costs, 24–5 V. 100, 74, 75, and 77, pp. 206–7.

By s. 73 of 24–5 V. 100: "Where any complaint shall be made of any offence against s. 26 [above] of this Act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace, before whom such complaint is heard, shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate, or a duplicate thereof upon the clerk of such guardians, or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs, reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and where there is a board of guardians, the clerk or some other officer of the union or place, and where there is no board of guardians, one of the overseers of the poor may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute."

It has been held, that a master is not bound by "the general law" to furnish medical advice for his servant; but that it is otherwise in the case of an apprentice, whom he is bound, during illness, to furnish with proper medicines. See *Smith*, 8 *C. & P.* 153 (1837). And see now the ss. above.

For ill-treatment amounting to murder, see p. 620.

Children.] By 42–3 V. 34, as amended by 60–1 V. 52, an employer of any male person under the age of sixteen years, and any female person under eighteen, may be indicted for an assault "where any accident causing any actual bodily harm occurs to any such" young person "in the course of a public exhibition or performance which in its nature is dangerous to the life or limb," &c., in the opinion of the magistrates. Punishment may include compensation up to 20*l.* to the child. See p. 251. Any parent or other person aiding, &c., in an offence against the Act is punishable by summary jurisdiction.

As to ill-treatment of children, see p. 325.

Apprentices.] It is an indictable misdemeanor not to provide proper necessaries for any infant unable to provide for itself—whether it be child, apprentice, or servant, if there is a duty to provide for him or her—so as to injure his or her health. *Friend*, *Russ. & Ry.* 20 (1802). As to proof of the apprenticeship, in the absence of an indenture, see *Crumpton*, *Carr. & M.* 597 (1842). Cf. p. 252.

Lunatics, &c.] By the Lunacy Act, 53 V. 5, 315, it is a misdemeanor to receive or detain two or more lunatics in a house which is not duly licensed or permitted under the Act. Under 8–9 V. 100, 44 (repealed), it was held that if the persons so received are found by the jury to be lunatic, the offence is made out, notwithstanding that the defendant honestly and reasonably believed that they were not lunatic. *Bishop*, 5 *Q. B. D.* 259; 49 *L. J. M. C.* 45; 14 *Cox C. C.* 404 (1880); *C. C. R.* By s. 322: "If any manager, officer, nurse, attendant, servant, or other person employed in an institution for lunatics, or any person having charge of a lunatic, whether by reason of any contract or of any tie of relationship or marriage or otherwise, ill-treats or wilfully neglects a patient, he shall be guilty of a misdemeanor, and on conviction on indictment shall be liable to fine or imprisonment, or to both fine and imprisonment at the discretion of the court."

A husband having been tried and convicted (under 16–17 V. 96, repealed), for that he, having the care and charge of his wife, a lunatic, "did abuse and ill-treat her," the court held that he was not a person having the care and charge of a lunatic within the s., which was not intended to apply to persons whose care or charge arose from natural duty. *Rundle*, 1 *Dears. & P. C. C. R.* 482; 24 *L. J. M. C.* 129 (1855).

But where a man voluntarily took upon himself the care and charge of a lunatic brother in his own private house, he was held to be liable under that s. *Porter*, *L. & C.* 394 (1864); 33 *L. J. M. C.* 126; *Smith*, 14 *Cox C. C.* 398 (1880). Cf. p. 601.

A mistress was indicted for manslaughter by neglecting to supply her servant who, it was contended, was of weak mind, with proper food and lodging. It was held that the question for the jury was, whether there was evidence that the deceased was reduced to such a state of body and mind as to be helpless and unable to take care of herself, and that she was so under the dominion and restraint of her mistress as to be unable to withdraw herself from her control. *Smith*, p. 30. See now 24–5 V. 100, 26, p. 517.

53 V. 5, contains regulations for the reception, detention, &c., of lunatics, and makes certain misdemeanors. By s. 38 (7), any person having charge of a lunatic who detains a patient after he knows that the reception order has expired, shall be guilty of a misdemeanor. So any contravention of the provisions contained in s. 40, as to mechanical restraint, is made a misdemeanor, and also that of those in s. 44 for the inspection of patients by outside doctors. By s. 177, it is a misdemeanor for a disqualified person

to act as a visitor. By ss. 195, 200, concealing any patient on any part of the premises from the authorised visitors; by s. 321, obstructing them in their duties; by s. 317, making wilful mis-statements or (s. 318) false entries in books or returns, are made misdemeanors; p. 400. So by 54–5 V. 65, 21, is disobedience to the order of the commissioners, by the superintendent of a hospital permitting patients to go outside, &c., without proper control.

By 53 V. 5, 324: "If any manager, officer, nurse, attendant, or other person employed in any institution for lunatics (including an asylum for criminal lunatics), or workhouse, or any person having the care or charge of any single patient, or any attendant of any single patient, carnally knows or attempts to have carnal knowledge of any female under care or treatment as a lunatic in the institution, or workhouse, or as a single patient, he shall be guilty of a misdemeanor, and on conviction on indictment shall be liable to be imprisoned with or without hard labour for any term not exceeding two years; and no consent or alleged consent of such female, thereto shall be any defence to an indictment or prosecution for such offence." See pp. 726, 728.

By s. 329: (1) "Where any person is proceeded against under this Act, on a charge of omitting to transmit or send any copy, list, notice, statement, report or other document required to be transmitted or sent by such person, the burden of proof that the same was transmitted or sent within the time required shall lie upon such person; but if he proves by the testimony of one witness upon oath that the copy, list, notice, statement, report, or document in respect of which the proceeding is taken was properly addressed and put into the post in due time, or (in case of documents required to be sent to the commissioners or a clerk of the peace or a clerk to guardians) left at the office of the commissioners or of the clerk of the peace or clerk to guardians, such proof shall be a bar to all further proceedings in respect of such charge.

(2) In proceedings under this Act, where a question arises whether a house is or is not a licensed house or registered as a hospital, it shall be presumed not to be so licensed or registered unless the licence or certificate of registration is produced, or sufficient evidence is given that a licence or certificate is in force." Cf. p. 146.

INCITING TO MUTINY, AND MUTINY.

See p. 653 and cf. p. 700.

37 G. 3, 70, 1, is: "Any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces, by sea or land, from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons, to commit any act of mutiny, or to make, or endeavour to make, any mutinous assembly, or to commit any traiterous or mutinous practise whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony. . . ."

S. 2 provides, "That any offence committed against this Act, whether committed on the high seas or within that part of Great Britain called England, shall and may be prosecuted and tried before any court of oyer and terminer, or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if the said offence had been therein committed."

By s. 1 of 7 W. 4 and 1 V. 91 (p. 666), which recites that and other statutes: "If any person shall, after the commencement of this Act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported beyond the seas [p. 198] for the term of the natural life of such person. . . ."

By the Naval Discipline Act, 1866, 29–30 V. 109, 10, mutiny with violence, and failure to use one's "utmost exertions to suppress such mutiny," combined *with acting traitorously*, are punishable with death, and severe penalties are awarded for acting "from cowardice" or with negligence during such a mutiny. By s. 11, where the mutiny is not accompanied by violence, the ringleaders are punishable with death, and those who join in or do not endeavour to suppress such mutiny are punishable with imprisonment, &c. By ss. 12, 13, 14, 15, persons, including civilians, inciting to mutiny are liable to death, and those subject to the act (sailors), uttering or concealing mutinous words, or in any way fomenting mutiny, are subjected to punishment. The punishment for striking or attempting to strike superior officers may be death (s. 16), and insubordination and desertion are severely dealt with (ss. 17, 19).

The annual "Mutiny" Acts (see 44–5 V. 58; cf. c. 57, both of which cc. have been frequently amended) now replaced by the annual Army Act (see 48 V. 8, 8, 2, 3), *e.g.* 6 E. 7, 2, make it a misdemeanor, punishable on summary conviction, for every person who shall, in any part of his Majesty's dominions, directly or indirectly, persuade any soldier to desert (c. 58, s. 153). Cf. p. 424.

JESUITS—OFFENCES BY.

By 10 G. 4, 7, 34: "In case any person shall . . . within any part of this United Kingdom be admitted or become a Jesuit or brother or member of any other such religious order, community or society as aforesaid," *i.e.* in s. 28, "of the church of Rome, bound by monastic or religious vows," not being females (s. 37), he is guilty of a misdemeanor, and on conviction must be banished for life from the United Kingdom; there are other penalties against such persons coming into, or after sentence remaining in, the country, &c., in the Act. Where a metropolitan magistrate refused on an information by a common informer disclosing a *primâ facie* case under this s. on the ground that there never had been any prosecution under it, and that it and other ss. of the Act were "practically obsolete," and that now any prosecution ought to be commenced by the crown, the K. B. D. refused a *mandamus* to him to hear the summons because he had exercised his discretion not "on improper and extraneous grounds," and, therefore, the court had no jurisdiction. *Kennedy*, 20 *Cox C. C.* 230; 86 *L. T.* 753 (1902). But they held that a common informer could prosecute.

JUSTICE—PERVERSION OF. *See* p. 697.

KIDNAPPING.

Originally this seems to have meant child-stealing (for the slave trade) according to *East* 1 *P. C.* 430. What was "properly" so "called" was the forcible abduction of any person and "sending them away from their own country into another," and he complains that the common law only punishes it by fine and imprisonment (and formerly pillory). Cf. 4 *Black. Comm.* 219. But see now *Abduction*, p. 228.

LARCENY.

Interpretation of terms.] By the Larceny Act, 24–5 V. 96, 1: "In the interpretation of this Act the term 'document of title to goods' shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such documents to transfer or receive any goods thereby represented or therein mentioned or referred to.

The term 'document of title to lands' shall include any deed, map, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title or any part of the title, to any real estate, or to any interest in or out of any real estate.

. . . . . .

The term 'valuable security' shall include any order, exchequer, acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined.

The term 'property' shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

For the purposes of this Act the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day." Cf. p. 236.

Distinction between grand and petit larceny abolished.] By s. 2: "Every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the twenty-first day of June, one thousand eight hundred and twenty-seven; and every court whose power as to the trial of larceny was before that time limited to petit larceny shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny."

This s. is practically the same as 7–8 G. 4, 29, 2 (repealed), which was passed on June 21, 1827.

"Compound" or "mixed" larceny is simple larceny "accompanied with either one or both of the aggravations of a taking from one's house or person." 4 *Black. Comm.* 240; 1 *Hawk. P. C.* Bk. 1, ch. 34 (1st pt.), calls robbery "mixt or complicated larceny." See pp. 562, 753.

Bailees fraudulently converting property.] By 24–5 V. 96, 3: "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction."

Punishment for simple larceny.] By s. 4: "Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude . . . or to be imprisoned . . . [see p. 198] and, if a male under the age of sixteen years, with or without whipping."

Three larcenies within six months may be charged in one indictment.] By s. 5, which is set out, p. 173.

Election.] See s. 6, which is set out, p. 173.

Larceny after a previous conviction for felony.] By s. 7: "Whosoever shall commit the offence of simple larceny after a previous conviction for felony, whether such conviction shall have taken place upon an indictment or under the provisions of" 18–19 V. 126 (largely repealed as to England), "shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, or . . ." Conclusion as in s. 4, above.

Larceny after a previous conviction for misdemeanor.] By s. 8: "Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this Act, shall be liable . . ." Conclusion as in s. 7, above; maximum term, ten years.

Larceny after two summary convictions.] By s. 9: "Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in . . ." 10–11 V. 82; 14–15 V. 92, 3–6 (Ireland) . . . "or in this Act, or the Act of this session," 24–5 V. 97 "(whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions or either of them shall have been or shall be before or after the passing of this Act), shall be guilty of felony, and being convicted thereof shall be liable . . ." Conclusion as in s. 7, above. Maximum term, seven years. Other statutes incorporated in this s. have been repealed.

Larceny by clerk or servant.] By s. 67: "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in

the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof shall be liable . . ." Conclusion as in s. 7, above. Maximum term, fourteen years.

Larceny by persons in the Queen's service or in the police.] By s. 69: "Whosoever, being employed in the public service of her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, shall steal any chattel, money, or valuable security belonging to or in the possession or power of her Majesty, or intrusted to, or received, or taken into possession by him by virtue of his employment, shall be guilty of felony, and being convicted . . ." Conclusion as in s. 70, p. 375. Cf. pp. 375, 526 (Customs).

Conviction for larceny on indictment for embezzlement, and vice versâ.] See s. 72, set out, p. 376.

Venue.] See s. 114, which is set out, p. 218.

Larceny of property of partners, &c., by shareholders or others.] By 7 G. 4, 64, 14 (passed in order to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners): "In any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and the provision shall be construed to extend to all joint-stock companies and trustees."

Under 7 G. 4, 46, 9, in "indictments, informations, and prosecutions by or on behalf of" joint-stock banking co-partnerships, for "stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property belonging to" them, "or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such co-partnership . . ." the money, &c., may be stated to be the property of, and the intent may be laid to defraud, any one of the public officers of such co-partnership, and the name of any one of their public officers may be used in all indictments or informations, where it otherwise would be necessary to name the persons forming the company, whether the accused are members of it or not.

7 G. 4, 46, was amended and continued by 1–2 V. 96, which was made perpetual by 5–6 V. 85 (repealed by S. L. R. Act (No. 2), 1874). As to other offences by shareholders of joint-stock banks, see 3–4 V. 111, 2, which as to stealing and embezzling only, is also repealed by that Act.

By 31–2 V. 116, 1: "If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, or security, or other property of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners."

Larceny of property of counties, &c.] By 7 G. 4, 64, 15: "In any indictment or information for any felony or misdemeanor committed in, upon, or

with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole, or in part, at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any of such inhabitants."

Larceny of goods for the use of the poor.] By 7 G. 4, 64, 16: "In any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any workhouse, or poorhouse, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poorhouse in or belonging to the same, or by the master or mistress of such workhouse or poorhouse, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers; and in any indictment or information for any felony or misdemeanor committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within the parish, township, hamlet, or place, otherwise than by the trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors."

See also 12–13 V. 103, 15, set out, p. 379.

Larceny of property of trustees of turnpikes.] By 7 G. 4, 64, 17: "In any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing erected or provided in pursuance of any Act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners."

Larceny of property of commissioners of sewers, &c.] By 7 G. 4, 64, 18: "In any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognisance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognisance, or management, any such thing shall be, and it shall not be necessary to specify the names of any of such commissioners."

Larceny of property of friendly societies, &c.] By 59–60 V. 25, 49, property belonging to friendly societies vests in the trustees for the time being; and by s. 51, "in all legal proceedings whatsoever concerning any property vested in the trustees of a registered society or branch, the property may be stated to be the property of the trustees in their proper names as

trustees for the society or branch without further description." As to Collecting Societies and Industrial Assurance Companies, see 59–60 V. 26, 11 (3).

Larceny of property of loan societies.] By 3–4 V. 110, 8, all moneys and securities for money, and all chattels whatsoever, belonging to any such society, are vested in trustees, who may bring or defend any suit, criminal as well as civil, at law or in equity, concerning the property or any claim of such society, and sue and be sued, &c., in their proper names as trustees of such society, without any other description, &c.

Larceny of property of building and industrial societies.] By 37–8 V. 42, 9, every society, upon receiving a certificate of incorporation under this Act, becomes a body corporate by its registered name. By 56–7 V. 39, every incorporated society registered under any Act relating to industrial and provident societies shall be deemed to be a society registered under this Act (s. 3), and on compliance with the provisions of the Act, a new society is entitled to an acknowledgment of registry (s. 6), which, by s. 8, shall be conclusive evidence that the society is duly registered, "unless it is proved that the registry of the society has been suspended or cancelled." By s. 21, the registration of a society shall render it a body corporate by the name described in such acknowledgment, "and shall vest in the society all property for the time being vested in any person in trust for the society, and all legal proceedings . . . may be prosecuted by or against the society in its registered name. . . ."

Larceny, &c., of property of trade unions.] By 34–5 V. 31, 8, amended by 39–40 V. 22, 3, for the purposes of an indictment, &c., the property of a registered trade union may be stated to be the property of the trustees "in their proper names as trustees of such trade union without further description." S. 9 further provides for the carrying on of criminal proceedings by the trustees and for the continuance thereof in case of their death or removal, &c. S. 12 provides that no person shall be proceeded against by indictment if a conviction shall have been previously obtained for the same offence under that Act. Such criminal proceedings are not affected by 6 E. 7, 47; p. 360. Cf. p. 377.

Larceny of property of savings banks.] The 26–7 V. 87, 10, vests the effects, securities, &c., of savings banks in the trustees for the time being, and provides that in all criminal proceedings the property may be laid in them in their proper names without further description. See p. 377.

Larceny of property of her Majesty's customs.] By 39–40 V. 36, 29, any moneys, chattels, or other valuable securities which may be received in the service of the customs are deemed to be within 24–5 V. 96 (p. 524), and may be laid as the property of her Majesty.

Summary jurisdiction.] By 42–3 V. 49, 11, 12, and sched. 1, simple larceny, offences punishable by statute as such, larceny or stealing from the person, larceny as a clerk or servant, aiding and abetting, and attempting the commission of those offences, are in the same position as other indictable offences; p. 376.

Definition of larceny.] The definitions of larceny to be found in the various books are mostly derived from *Bracton, lib.* iii. *c.* 32, *fol.* 150 *b* (*ed.* 1569), "*furtum est secundum leges, tractatio rei alienæ fraudulenta, cum*

animo furandi, invito illo domino cujus res illa fuerit." This is evidently derived from the definition of *furtum* given by the Roman law, *Inst. Justin. lib.* iv. *tit.* 1, 1; "*furtum est contrectatio rei fraudulosa* [*lucri faciendi gratia*] *vel ipsius rei, vel etiam usus ejus possessionisve.*" (The words in brackets are of doubtful authority here. With them inserted this passage is identical with *Dig.* xlvii., *tit.* 2, 1, 3, *De Furtis.*) The difference between the Roman and Bracton's definitions are discussed by Sir J. F. Stephen, 3 *History*, &c., ch. 28, pp. 131–2. East defines larceny to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with a felonious intent to convey them to his (the taker's) own use, and make them his own property, without the consent of the owner." 2 *P. C.* 553. In *Holloway*, pp. 203, 548, Parke B. cited this definition with approbation, but thought that "without any colour of right" should be added; but perhaps that is sufficiently expressed by the word *felonious*. Cf. p. 754. It is erroneous in other respects. Eyre B.'s definition in *Pear*, 2 *East P. C.* 553, 685; 1 *Lea.* 212 (1779), was, "the wrongful taking of goods with intent to spoil the owner of them *causâ lucri.*" Cf. p. 548. And Blackstone says, the "taking and carrying away must also be felonious, that is, done *animo furandi*, or, as the civil law expresses it, *lucri causâ*;" 4 *Com.* 232, having previously (229) defined "simple larciny" as "the felonious taking and carrying away of the personal goods of another." This the Commissioners on Criminal Law adopt while criticising it amongst others. *First Report* (1834), p. 16. See below. A materially different definition is that of a body with the same name in 1845: "Theft is the wrongfully obtaining possession of any moveable thing which is the property of some other person, and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or deal with it as the property of some person other than the owner." *Third Report*, p. 7, art. 1.

Possession.] It may be remarked here, once for all, that much in larceny, and the kindred offences of embezzlement and obtaining by false pretences, may depend on a clear appreciation of the difference between *possession* and *property*. "There is nothing in the law of trespass or theft," says Mr. (afterwards Mr. Justice) R. S. Wright, "which makes necessary an investigation of the general legal notion of property, but it is necessary to observe that there are numerous cases in the year books and old writers in which the word 'property' is used to signify possession; and property is attributed alike to the owner, the bailee, and the trespasser, and the owner is said to lose the property by a delivery or taking; and that even at this day, when it is said that in an indictment for theft the property may or may not be laid in a particular person, this means no more than that the person had or had not the possession or such a right to it as against the taker as enables him to maintain trespass; and 'property' cannot be laid even in the general owner if at the time he had neither the possession nor a present right to it." *Pollock and Wright* on *Possession in the Common Law* (1888), Pt. 3, ch. 1, s. 3, p. 122.

"There can, we think, be little doubt that the 'taking and carrying away,' upon which our later law insists, had been from the first the very core of the English idea of theft. . . . The crime involves a violation of possession; it is an offence against a possessor, and therefore can never be committed by a possessor." *Pollock and Maitland*, 2 *History*, Bk. 2, ch. 8, s. 2, p. 496. The former of these learned writers thus applies the principle of possession to larceny: "Notwithstanding first appearances . . . the common law has a theory of possession, and a highly elaborated one . . . we have to bear in mind that it must be known who is in legal possession of any given subject of property, and who is entitled to possess it, before we can tell what wrongs

are capable of being committed, and against whom, by the person having physical control over it or by others. Legal possession does not necessarily coincide either with actual physical control or the present power thereof (the 'detention' of continental terminology), or with the right to possess (constantly called 'property' in our books); and it need not have a rightful origin. The separation of detention, possession in the strict sense, and the right to possess, is both possible and frequent. A. lends a book to B. gratuitously, and not for any fixed time, and B. gives the book to his servant to carry home. Here B.'s servant has physical possession, better named 'custody' or 'detention,' but neither legal possession nor the right to possess. B. has legal and rightful possession, and the right to possess as against every one but A., while A. has not possession, but has a right to possess which he can make absolute at any moment by determining the bailment to B., and which the law regards for many purposes as if it were already absolute. As to an actual legal possession (besides and beyond mere detention) being acquired by wrong, the wrongful change of possession was the very substance of disseisin as to land, and is still the very substance of trespass by taking and carrying away goods (*de bonis asportatis*), and as such it was and is a necessary condition of the offence of larceny at common law." *The Law of Torts, 7th ed.*, ch. 9, pp. 335–7. Cf. *Holland*, "Possessory rights are, it is true, denied to servants, but, with this exception, the common law ignores the distinction between 'detention' and 'possession,' granting possessory remedies to all persons in occupation of land or having the custody of goods." *Jurisprudence*, 10*th ed.*, ch. 11, p. 194. And see *Kenny*, *Outlines*, ch. 13, *Larceny*.

Property or ownership.] The relation between property and possession is thus put by Professor Holland: "It is a still further advance [on legal possession] when law gives to a man that far ampler measure of right over an object, quite irrespectively of his having any actual or even constructive control over it, which is known as 'ownership.' (So that Ulpian goes so far as to say, '*Nihil commune habet possessio cum proprietate.*' *Dig.* xli. 2. 12. 1.) The higher is no doubt a development of the lower right. . . . It is usually defined as a plenary control over an object [from Puchta]." *Jurisprudence*, 10*th ed.*, ch. 11, p. 199.

It will be seen that most of the decided cases accord with these views. Thus in *Cabbage*, *Russ. & Ry.* 292 (1815), p. 548, the prisoner undoubtedly took and killed a horse, but he did it clearly to screen a friend, who was in custody for having previously stolen it. Six judges held a conviction for stealing right, because taking *lucri gratia* is not essential to larceny, though some thought the service to the friend was *lucrum* (to the thief); the fraudulent taking with intent wholly to deprive the owner of his property was enough; but five judges thought the conviction wrong. Upon this case it is observed in the First Report (1834) of the Criminal Law Commissioners (p. 25), that "where the removal is merely nominal, and the motive is that of injury to the owner, and not of benefit to the taker, the offence is scarcely distinguishable from that of malicious mischief." A similar case was *Jones*, 1 *Den. C. C.* 188 (1846), where a servant, after her discharge, applied at the post-office and received her master's letters; she delivered all but one to her master, and that one she destroyed, with a view of suppressing inquiries with reference to her character. This was held by all the judges present but one to be larceny; they did not admit the doctrine of *lucri gratia*, but said the suppression was sufficient *lucrum*. Cf. pp. 547–8.

That the possession ousted need not be physical, see *Wright* and *Reed*, p. 546.

On the other hand, it is clearly laid down that although prisoner may

wrongfully take possession of the goods, yet unless he intend to deprive the owner of his property therein, this is a trespass only and not larceny; as in the numerous cases where the prisoner merely intended to borrow the goods for a short time, and then return them. These cases are collected, p. 547. See below.

An unauthorised gift by a servant of his master's goods is as much a felony as if he had sold or pawned them. *Per* Erskine J., *Eliz. White*, 9 *C. & P.* 344 (1840).

The taking.] The Criminal Law Commissioners (1834) say, "The taking and carrying away are felonious, where the goods are taken against the will of the owner, either in his absence, or in a clandestine manner, or where possession is obtained by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends in any such case fraudulently to deprive the owner of the entire interest in the property against his will." 1*st Rep.* p. 24. Cases where goods are obtained by menaces were said to come within (even) the second commissioners' definition, p. 527, the taking being "against the will of the owner." *McGrath, L. R.* 1 *C. C. R.* 205; 39 *L. J. M. C.* 7, p. 542; 11 *Cox C. C.* 347 (1869); *Lovell*, 8 *Q. B. D.* 185; 50 *L. J. M. C.* 91 (1881); *C. C. R.*, p. 542; the second commissioners expressly make obtaining by intimidation theft, even with the owner's consent (*ib.* art. 10, p. 9); and as to cases where the possession has been obtained in consequence of a mistake, and the property has not passed, see *Middleton*, p. 532; 12 *Cox C. C.* 260, 417; *L. R.* 2 *C. C. R.* 38; 42 *L. J. M. C.* 73 (1873).

Taking and returning.] Where goods are once taken with a felonious intent, the offence cannot be purged by a restoration of them to the owner. Thus, the prisoner, having robbed the prosecutor of a purse, returned it to him again, saying, "If you value the purse take it, and give me the contents," but before the prosecutor could do this the prisoner was apprehended; the offence was held to be complete by the first taking. *Peat*, 2 *East P. C.* 557, 708; 1 *Lea.* 228 (1781), p. 549; see also *Wright*, 2 *Russ. Cri.* 126 (1828), cited in *Phetheon*, 9 *C. & P.* at 554 *n.* (1840), as to stealing and returning. See pp. 528–9, 547, 754, and *Trebilcock*, p. 549.

What manual taking is required.] In order to constitute larceny, there must be an actual taking possession by the thief, and this is what is meant by saying that every larceny includes a trespass, though, as we shall see presently, the trespass is sometimes constructive only. Thus, A. owing money to B., the prisoner said he could settle the debt on A.'s behalf, and taking a stamped receipt from his pocket put it on the table, and then took out some silver. B. then wrote the receipt, and the prisoner took it up and went out of the room. On being asked for the money he said, "It is all right"; but never paid it. It was held that this was not a larceny, as B never had such a possession as would enable him to maintain trespass. *Smith*, 2 *Den. C. C.* 449; 21 *L. J. M. C.* 111 (1852). So where the prisoner assigned his goods by deed to trustees for the benefit of his creditors, but under the deed remained in possession, and before the trustees had taken possession he removed the goods intending to deprive his creditors of them, it was held that, as the jury found the goods were not in his custody as the agent of the trustees, he was not guilty of larceny. *Pratt*, 1 *Dears. & P. C. C.* 360 (1854). The taking "need not be by the very hand of the party accused. For if he fraudulently procure another, who is himself innocent of any felonious intent, to take the goods for him, it will be the same as if he had taken them himself . . . as if one procure an infant, within the age of

discretion, to steal goods for him." 2 *East P. C.* 555, "and it should be so charged"; 2 *Russ. Cri.* 122. See also *Williams*, 1 *C. & K.* 195 (1843—trap to catch thief).

"The least removing [asportation] of the thing taken from the place where it was before is sufficient"; indeed, "take and carry away," ordinarily used in the indictment seems to mean no more than "take" alone; thus a guest, who having taken the sheets from his bed with an intent to steal them, and carried them into the hall, and was apprehended before he could get them out of the house, was adjudged guilty of larceny. 1 *Hawk. P. C.* Bk. 1, ch. 33 (pt. 1), s. 25; 3 *Inst.* 108; *Lapier*, 2 *East P. C.* 555, 557, 708; 1 *Leach* 320 (1784), below; cf. *Farrell*, *ib.* (1787), below; see also *Samways*, 1 *Dears. & P. C. C. R.* 371 (1854). Cf. pp. 737, 755. So where a person takes a horse in a close, and is apprehended before he can get him out of it, 3 *Inst.* 109; see further as to cattle, *Williams*, 1 *Moo. C. C.* 107 (1825), where asportation of the carcase was held (under a repealed statute) not enough, there being none of the live animal; see p. 318. The prisoner got into a waggon, and taking a parcel of goods which lay in the forepart, had removed it behind, when he was apprehended. The twelve judges were unanimous that as he had removed the property from the *spot* where it was, *with an intent to steal*, it was a sufficient *taking* and *carrying away*. *Coslet*, 1 *Leach* 236; 2 *East P. C.* 556 (1782). But where the prisoner had set up a parcel containing linen, which was lying lengthways in a waggon, on one end, for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken anything, all the judges agreed that this was no larceny, although the intention to steal was manifest. "For . . . the felon must, for the instant at least, have the entire and absolute possession of" the goods. *Cherry*, *ib.* (1781). But where the prisoner, sitting on a coach-box, took hold of the upper part of a bag which was in the front boot, lifted it up from the bottom, handed the upper part of it to a person who stood beside the wheel and, both holding it, endeavoured to pull it out, but were prevented by the guard, the judges were of opinion that a conviction was right, thinking that there was a complete *asportation* of the bag. *Walsh*, 1 *Moo. C. C.* 14 (1824). As a lady was coming out of the opera-house the prisoner snatched at her ear-ring, and tore it from her ear. She thought it was lost, but it fell into her hair, where it was found on her return home. No one saw it in prisoner's hand, but the judges were of opinion that this was not only larceny but robbery; its being in the possession of the prisoner for a moment, separated from the owner's person, was sufficient, though he could not retain it, but probably lost it again the same instant that it was taken. *Lapier*, above. The prisoner stopped the prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down or he would shoot him. The prosecutor laid the bed down; but before the prisoner could take it up he was apprehended. The judges were of opinion that the offence was not completed. *Farrell*, above. Where a letter carrier did not deliver a letter sorted to him for delivery, nor return it in the pouch with the other undelivered letters upon his return to the office as it was his duty to do, but kept it in his pocket, the jury found that he had detained the letter with intent to steal it, and it was held that there was a sufficient taking to constitute a larceny. *Poynton*, *L. & C.* 247; 32 *L. J. M. C.* 29 (1862). Where a servant *animo furandi* took more than he was entitled to of his master's hay from his stable, and put it into his master's waggon, it was held to be larceny. *Gruncell*, 9 *C. & P.* 365 (1839). So where the prisoner induced a postman to hand over to him letters which were not addressed to him, it was held that he could be convicted on an indictment for the larceny, as he was either a joint (principal) thief with the postman or an accessory before the fact, and therefore liable by 24–5 V. 94, 1, p. 155, to

be convicted as a principal. *James*, 17 *Cox C. C.* 24 (1890), *C. C. R.*, p. 739: (24 *Q. B. D.* 439; 59 *L. J. M. C.* 96, contain a confusing mistake).

There must be a severance of the goods from the possession of the owner. The prisoner took a purse out of a pocket, but the purse being tied to a bunch of keys, the keys remained in the pocket, and he was apprehended while they so remained: it was held no larceny, on the ground that the owner still remained in possession of his purse; and that though there was *cepit* there was not *asportavit*. *Wilkinson*, 1 *Hale P. C.* 508 (1611); 1 *Lea.* 321 *n.* So where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter, and the prisoner took them and carried them towards the door as far as the string would permit, and was then stopped, Eyre B. ruled that there was no severance, and consequently no felony. *Anon.* (about 1780), cited in *Cherry*, above.

The prisoner was indicted for stealing five thousand cubic feet of gas. The gas company had contracted to supply him with gas, to be paid for by meter. The gas was received from the company's main into an entrance-pipe belonging to the prisoner, and passed through the meter which the prisoner had hired of the company into another pipe, the property of the prisoner, called the exit-pipe, which fed the burners. The prisoner fraudulently, by fixing a pipe connecting the entrance and exit-pipe, made a passage through which the gas rose to the burners without passing through the meter, which consequently did not show all the gas consumed. The jury found that the prisoner had not by contract any interest in or control over the gas until it passed the meter. It was held, that there was a sufficient severance of the gas in the entrance-pipe to make an *asportation*. *White*, 1 *Dears. & P. C. C. R.* 203; 22 *L. J. M. C.* 123 (1858). So water in pipes can be the subject of larceny at common law. *Ferens* v. *O'Brien*, 11 *Q. B. D.* 21; 52 *L. J. M. C.* 70 (1883).

Unspecified or undetermined quantity.] See above, and *Tideswell*, p. 535, and *Hornby*, p. 541.

Possession obtained by mistake.] A felonious intent may be rebutted by showing that the accused took by mistake. Thus, if the sheep of A. stray from his flock into that of B., and B. by mistake drives them with his own flock, or shears them, that is not felony; but if he knows the sheep to be another's, and marks them with his own mark, "this is an evidence of a felony." 1 *Hale P. C.* 507. And where the prisoner by mistake drove away with his flock the lamb of another, and afterwards finding out his mistake, immediately sold it as his own (and then denied the transaction), it was held, that as the original taking was not rightful, but was and continued a trespass, the subsequent resolve made the trespass felonious, *i.e.* larceny. *Riley*, 1 *Dears. & P. C. C. R.* 149; 22 *L. J. M. C.* 48 (1853). The doctrine in *Riley*, "it is submitted, does apply to all cases in which the essential element of delivery—namely, consent to a change of possession—is absent, and that where that consent is absent the only question is whether there has been in law any change of possession at all or at what moment of time it has taken place." (*Pollock* and) *Wright* on *Possession*, p. 211; see below. "So it is if he appear desirous of concealing the property, or of preventing the inspection of the owner, or of any one who might make the discovery, or if, being asked, he deny the having them, although his knowledge thereof be proved," and opposite conduct leads to an opposite conclusion. 2 *East P. C.* 661.

But there is a distinction between things *taken* by mistake, and things physically *delivered* by mistake. In the case of things *delivered by mistake* one important circumstance to be considered is whether at the moment of

delivery the prisoner had an *animus furandi* or not. If he had previously intended to procure the delivery to himself, then the question—discussed p. 533—is whether the possession only is obtained by the fraud, or whether the property has passed (p. 541): if the property has passed, whether in consequence of the fraud or not, no subsequent appropriation of the goods will amount to larceny, so long as the legal possession continues. *Mucklow*, 1 *Moo. C. C.* 160 (1827); *Davis*, 25 *L. J. M. C.* 91; 7 *Cox C. C.* 104 (1856); *C. C. R.*; *Fish*, 131 *C. C. C. Sess. Pap.* 212 (1900), were all cases of post letters containing paper money delivered by mistake to persons with similar names; in all of them the court held that as there was no *animus furandi* at the moment of delivery there was (at any rate) no larceny. Dr. Kenny (*Outlines*, ch. 13, p. 218) points out that it is suggested (in *Pollock (and Wright)*, on *Possession*, p. 113, cf. p. 210) that the authority of these cases is still maintainable, whatever view be taken of the conflict of opinion in *Ashwell*, p. 533. But there is another class of cases, viz. where the prisoner has not previously intended to procure the delivery, but some one by some mistake delivers the goods to him, and he, at the moment of delivery, has an *animus furandi*; in that case it has been held that the property in the goods has not passed to the prisoner, but still remains in the owner, and the prisoner receiving them *animo furandi* is guilty of larceny. In *Middleton*, p. 529, &c., the prisoner had eleven shillings in a post-office savings bank. He gave notice to withdraw ten shillings, and in due course delivered his warrant to the clerk at the post-office, who by mistake referred to another depositor's letter of advice for 8*l.* 16*s.* 10*d.*, placed that amount upon the counter, entered it in the prisoner's deposit book, stamped it, and the prisoner took up the money and went away. The jury found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up. Eleven judges were for affirming and four for quashing the conviction. Seven considered that the test of larceny in this case was whether the property had *in fact* passed or not, though it was the intention of the clerk, who stood in the position of the Postmaster-General, to pass it. If, they said, a man obtains a sale and delivery to himself by fraud, the property passes to him, and he cannot commit larceny of it. But if things are delivered by mistake no property passes, and larceny may be committed by the person receiving. Thus, if a merchant sells six sacks of beans, and by mistake delivers six sacks of coffee, larceny of the coffee may be committed. They held that the handing over by mistake did not pass the property, and as the prisoner knew the mistake and had the *animus furandi* he committed larceny. They thought the case was undistinguishable from that of handing a sovereign to a cabman by mistake for a shilling: they were decidedly of opinion that the property would not vest in him, and whether he was guilty of larceny or not would depend whether at the time he was aware of the mistake and took *animo furandi*. Three judges thought that the matter was concluded because the clerk had authority (from the Postmaster-General) only to pass ten shillings and none to pass more, and therefore the prisoner got no property, and only got possession *animo furandi*; while another thought that before he even got possession he had formed the intention to steal, because he could tell from the clerk's mistake (in the book, &c.) that he was about to pay too large a sum (*i.e.* as explained, *Pollock (and Wright)* on *Possession*, pp. 111–12, "there was not a complete manual delivery to the prisoner at all, but only a placing of the money within his reach, *i.e.* he was like a dishonest finder"). Four of the judges regarded the case from an entirely different point of view. They insisted that the money had not been taken *invito domino*, and therefore there was no larceny. See p. 541. The result is

"We therefore can only say that if a chattel is given and received 'intelligently' the possession will certainly pass; and beyond this we must not go. For it is not yet possible to lay down authoritatively *what* exactly it is that must be correctly understood by the parties." *Kenny, Outlines*, ch. 13, p. 217.

In *Ashwell*, 16 *Q. B. D.* 190; 55 *L. J. M. C.* 65; 16 *Cox C. C.* 1 (1885); *C. C. R.*, p. 551, the prisoner having asked for the loan of a shilling the prosecutor gave him a sovereign, believing it to be a shilling. The prisoner took the coin under the same belief, but some time after discovering it to be a sovereign, he fraudulently appropriated it to his own use. Seven judges were of opinion that there was no larceny, and seven that there was: hence, on the principle *semper præsumitur pro negante*, the conviction was affirmed. A majority also held that he was not guilty within 24–5 V. 96, 3, pp. 523, 542. The difference of opinion arose as to the point of time at which the receipt took place. Those judges who held there had been no larceny thought that the receipt of the sovereign took place when the supposed shilling was taken by the prisoner, and the felonious intent arose subsequently, when the prisoner discovered that he had a sovereign; while those judges who held there had been a larceny thought that, though the receipt of the coin (as and for a shilling) took place at the time when the prisoner received the coin, yet the receipt of the sovereign, as and for a sovereign, did not take place, and could not take place, until the moment when the prisoner found out that it was a sovereign, at which moment he feloniously made up his mind to steal it. It was held by five judges to four in similar circumstances that there was no larceny. *Hehir*, 18 *Cox C. C.* 267 (1895), *C. C. R. Ir.* All the judges in *Ashwell* agreed that "if the original taking is innocent no subsequent fraudulent appropriation can be" larceny at common law, as was clearly stated in *Flowers*, 16 *Q. B. D.* 643; 16 *Cox C. C.* 33 (1886); *C. C. R.* The jury found that the prisoner "*received*" 7*s.* odd at one time, and at a "*subsequent*" time fraudulently appropriated it, so that upon that finding there was clearly no larceny, there being no *animus*, and a conviction was quashed. In 1888, however, it had been said, "We conceive the better opinion to be that" Ashwell, "in the first instance, acquired possession as an excusable trespasser. If this be so, and if it is too late (as we think it is) to argue that an excusable trespasser's possession cannot in any case become felonious, the conviction was right" (*Pollock and Wright* on *Possession*, Pt. 2, ch. 3, s. 18, pp. 110, 210).

In *Jacobs*, reported in 12 *Cox C. C.* 151 (1872), it was ruled that, where a purchaser gave by mistake a half-sovereign for a sixpence, there was no larceny.

Cf. *Bramley, L. & C.* 21 (1861), p. 538. As to the mistake of a bailee, see p. 560.

Possession obtained by fraud at the time of taking, but not property.] See p. 531. It is clear that if the possession of goods be obtained by fraud, this is a taking that constitutes larceny, unless the property be also parted with, in which case there is no larceny. See p. 535. Cases of possession obtained by fraud turn, therefore, upon the intention of the prisoner *at the time* that he obtained possession. Formerly, if his intention was originally fraudulent, then it was larceny; if it was originally innocent, then he was merely bailee, and a subsequent fraudulent appropriation was not necessarily larceny. Now, however, inasmuch as every fraudulent appropriation by a bailee is, by 24–5 V. 96, 3, pp. 523, 542, a larceny, the distinction is of less importance; but it is not desirable to lose sight entirely of the decisions on the point, the principal of which are here given. Thus, where the prisoner hired a mare for a day to go to S., and said he should return the same evening, gave a

false reference, and on the same day sold the mare in Smithfield, this was held to be larceny, the jury having found that he had hired with the fraudulent intent of selling immediately. *Pear*, 2 *East P. C.* 685, 697; 1 *Lea.* 212 (1779). Prisoner, a postboy, applied to a livery-stable keeper, for a horse, in the name of E., saying that there was a chaise going to Barnet, and that E. wanted a horse for his servant to accompany the chaise, and return with it. The horse was delivered by a servant to the prisoner, who mounted him, and, saying he was going to Barnet, proceeded a short way on that road; on the same day he sold the horse for a guinea and a half, including saddle and bridle. The court observed that the judges in *Pear* had determined that if a person, at the time he obtained another's property, meant to convert it to his own use, it was felony; that there was, however, a very nice distinction to be observed here, for if they thought that the prisoner, at the time of hiring for the purpose of going to Barnet, really intended to (and perhaps did) go thither, but finding himself in possession of the horse, afterwards determined to convert it to his own use, instead of going there, it would not amount to a felony. *Charlewood*, 2 *East P. C.* 689; 1 *Leach* 409 (1786). Semple had been in the habit of hiring carriages from a coachmaker, and in 1786, he hired a chaise, saying he should want it for three weeks or a month for a tour. The rate was agreed and a price of fifty guineas was talked about in case he should purchase it on his return to London, as he suggested, but no agreement took place as to the purchase. He took the chaise with his own horses from London and ultimately disappeared. Being indicted for stealing the chaise, it was argued for him that he had obtained the chaise under a contract which was not proved to be broken, and that this distinguished it from *Pear* and *Aickles*, below; that the chaise was hired generally for an indefinite time and not to go to any particular place; that he had a legal possession, at any rate, for three or four weeks, and that there was no evidence even of a tortious conversion, still less of a felony; for *non constat*, that the prisoner had disposed of the chaise. The court, however, while assenting to this reasoning directed that it was now settled that the question of intention was for the jury, and if they were satisfied that the original taking of the chaise was with a felonious intent, and the hiring a mere pretence to give effect to that design, without intention to restore or pay for it, it would fall precisely within *Pear*, and the other decisions, and the taking would amount to felony; the jury, too, could judge whether there had been a conversion; proof of actual conversion was not necessary. *Semple*, 2 *East P. C.* 691; 1 *Leach* 420 (1786).

Aickles was indicted for stealing a bill of exchange, the property of E. E. wanted the bill discounted, and sent his clerk to the prisoner to know whether he could do it. The prisoner went with the clerk to the acceptor's house, where he satisfied himself and terms were agreed. He then said that if E. would go with him to his house, he should have the cash. E. replied, that his clerk should go, and pay him 25s. and the discount on receiving the money. The clerk went with prisoner to his lodgings, where the prisoner showed him into a room, and desired him to wait for a quarter of an hour. The clerk, however, followed him, but, in turning a corner, missed him. He was apprehended in a few days, and promised to return the bill. The bill was not produced. It was objected, that the facts, if proved, did not amount to felony. It was left to the jury to consider, and they found that the prisoner had a preconcerted design to get the bill into his possession, with intent to steal it; and, that E. did not intend to part with the bill to the prisoner, without having the money first paid; and, generally, guilty. The judges held the conviction to be proper. *Aickles*, pp. 10, 536.

East says, "From the whole transaction it appeared that E. never gave credit to the prisoner. It is true that he put the bill into his hands, after

they had agreed upon the terms on which it was to be discounted, that by showing it to" the acceptor "he might satisfy himself that it was a genuine acceptance. But besides, that this was an equivocal act of delivery in itself, it seems sufficiently explained by the subsequent acts; for E., or his clerk by his direction, continued with the prisoner until he ran away, for the very reason, because they would not trust him with the bill." 2 *P. C.* 677.

All these cases may be summed up: "Consent obtained by fraud is not a true consent." *Kenny, Outlines*, ch. 13, p. 206.

Property as well as possession parted with by fraud: Contract intervening.] Sometimes, though there is no doubt of the intention of the prisoner to steal, yet the intention of the owner to part with the property, or the fact of his having effectually done so, is in dispute. If the owner part with the property as well as the possession, the offence is not larceny, but the decisions upon this point are in some cases scarcely to be reconciled. In some of the earlier cases especially, the distinction between what was the intention of the prisoner and what was the intention of the owner does not appear to have been clearly maintained. However fraudulent the prisoner's intention may have been from the first, if the owner deliberately intends to part with his property, and completely carries out that intention, there can be no larceny. If he intends to part with the property in the goods but it does not pass in law, his intention to pass it is immaterial, and the prisoner can commit larceny of the property which still remains in the owner. The distinction was well illustrated in *Tideswell*, 21 *Cox C. C.* 10 (1905): *C. C. R.*, p. 538, where for many years E. had agreed with prisoner whenever E. had an accumulation of waste, ashes, &c., to sell him so much of the bulk as he should require at so much per ton; "no specific quantities would be mentioned, the understanding being that the quantities purchased should be defined by the weighing." By a fraud jointly with E.'s servant, prisoner got more than he paid for. It was contended that there could be no *larceny* of "undefined goods," but that there was a sale (and then a subsequent fraud), but it was held that there was a larceny of the *excess* quantity; "if a person sells all the sheep in a field . . . at so much per head, but not knowing for certain how many sheep there are sends his servant with the purchaser to count them, and they fraudulently agree to say there are only nineteen sheep when there were really twenty, there is no larceny, because all the sheep have been sold . . . but the purchaser and the servant have conspired, &c. . . . If, however, a farm bailiff, having authority to sell his master's sheep . . . says to a purchaser "there are twenty sheep in the field . . . but he does not know how many there are; you can take them all. I will tell my master you had nineteen only, and you can pay him for nineteen, and give me a present for myself," then in that case there is clearly a larceny of one sheep, and that whether the bailiff professes to sell the twenty sheep, or whether he professes to sell nineteen only, for the fraud of the servant is known to the purchaser, and no property passes in the twentieth sheep" by that fraudulent act, "even if the bailiff proposes to part with the property in it." *Hornby*, p. 541, was expressly followed. "If," said one judge, "there had been a fixed contract with E. no subsequent arrangement, however fraudulent, would have made the offence larceny." Cf. *Middleton*, p. 532. The prisoner was indicted for stealing two ewers from a silversmith. He had been servant to a gentleman, who dealt with the silversmith, and some time after he called at the shop, and said that his (late) master wanted some ewers, and desired the silversmith to give him one, and to put it down to his master. The man gave him two, in order that his master might choose. The prisoner took both, sold them, and absconded. At the trial the tradesman swore that he did not charge the master (his

customer) with the things, nor did he intend to charge him with either until he had selected. It was objected that this amounted merely to obtaining goods under false pretences; but Bayley J. held, that as the prosecutor had parted with the possession only, and not with the right of property, the offence was larceny, but that if he had sent only *one* ewer, in execution of the pretended order, and had charged the customer with it, it would have been otherwise. *Davenport* (1826). 1 *Archbold's Peel's Acts*, 271, *3rd ed.*, p. 540.

In the following cases the owner has expected to be paid on delivery, and has therefore not completely parted with his property in goods. The prisoner having bargained and agreed for some oxen, went to the place where they were in the care of a boy, and took them away. By the custom of the trade, the oxen ought not to have been taken away till the price was paid. It was left to the jury to say, whether, though the beasts had been delivered under a contract, they thought prisoner originally got possession of them without intending to pay for them, the bargain being a mere pretext. The jury having convicted, the judges were unanimous that the offence amounted to felony. *Gilbert, Gow N. P. C.* 225 *n.*; 1 *Moody C. C.* 185 (1828). Here the consent was conditional. See *Aickles*, p. 534. The prisoner called at a shop and selected some trinkets, desiring they might be sent to an address, which was done. The traveller was prevailed upon by the prisoner to leave them there, under a promise ingeniously confirmed that he should be paid for them by a friend that evening. The prisoner and the prosecutor desired they might be taken care of at the inn, and the prosecutor said he considered the goods to be sold if he got his cash, but not before. Half an hour afterwards the prisoner returned, and took the articles away. It was contended there was a complete sale, but the judge directed the jury that if they were satisfied from these and other circumstances that the prisoner from the first had no intention of buying and paying for the goods, but gave the order, &c., for the express purpose of getting them out of his possession, &c., they should find him guilty, which they did; and the judges held the direction and conviction right. *Campbell*, 1 *Moody C. C.* 179 (1827). The prisoner bargained for four casks of bristles, *to be paid for on delivery*, and was told he could not have them on any other terms. The owner's clerk ultimately consented that the prisoner should take them away, and gave him a delivery order, on the express condition that they should be paid for at the door of his house, before they went in. The prisoner never took the goods to his house, but lodged them elsewhere. The prisoner was indicted for stealing the goods. The jury found that he had no intention to buy the goods, but to get them by fraud, and on this finding the judges were unanimously of opinion that the felony was complete, and the conviction good; the transfer of the delivery order not having been absolute but conditional. *Pratt*, 1 *Moody C. C.* 250 (1830). So, where the prisoner bargained for some waistcoats, and agreed to pay a price for them, but upon their being put into his gig drove off without paying for them, and absconded for two years; and the jury found that "the waistcoats were parted with conditionally that the money was to be paid at the time, and that" prisoner "took them with a felonious intent"; it was held to be larceny. *Cohen*, 2 *Den. C. C. R.* 249 (1851). See also *Morgan*, 1 *Dears. & P. C. C. R.* 395 (1854); *Slowly*, 12 *Cox C. C.* 269 (1873), *C. C. R.*; *Bramley*, p. 538.

The prisoner went into a shop, and asked a boy to give him change for half a crown; the boy gave him two shillings and sixpennyworth of coppers. The prisoner held out half a crown, which the boy caught hold of by the edge, but did not get. The prisoner then ran away. Park J. held this to be a larceny of the two shillings and the coppers; but said if the prisoner had been charged only with stealing the half-crown, he should have had great doubt. *Williams*, 6 *C. & P.* 390 (1834).

A landlord went to his tenant (who had removed all his goods) to demand his rent, amounting to 12*l.* 10*s.*, taking with him a receipt, ready written and signed; the tenant gave him 2*l.*, and asked to look at the receipt. On its being handed to him he refused to return it, or to pay the remainder of the rent, as "he had got his receipt." The landlord, at the time he gave the prisoner the receipt, thought the prisoner was going to pay him the rent, and would not have parted with the receipt unless he had been paid all the rent; hence he never expected to have it again, and did not want it again, but the money. Coleridge J. held that it was a larceny of the receipt, as it was only lent him to look at, and that the fact of the prisoner paying the 2*l.* made no difference. *Rodway*, 9 *C. & P.* 784 (1841).

Where a lady gave a sovereign to the prisoner in order that he might obtain for her a railway ticket, and he ran away with the money, and the jury found that the prisoner had placed himself near the booking-office for the fraudulent purpose of being entrusted with money in this way, it was held that he was rightly convicted of larceny. *Thompson*, *L. & C.* 225; 32 *L. J. M. C.* 58 (1862).

The prisoner went with another man into a shop and asked for a penny-worth of sweetmeats. He put down a florin which the shopkeeper put into the money drawer. She then placed on the counter a shilling, a sixpence, and five pence. The prisoner took up the change. The other man said, "You need not have changed," and put down a penny, which the prisoner took up. The prisoner then put down a sixpence and six pennies, and asked for a shilling. She put a shilling on the counter, when the prisoner said, "You may as well give me the two-shilling piece, and take it all." She then put the florin she had received from the prisoner upon the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. The prisoner took the florin, and she took her own shilling, the sixpence, and the six pennies, and was in the act of putting them into the till when she discovered the fraud; but before she had time to speak the prisoner left the shop. She said that she did not intend parting with the florin without getting full change for it. The prisoner was convicted of larceny; and the court held, confirming the conviction, that the transaction was not complete, and that the property in the florin had not passed to the prisoner. *McKale*, 37 *L. J. M. C.* 97; *L. R.* 1 *C. C. R.* 125 (1868). See also *Twist*, 12 *Cox C. C.* 509 (1873), *C. C. R.*; *Hollis*, 12 *Q. B. D.* 25 (1883), *C. C. R.* ("ringing the changes").

The prisoner was charged with stealing nineteen shillings and sixpence. The prosecutor gave the prisoner a sovereign, under the expectation that nineteen shillings and sixpence change would be given. The chairman amended the indictment (if he could) to one for stealing a sovereign, and directed the jury that if they believed that the prisoner, at the moment of obtaining it, intended by a trick feloniously to deprive the prosecutor of the sovereign, they were to find a verdict of guilty, and it was held that the direction was right. *Gumble*, p. 177. Where the indictment was not amended, the prisoner, who, being entitled to one penny out of a sovereign, first gave elevenpence, and then denied that she had received anything but a shilling, could not be convicted of the larceny of "nineteen shillings in money," as she had never taken nineteen shillings at all; but the majority of the judges thought that she might have been convicted on an indictment for stealing one sovereign, if the issue had been properly left to the jury. *Bird*, 13 *Cox C. C.* 257; 45 *L. J. M. C.* 44 (1873); *C. C. R.*, p. 177.

So, also, where money has been merely deposited with the prisoner, he may commit larceny of it. Thus, obtaining goods by *ring-dropping*, *&c.*, p. 371, has been held to be larceny. The prisoner, with some accomplices, meeting the prosecutor, pretended to find a valuable ring and

a paper, appearing to be a jeweller's receipt "for a rich brilliant diamond ring." They offered to share the value of it with him, if he would deposit some money and his watch as a security. He having accordingly laid down his watch and money on a table, was beckoned out of the room by one of them, while the others took away his watch and money. This was held to amount to larceny. *Patch*, 1 *Leach* 238; 2 *East P. C.* 678 (1782), p. 539. So, where, in similar circumstances, the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving a counterfeit jewel with him as security, this was held by nine judges to be larceny, although two thought that the transaction was a loan and security, and that he had parted with the property as well as possession. *Moore*, 1 *Leach* 314; 2 *East P. C.* 679 (1784). To the same effect is *Watson*, 2 *Leach* 640; 2 *East P. C.* 680 (1794). So, where the prosecutor was induced, by a plot, to deposit his money with one of the defendants, under colour of a pretended bet, and the stakeholder, upon one of his confederates winning the bet, handed over the money to him, it was left to the jury to say whether, at the time the money was taken, there was not a plot that it should be kept, under the colour of winning the bet fairly, and the jury found there was: this was held to be larceny. *Robson, Russ. & R.* 413 (1820). Cf. *Nicholson*, p. 541, which was followed in a typical "welshing" case. The prisoner, who was at a race-meeting offering to lay odds against various horses, made a bet with the prosecutor, laying odds against a horse; prosecutor's money was deposited with the prisoner, who eventually went away with it, never having intended to repay it if the horse won, as it did. It was clear that prosecutor did not expect his identical coins back; cf. p. 542. It was held that there was no contract by which the property in the money could pass, nor was there any intention to pass the property, and that there was therefore evidence of larceny. *Buckmaster*, 20 *Q. B. D.* 182; 57 *L. J. M. C.* 25; 16 *Cox C. C.* 339 (1887); *C. C. R.*

The prisoner agreed to sell a horse to the prosecutor for 23*l.*, and the prosecutor handed him 8*l.*, in return for which the prisoner gave him a receipt, which stated that the balance was to be paid on delivery. The prisoner never delivered and never intended to deliver the horse. It was held that the prisoner was rightly convicted of larceny by a trick, since the prosecutor had not intended to part with the property in the 8*l.* until he received the horse, but had only paid it as a deposit. *Russett*, 1892, 2 *Q. B.* 312; 17 *Cox C. C.* 534; *C. C. R.*, following *Buckmaster*.

Where the prisoner concealed coals in a cart by covering them with slack, and declared it for weighing as slack, and paid for it as slack only, and so got the coal, it was held that this preconceived fraud was a larceny of the coal, for the prosecutor had not parted and never intended to part with the *coal*. *Bramley, L. & C.* 21 (1861), p. 533.

But if the owner intends to part with the property in the goods, and, in pursuance of such intention, delivers the goods to the prisoner, who takes them away, and the property becomes his, this, it is clearly established, is not larceny, even though the prisoner has from the first a fraudulent intention. It may be obtaining by false pretences, pp. 405–25; and as that is now an offence as easily and as fully punishable as larceny, there is no reason whatever why the acknowledged principle should not be strictly applied. "High authorities," said Kennedy J. in *Tideswell*, p. 535, "have stated that we should not invent artificial larcenies, but that the offence is a plain offence, and should be kept out of the net of decisions which deal with offences which, though showing gross dishonesty, yet do not amount to larceny."

The following are instances in which the offence has been held not to amount to larceny, on the ground that the *property* has passed to the prisoner. *Glass*, p. 711, is an extreme case. One of the prisoners, in the presence of

the prosecutor, picked up a purse containing a watch, a chain, and two seals—all worthless—which a confederate represented to be gold, and worth 18*l.*; upon which the prosecutor purchased the share of the man who picked up the purse for 7*l.*, another confederate having promised to buy it back from him; Coleridge J. held that this was not larceny, as "the prosecutor meant to part with his money for ever . . . he never intended to have it back again, but meant to sell . . . for himself": prisoners were, however, convicted of a conspiracy to defraud. *Wilson*, 8 *C. & P.* 111 (1837). Compare this case with *Patch*, p. 538, where the prisoner had only deposited his money. The prisoner was indicted for horse stealing; he met the prosecutor at a fair with a horse, which the latter had brought there for sale. After bargaining, prosecutor told prisoner he should have it for 8*l.*, and calling his servant, ordered him to deliver it to prisoner, who immediately mounted the horse, telling the prosecutor that he would return immediately and pay him. The latter replied, "Very well," and prisoner rode away, and never returned. Gould J. ordered an acquittal, for here was a complete unconditional contract of sale and delivery; the property as well as possession was entirely parted with: the fraud was of *the price*. *Harvey*, 2 *East P. C.* 669; 1 *Leach* 467 (1787).

The prisoner pretended to put three shillings into a purse and offered the purse and its contents to the prosecutor for one shilling. The prosecutor gave the prisoner a shilling and took the purse, but on opening it found it contained only three half-pence. It was held that the prisoner could not be convicted of larceny of the shilling since the prosecutor clearly intended to part with the property in it. *Solomons*, 17 *Cox C. C.* 93 (1890); *C. C. R.*—"the purse trick," than which there cannot be "a clearer illustration of the difference between" false pretences and larceny. *Per* Hawkins J.

Parkes was indicted for stealing a piece of silk, the property of T. W. P. called at W.'s warehouse, and having looked at several pieces of silk, selected one. He gave his address, saying that if W. would send it that evening, he would pay him for it. W. accordingly sent his shopman. P. examined the bill of parcels, and gave the man bills for more than the price. The man had not enough change, but P. said he wanted more goods, and should call the following day, which he did not do. The bills were proved to be good for nothing, and forgeries; the address had only just been taken, and prisoner left a few minutes after he got the goods. Before the goods were sent from W.'s they were entered in the regular course of business as if prisoner was a debtor for them. It was left to the jury whether there was from the beginning a premeditated plan by prisoner to obtain the goods without paying for them, or whether this was a sale by W., and a delivery of the goods with intent to pass the property, he having received bills in payment. The jury found the former, and that it was not W.'s intention to give him credit. But the judges were of opinion that the conviction was wrong, the *property*, as well as the possession, having been parted with, upon receiving that which was accepted as payment by the shopman, though that afterwards turned out to be of no value. *Parkes*, 2 *East P. C.* 671; 2 *Leach* 614 (1794). See *Small*, *&c.*, p. 541.

The prisoner was a servant of grocers who purchased "kitchen stuff." In the absence of the chief clerk, the prisoner had himself authority to buy and pay the seller, and afterwards, on producing a ticket to the chief clerk, was repaid. The prisoner presented a ticket in the usual form to the chief clerk, and received the sum of 2*s.* 3*d.*; there had been no sort of sale. The court held that this was a case of false pretences, and not of larceny, "as the clerk delivered the money to the prisoner with the intent of parting with it wholly to him." *Barnes*, 2 *Den. C. C. R.* 59 (1850).

A case of frequent occurrence is the following. The prisoner being the prosecutor's bailiff, it was his duty to receive and pay moneys for him, and to

make entries there of such receipts and payments. On one occasion the book showed a balance of 2*l.* in his favour, by his taking credit for a payment he had never made, and he got the 2*l.* A conviction of larceny was quashed, though an indictment for some other offence might have been sustained. *Green*, 1 *Dears. & P. C. C.* 323 (1854); but see *Cooke*, below.

So where a clerk getting money in due course from the cashier of his firm to pay away falsely represented a sum of 3*l.* 10*s.* 4*d.* to be due, whereas a less sum was then due, and having got it, took the difference, it was held not to be obtained by larceny, but by false pretences. *Thompson*, *L. & C.* 233; 32 *L. J. M. C.* 57 (1862). That decision "went entirely upon the question whether there was a larceny . . . in the first instance . . . not whether the subsequent misappropriation was larceny, nor was any question raised as to the Act relating to fraudulent bailees. The present case is not governed by it but" by *Goode, &c.*, pp. 544–5. *Cooke*, *L. R.* 1 *C. C. R.* 295; 40 *L. J. M. C.* 68; 12 *Cox C. C.* 10 (1871); which see for possession obtained by servants, pp. 544–5.

Trick through a third person.] Where one gets goods purchased *by a third person* in that person's name by false pretences, there is sometimes a difficulty. The prisoner was indicted for stealing a hat, in one count laid to be the property of Beer, in another of Paul. The prisoner purported to buy a hat of Beer, a hatter, but was told he could not have it without paying for it. Having left the shop he met a boy, and told him that Paul, who, he had just heard, had a hat waiting for him at Beer's, had sent him to Beer's for his hat; but that, as he owed Beer money, he did not like to go; and asked him, promising him something for his trouble, to go and fetch Paul's hat to him. He told him not to go into the shop if Paul, whom he described, was there. The boy went, and got the hat, which, after carrying part of the way by the prisoner's desire, he delivered to him, when he said he would take it himself to Paul, which he never did. It was objected for him that this was not larceny, but false pretences; and the judges decided that the offence did not amount to a felony, the owner having parted with his property in the hat. They thought the second count out of the question as Paul never had possession of the hat. *Adams*, *R. & R.* 225: 2 *Russ. Cri.* 145 (1812); cf. *Davenport*, *ib.* p. 536, and *Boor*, 9 *C. & P.* 126 (1839). But see *Kay*, p. 713. *Adams* and *Atkinson*, p. 545, "appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principles the cases can be supported if *Davenport* (p. 536) and the others involving the same principle are law . . . we ought not to feel bound by two cases which, as far as we can perceive, stand alone and seem to us contrary both to principle and justice" (judgment of seven of the judges in *Middleton*, p. 532), from which it seems that the property in the hat had never passed to the prisoner, and his offence was larceny.

"*Confidence*" *trick.*] The prisoners, Nicholson, &c., were indicted for stealing two bank post bills and seven guineas. Nicholson called on the prosecutor and discovered that he had some money. He induced him to go to a public house, where he met other sharpers. By (what is now known as) the "confidence trick" they induced him to go and fetch money and inveigled him to play at betting games at which at first he, or a confederate, won but he ultimately lost, as he believed, fairly, all his money, to their taking which he made no objection. There was abundant evidence that the prisoners were expert sharpers. For the prisoners it was contended, that this was a mere gaming transaction, or at most only a cheat, and not a felony, but the jury

found that it was a preconcerted scheme in all of them to get prosecutor's money; but the judges held the conviction wrong, for in this case possession had been parted with by the prosecutor (as well as the money itself), under the idea that it had been fairly won. *Nicholson*, 2 *East P. C.* 669; 2 *Leach* 610 (1794). But cf. *Robson, &c.*, p. 538.

Trick through third person—Possession obtained from servant by fraud.] A question sometimes arises whether the owner has delegated to the servant a general authority or only a limited one, and if the latter whether the servant has pursued such limited authority or not. (Cf. *Middleton*, p. 532.) In the following cases it has been held that the servant having only a limited authority and not having pursued it, the property has not passed, and the prisoner was rightly convicted. If a carman having orders to deliver goods to a certain person, in mistake deliver them to another person, who misappropriates them, he is guilty of larceny, as the carman has no authority to part with the ownership to the prisoner. *Longstreeth*, 1 *Moo. C. C.* 137 (1826); *Little*, 10 *Cox C. C.* 559 (1867); in both, especially in the former, delivery was fraudulently obtained. See p. 531.

The prisoner for a fraudulent purpose stopped a letter carrier, and by a lie induced him to deliver up letters directed to others. Denman J. ruled that the letter carrier could not be held to be the agent of the Postmaster-General for wrongfully giving up the letters, and that the offence was larceny. *Dowdeswell* (1873); *previous editions of this work*; cf. p. 713; and *Middleton*, p. 532.

The prisoner, by false statements, induced a tradesman to send by his servant, to a particular house, goods to the value of 2*s.* 10*d.* with change for a crown. On the way he met the servant, and induced him to part with the goods and change, giving him a crown which proved to be bad. Both master and servant swore that the latter had no authority to part with goods without payment, but the former admitted that he intended to sell the goods, and never expected them back again. The jury were directed, perhaps with the concurrence of two judges, that if they thought the servant had an uncontrolled authority to part with the goods and the change, they ought to find the prisoner not guilty; but if they should be of a contrary opinion, and find it a preconcerted scheme, then it amounted to larceny. *Small*, 8 *C. & P.* 46 (1837); see *Prince*, below, and *Middleton*, p. 532.

A. received goods of B., the servant of C., under colour of a pretended sale, mainly shown to be such by the absence of an invoice. It was held that the fact of A.'s having received such goods with knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence to support an indictment for larceny against A. jointly with B. *Hornby*, 1 *C. & K.* 305 (1844), expressly followed in *Tideswell*, p. 535.

The earliest, apparently, of these servant cases, was one where the prisoner stopped an apprentice with a parcel, and by a series of lies persuaded him to part with it. The jury found the prisoner guilty, and the judges in confirming the conviction, laid down the following rules "as clearly settled: that the possession of personal chattels follows the right of property in them; that the possession of the servant was the possession of the master, which could not be devested by a tortious taking from the servant; that this rule held in all cases where servants had not the absolute dominion over the property, but were only entrusted with the care or custody of it for a particular purpose." *Wilkins*, 2 *East P. C.* 673, p. 558, who points out that in *Parkes*, p. 539, the servant had power to sell; 1 *Leach* 520 (1789).

In some cases it has been held that the servant has a general authority to part with the goods, and thus that the prisoner could not be guilty of larceny. The prisoner, who had previously pawned certain articles at a shop, brought

a packet of diamonds there, which he also offered to pawn, redeeming the former articles. The shopman, who had authority to act in his master's business, after looking at and pricing the diamonds, delivered them back to the prisoner to seal up, who then substituted another parcel of false stones. He then got back the articles previously pledged, and the loan on the diamonds, and carried them away. Being convicted of stealing these articles, the judges resolved unanimously that the case was not larceny, because the servant, who had a general authority from his master, parted with the property, and not merely with the possession. *Jackson*, 1 *Moody C. C.* 119 (1826). Cf. *Longstreeth*, p. 541.

So also the cashier of a bank has a general authority to pay money and to judge of the genuineness of cheques, and it is no larceny (but false pretences) to obtain money from him by a forged cheque. *Prince*, *L. R.* 1 *C. C. R.* 150; 38 *L. J. M. C.* 8; 11 *Cox C. C.* 193 (1868).

Possession obtained by threat.] The prisoner, who was an auctioneer, obtained money for some goods by asserting that a woman had bid for them, and by threatening to detain her if she did not pay, and it was held that he was guilty of a larceny of the money. *M'Grath*, p. 529; *Hazell*, 11 *Cox C. C.* 597 (1870), *C. C. R.* So where the prisoner obtained by threats a larger sum than was due for knife grinding, he was held guilty of larceny. *Lovell*, p. 529. Cf. p. 760 and p. 789.

Possession obtained by false process of law.] Where the possession is obtained from the owner by means of the fraudulent abuse of legal process, the offence will amount to larceny. Thus if A. has a design to steal the horse of B.—impounded in a distress—and enters a plaint of replevin in the Sheriff's Court for the horse, and thereby "gets him delivered to him, and then rides him away, this is taking and stealing, because done *in fraudem legis*." So where "A., hath a mind to get the goods of B. into his possession privately, delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession and takes the goods, if it were *animo furandi*, it is larciny." *Farre's Case*, pp. 301, 309. 1 *Hale P. C.* 507; cf. 2 *East P. C.* 660; 2 *Russ. Cri.* 195.

Possession obtained by bailees.] See p. 533. For 24–5 V. 96, 3, see p. 523. As to the proviso, see *Daynes*, 12 *Cox C. C.* 514 (1873), *C. C. R*, where a conviction on indictment was quashed because there might have been a summary conviction.

Probably it is not necessary to aver "as a bailee." *Per* L. Coleridge C.J., *Macdonald*, p. 544.

To bring a case within the section it must be shown that there was such a delivery of the goods as to vest the possession of them for the time in the prisoner, and also that at the expiration of that time the goods were to be restored to the bailor, or to be delivered to some one else. A bailment (from Fr. *bailler*, to deliver) is defined by Sir William Jones (on Bailments, 1781) to be "a delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor or according to his directions as soon as the purpose for which they are bailed shall be answered."

A carrier who receives money to procure goods, and does so, but fraudulently retains the money, is within 20–1 V. 54, 4 (repealed). *Wells*, 1 *F. & F.* 109 (1858). So one who takes a watch from the pocket of a tipsy man with his consent is (not guilty of larceny at common law but) a bailee within that s. *Reeves*, 5 *Jur. N. S.* 716 (1859). But one who receives money, with no obligation to return the identical coins, is not a bailee of such coins within that s., which refers to a return *in specie*. *Hassall*, *L. & C.* 58 (1861); cf. p.

538; and see also *Garreti*, 2 *F. & F.* 14 (1860), and *Hoare*, 1 *F. & F.* 647 (1859), both under that s. Where the prisoner obtained back an equity of a redemption which he had given as security for a loan to the prosecutor, for the purpose of raising money upon it to pay off the lender, and obtained the money and gave the deed as security to the second lender but appropriated the money to his own use, it was held that the prisoner was a bailee of the deed, and that it was immaterial that he was at liberty either to return the deed or the money to the first lender. *Tonkinson*, 14 *Cox C. C.* 603 (1881), *C. C. R.* See also *Aden*, 12 *Cox C. C.* 512 (1873), *C. C. R.* Where a traveller receives from his employers silk to sell for them, but which is to remain their property until disposed of to customers, and to be returned to them within six months, such traveller is rightly convicted of larceny as a bailee, if he fraudulently disposes of them for his own use within the six months. *Richmond*, 12 *Cox C. C.* 495 (1873), *C. C. R.* So where the prisoner was to have two brooches for a week or ten days to sell for the owner, but after that interval he sold them but arranged terms for their redemption after two months, he was held guilty of larceny as a bailee, for his duty was to return the two brooches in ten days if he could not sell them before. *Henderson*, 11 *Cox C. C.* 593 (1870), *C. C. R.*

The prisoner, who received a bill of exchange for the purpose of getting it discounted, and handing back the proceeds, instead of getting it discounted, indorsed it as his own to a creditor in payment of his account, the jury finding he intended to pass the bill absolutely to the creditor. He was held to be a bailee of a valuable security, and guilty within s. 3, above. *Oxenham*, 46 *L. J. M. C.* 125 (1876), *C. C. R.*

L., one of the trustees of a friendly society, in whom the funds were invested by statute, was sent, by resolution of the society, to the bank to pay in money which till then was in the possession of C., the treasurer. L. applied the money to his own use, and was indicted for stealing, &c., *and* as a bailee, the money of the treasurer. Held, that the property could not be laid in the treasurer, who as soon as he "parted with the money had nothing more to do with it" (but prisoner may have been guilty of a breach of trust as against the other trustees). *Loose*, *Bell C. C.* 259 (1860).

The prisoner received money to pay for some coals, and he was to bring them home in his own cart, which he did, but on the way abstracted a portion of the coals. It was held that he was guilty of larceny as a bailee, some of the judges thinking that the money being the prosecutor's, the property vested *ipso facto* in him, and that thereupon a bailment arose, and others that there must be a specific appropriation of the coals to the prosecutor, and that there was evidence of such appropriation. *Bunkall*, 33 *L. J. M. C.* 75; *L. & C.* 371 (1864), p. 546. A carter was employed by the owner of a cargo of coals to go and load the coals in his cart from the vessel, and deliver specified quantities to persons on a list. He sold two of the loads fraudulently, and not to such persons, and appropriated the moneys: he was held to be rightly convicted under s. 3, above. *Davies*, 10 *Cox C. C.* 239 (1866), *C. C. R.*

The owner of a wrecked ship made a contract to salvage the wreck with a person who sub-contracted with the prisoner's father. Prisoner was in charge of the wreck, and while so engaged corresponded with the contractor of the wreck, although the latter swore that he still considered the father responsible. The jury found that the prisoner stole some of the wreck *animo furandi*, but they were not asked whether he was bailee. It was held by a majority that he was a bailee and was rightly convicted. *Clegg*, 11 *Cox C. C.* 212 (1869), *C. C. R., Jr.*

Prisoner induced a man to buy horses by pretending that he had to pay so much for them and was only selling on commission, whereas they

were his, and he had bought them for a smaller sum: the false pretence failed because it was not averred, and it was held that he was not a bailee of the money under 20–1 V. 54, 4, p. 542. There cannot be bailment by fraud. *Hunt*, 8 *Cox C. C.* 495 (1861).

A married woman can be guilty under 20–1 V. 54, 4, p. 542. *Robson*, p. 555. And so also can an infant. In *Macdonald*, 15 *Q. B. D.* 323; 15 *Cox C. C.* 757 (1885), *C. C. R.*, the prisoner who was twenty years of age was supplied with furniture under "a hire purchase" agreement, by which he was to pay by instalments, and till all were paid and the goods became his, not to dispose of them. Before they became his he fraudulently converted them. It was held (by five judges) that he was rightly convicted of larceny as a bailee: and after further argument before these and eight other judges sitting "as an assembly of the judges in accordance with the old practice at common law" *i.e.* before the creation of the Court for C. C. R., this was confirmed by a majority.

Possession obtained by servants.] It has been long settled, that if a servant have possession of his master's goods, and appropriate them to himself, he is guilty of larceny: and the intention to appropriate may be proved by any unequivocal act. This, like larceny from a bailee, comes within the definition of larceny, p. 526, the wrongful change of possession taking place by the servant ceasing to hold the goods for the benefit of his master, and assuming to hold them for himself. See *Kenny, Outlines*, ch. 13, s. 2, and cf. below.

Thus it is said by Hale that it is larceny if the butler who has charge of his master's plate, or the shepherd who has that of his master's sheep, appropriates them, and so it is of an apprentice that feloniously embezzles his master's goods. 1 *Hale P. C.* 506; 2 *East P. C.* 554. So where a carter goes away with his master's cart. *Robinson*, 2 *East P. C.* 565 (1755); *Reed, Dears. & P. C. C.* 257; 23 *L. J. M. C.* 25 (1854), pp. 528, 546. The prisoner was a drover, and had been employed by the prosecutor as such, off and on, for nearly five years. On one occasion he sold several of his drove and used the money. He was found guilty of larceny; but the jury found that he did not intend to steal the sheep *at the time* he got possession. The judges were of opinion, that as the owner parted with the custody only, and not with the possession, the prisoner's possession was the owner's, and that the conviction was right. *M'Namee*, 1 *Moo. C. C.* 368 (1832). See *Hey*, 1 *Den. C. C. R.* 602 (1849). The prisoner was employed by the prosecutor as his foreman and book-keeper, but did not live in his house. The prosecutor, as usual, delivered a bill of exchange to him, with orders to take it to the post for London. The prisoner got cash for the bill, with which he absconded. It was objected that by the delivery the prosecutor had parted with the possession of the bill, and the case was likened to that of a carrier entrusted with goods; but the judges held it larceny, on the principle that the possession still remained in the master. *Paradice*, 2 *East P. C.* 565 (1766), cited 1 *Leach* 523, 524. The prisoner was employed as a porter by the prosecutor, who delivered to him a parcel to carry to a customer. While carrying it he met two men, who persuaded him to dispose of the goods, which he did, taking them out of the parcel and receiving part of the money. All the judges held this to be larceny, as the possession still remained in the master. *Bass, ib.*; 1 *Leach* 251, 523 (1782).

So where the prosecutor delivered to his servant a sum of money to carry to a person, who was to give him a bill for it, and the servant appropriated it to his own use, the judges were of opinion that this was not a mere breach of trust, but a felony. *Lavender, East, ib.* (1793); 2 *Russ. Cri.* 328; see also *Heath*, 2 *Moo. C. C.* 33 (1838). A. employed B. to take his barge from one

place to another, and paid him his wages in advance, and gave him a separate sum of 3*l.* to pay the tonnage dues. B. took the barge sixteen miles, and paid tonnage dues to an amount under 2*l.*, and appropriated the rest. Patteson J. held this to be a larceny, and that there was no need to show the relation of master and servant. *Goode, Carr. & M.* 582 (1842), p. 540. See also *Beaman, Carr. & M.* 595 (1842). Where a servant went to her master's wife, and told her she was acquainted with a person who could give her ten guineas' worth of silver, and the latter gave her them for that purpose, with which she ran away, she was found guilty of the larceny. *Atkinson*, 1 *Leach* 302 *n.* (1778); 2 *Russ. Cri.* 328.

A servant whose duty it was to pay workmen obtained fraudulently a larger sum from the cashier than was necessary, intending at the time to appropriate the balance, and it was held that whether the obtaining was in the first instance larceny or false pretences, yet that the money while in the servant's custody was the property and in the possession of the master, and therefore the misappropriation of it by the servant was larceny. *Cooke*, p. 540.

In order to render the offence larceny, where there is an appropriation by a servant, who is already in possession, it must appear that the goods were at the time in the constructive possession (pp. 388, 473) of the master. They will be considered in the constructive possession of the master if they have been once in the possession of the master, and have been delivered by the master, or by his orders, to the servant. Cf. above, and *Mallison*, p. 429. But if the money or goods have come to the possession of the servant from a third person, and have never been in the hands of the master, they will not be considered to be in the constructive possession of the master for the purposes of larceny. This is the distinction which gave rise to the acts (beginning with 39 G. 3, 85, pp. 378–86, *passim*) creating the offence of embezzlement. See p. 560, and below. The rule has never been doubted, but not unfrequently judges, while professing to recognise it, have given decisions with which it is scarcely reconcilable. The origin of these decisions is to be found in the unsatisfactory state of the criminal law, which before that series of statutes left a large number of offences unprovided for. This remark applies to some of the following cases.

Where a clerk took a bill of exchange belonging to his master, got it discounted, and converted the proceeds to his own use, this was held to be a larceny of the bill, though the clerk had authority to discount bills. Heath J. was clearly of opinion that it was felony, the bill having been once decidedly in the possession of the master, by the clerk who got it accepted putting it amongst the other bills in the master's desk, and the prisoner having feloniously taken it away out of that possession. *Chipchase*, 2 *East P. C.* 567; 2 *Leach* 699 (1795).

A company had a drawing account with a bank, and used to send their pass-book every Tuesday to be written up, and their messenger went on the Wednesday to bring it back, together with the cheques, &c., of the week. The prisoner was a clerk of the company; it was his duty to receive the pass-book and vouchers from the messenger, and to preserve the vouchers for the use of the company. The bank delivered the pass-book, containing amongst other things a cashed cheque, to the messenger of the company, who delivered the book and cheque to the prisoner in the usual way, and he thereupon fraudulently destroyed the latter. It was held that the prisoner had been rightly convicted of larceny of a piece of paper, inasmuch as the cheque, when delivered into his custody in the usual course of business, was constructively in the possession of the directors, who, in the circumstances, were his masters: his being a shareholder gave him no property in the paper. *Watts*, 2 *Den. C. C. R.* 14; 19 *L. J. M. C.* 193 (1850), pp. 418, 557; *Murray*, 1 *Moo. C. C.* 276 (1830); and *Masters*, pp. 203, 385.

If the goods, &c., be deposited in some receptacle which is itself in the actual or constructive possession of the master, then they are in his constructive possession, so that a subsequent appropriation of them by the servant will be larceny. Thus the prisoner was ordered by his masters, the prosecutors, to go with their barge to a corn-meter, for as much corn as the barge would carry, to be brought in loose bulk. The prisoner received 230 quarters in loose bulk, and five other quarters, which he ordered to be put in sacks, and afterwards appropriated. The question was whether this was felony, the corn never having been in the possession of the master, and the judges held that this was larceny, for it was "a taking from the actual possession of the owner as much as if the oats had been in his granary." *Spears*, 2 *East P. C.* 568; 2 *Leach* 825 (1798); 2 *Russ. Cri.* 321. See also *Abrahat*, 2 *East P. C.* 569; 2 *Leach* 824 (1798); *Johnson*, 2 *Den. C. C. R.* 310; 21 *L. J. M. C.* 32 (1851).

When the prisoner was sent with his master's cart for some coals the latter had bought, which were delivered to him and deposited in the cart, and on the road home he disposed fraudulently of a portion of them, it was held by ten judges that this was larceny and not an embezzlement, the coals being constructively in the possession of the master when deposited in his cart, exactly as in *Spears*, above. *Reed*, p. 544. See *Bunkall*, p. 543.

A very similar case to *Reed* was *Wright*, *Dears. & B. C. C.* 431 (1858), p. 528. The prisoner was employed by a bank to conduct a branch entirely by himself. Out of his salary he had to provide an office for which he used his own house where he carried on another business. In this office was an iron safe, provided by the bank, into which it was the duty of the prisoner to put at night money which had been received during the day. A branch manager kept a key of this box as well as the prisoner: the latter furnished weekly accounts to him. For two years, though the weekly accounts were furnished as usual, the cash balance was not examined. The manager having come to examine the cash balance, the prisoner said he was 3000*l.* short, and handed over to him 755*l.* 16s., which he said was all the cash he had left, and which sum he took from a drawer in the counter, and not from the safe. The jury found the prisoner guilty of larceny as a clerk of some of the money received from customers, placed in the safe and accounted for weekly, and the Court of C. C. R. held that there was evidence that the prisoner, as his duty was, placed in the safe the money which he had received from customers; that he thereby determined his own exclusive possession of the money, and that by taking some of such money out of the safe, *animo furandi*, he was guilty of larceny. They could not distinguish this from a shopman's taking money out of his master's till.

A. had agreed to buy straw of B., and sent his servant C. to fetch it. C. did so, and put down the whole quantity of straw at the door of A.'s stable, which was in a courtyard of A., and then went to A. and asked him to send some one with the key of the hayloft which was over the stable, which A. did, and C. put part of the straw into the hayloft and carried the rest away to the public-house and sold it. Tindal C.J. held that this carrying away of the straw by C., if done with a felonious intent, was a larceny, and not an embezzlement, as the delivery of straw to A. was complete when it was put down at the stable door. *Hayward*, 1 *C. & K.* 518 (1844).

The following are cases in which the master or employer has been held not to have such a possession as is necessary in order that the servant may be guilty of larceny.

A cashier at the Bank of England was indicted (before 15 G. 2, 13, 12, p. 389) for stealing certain India bonds, laid as the property of the bank in one count, and in another, of a person unknown. The bonds were paid into the bank by order of the Court of Chancery, and ought to have been deposited

in a chest. The prisoner, who received them from the court, put them in his own desk, and afterwards sold them. The court was of opinion that this was not larceny (before that statute); that the possession of the bonds was always in the prisoner, and that the bank never had possession till they were in the chest. *Waite*, 2 *East P. C.* 570; 1 *Lea.* 28 (1743), which was relied on in *Bazeley*, p. 385. The prosecutor suspecting that he was robbed by the prisoner, his shopman, employed a customer to come to his shop, and gave him some marked silver of his own, with which he bought goods of the prisoner. Afterwards the master examined the till, in which the prisoner ought to have deposited the money, and not finding it there, had him arrested and searched, when the marked money was found on him. The judges were of opinion that the prisoner was not guilty of felony, but only of a breach of trust, the money never having been put into the till, and, therefore, not having been in the possession of the master. *Bull* (1797), cited in *Bazeley*, above. *Sullens*, p. 385, is to the same effect. So where A. owed B. 5*l.* and paid it to prisoner, who was B.'s servant, supposing him authorised to receive it, which he was not, and prisoner never accounted for the money to B., Alderson B. held that this was neither embezzlement nor larceny. *Hawtin*, 7 *C. & P.* 281 (1836), p. 384. Where the prisoner was sent by his fellow-workmen to the employer to get their wages, and he received the money in a lump sum wrapped up in paper, on which the names and sums due to each were written, it was held that he was the agent of the workmen, and could not be convicted on the indictment which laid the property in the employer (it had originally been laid in the men, but had been amended on the application of the prosecution). *Barnes*, *L. R.* 1 *C. C. R.* 45; 35 *L. J. M. C.* 204 (1866).

The intent to deprive the owner of his property.] We now come to the other ingredient of larceny—the intent to deprive the owner of his property. This, like every other intent, is to be inferred from the mode in which the accused deals, in this case, with the property. It will, however, be a general presumption that where one takes wrongful possession of the goods of another, his intention is to steal them, and the onus will lie upon him to prove the contrary. If a man carries away the goods of another openly ("otherwise than by apparent robbery"), before him or others, this carries with it evidence of being a trespass only. 1 *Hale P. C.* 509. *Animus furandi* is, however, a question for the jury, and not for the bench, who cannot draw an inference of fact from their finding. *Farnborough*, p. 190. A servant, taking his master's horse to ride "about his own occasions" is not guilty of larceny if he returns again. *Hale*, *ib.* The prisoners were charged with stealing two horses: they went in the night to an inn, took a horse and mare from the stable, and rode about thirty-three miles to a place where they left them in the care of ostlers, saying that they should return. They were apprehended on the same day about fourteen miles off. The jury found the prisoners guilty, but added that they were of opinion that the prisoners merely meant to ride the horses to the place where they left them, and to leave them there; and that they had no intention either of returning them or making any further use of them. The judges, by a large majority, held that, upon this finding, it was a trespass only, and not a larceny, but they all agreed that it was a question for the jury, and that, if the jury had found a general verdict of guilty on this evidence, it could not have been questioned. *Philipps*, 2 *East P. C.* 662 (1801). So where a prisoner indicted for stealing a horse, two saddles, &c., had got into stables and taken away the horse and other articles altogether, but, when he got some distance, had turned the horse loose, and proceeded on foot with the saddles, &c., Garrow B. left it to the jury to say, whether the prisoner had any intention

of stealing the *horse*; for, if he intended to steal the other articles, and only used the horse as a mode of carrying off the plunder more conveniently, he would not be guilty of larceny of the horse. *Crump*, 1 *C. & P.* 658 (1825), not guilty as to the horse. Cf. p. 407. Upon the same principle, where a prisoner who was indicted for stealing a straw bonnet, &c., had entered the house where the articles were, through a window which had been left open, and took things which belonged to a girl with whom he had relations, and carried it to a hay-mow of his own (where they met), the jury thought that the prisoner wanted to induce the girl to go thither again, but that he did not intend to deprive her of the bonnet, &c., and this was held not to be larceny. *Dickinson, Russ. & Ry.* 420 (1820).

It is not necessary that the prisoner should intend to appropriate the goods to his own benefit; it is sufficient if he intends to deprive the owner of his property in them, and in the words of Parke B. in *Holloway*, below, "to take the entire dominion over" them. So in *Cabbage*, p. 528, and *Jones, ib.*

In *Morfit, Russ. & Ry.* 307 (1816), the prisoners were charged with stealing a quantity of beans. They were servants of the owner, and took care of his horses, for which he made them an allowance of beans. The prisoners had entered the granary, and carried away a quantity of beans, which the jury found they intended to give to his horses. A majority of the judges thought it was larceny. See *Handley, C. & M.* 547 (1842). In *Privett*, 1 *Den. C. C.* 193 (1846), the jury found distinctly that the prisoners "took the oats with the intent of giving them to their master's horses, and without any intent of applying them for their private benefit." This distinguished the case from *Morfit*, where the majority thought the element "*lucri gratia*," p. 527, consisted in the grooms' easier work owing to the horses' better food, but most of the judges agreed that they were bound by the previous decisions to hold this larceny; otherwise several would have dissented, and two did. But now by 26–7 V. 103, 1, any servant taking from his master's possession "any corn, pulse, roots, or other food," contrary to his master's orders, for the purpose of giving the same to the horses or other animals of his master, shall not by reason thereof be deemed guilty of felony, but may be convicted summarily.

In another case the prisoner was supplied with a quantity of pig-iron by B. & Co., his employers, which he was to put into a furnace to be melted, and he was paid according to the weight of the metal which ran out of the furnace, and became puddle-bars. A. put the pig-iron into the furnace, and also put in with it an iron axle of B. & Co., which was not pig-iron; the value of the axle to B. & Co. was 7*s.*, but the gain to the prisoner by melting it, and thus increasing the quantity of metal which ran from the furnace, was 1*d.* Tindal C.J. held that if the prisoner put the axle into the furnace with an intent to convert it to a purpose for his own profit, it was larceny. *Richards*, 1 *C. & K.* 532 (1844).

Where the prisoner took some skins of leather, not with the intent to sell or dispose of them, but to bring them in and get paid for them as his own work, they having been dressed, not by the prisoner, but by another workman (it was a common practice at that tannery for one man to lend his dressed work to another, though it was not proved to have happened here); it was held not to be a larceny. *Holloway*, pp. 203, 527, above. The distinction between this case and the last seems to be this: that in the former there was such a conversion of the goods to the prisoner's own purposes as that the master never could have them again in their original condition; whereas in the latter their condition was never altered. So in *Poole, Dears. & B. C. C.* 345 (1857), the prisoners were glove finishers, and the practice was to take the finished gloves into an upper room on the master's premises,

and lay them on a table, in order that the workmen might be paid according to the number they had finished. The prisoners took a quantity of finished gloves out of a store-room on the same premises, and laid them on the table with intent fraudulently to obtain payment for them as for so many gloves finished by them. It was held on the authorities that this was not larceny; but had the point been *res integra* the judges apparently would have decided otherwise.

Where a servant took his master's goods, in order to offer them for sale to the master himself, as the goods of another, he was held to be guilty of larceny, as it was clear that he intended to assume the entire dominion over the goods. *Hall*, 1 *Den. C. C.* 381; 18 *L. J. M. C.* 62 (1848); *Manning, Dears. & P. C. C.* 21; 22 *L. J. M. C.* 21 (1852).

If the prisoner has once assumed the entire dominion over the goods, an intention "ultimately" to return the goods will not be sufficient to prevent the offence amounting to larceny. Thus, where the jury found a prisoner guilty, who had broken open a box of plate entrusted to him and pawned the contents, under 20–1 V. 54, 4, p. 542, but recommended him to mercy on the ground that they believed that he intended "ultimately" to return the property, some of the judges doubted whether this was in law any other than a general verdict of guilty, but all thought that the conviction was good. It seems that to acquit, the jury must find he intended to return *at the time of the taking*. The recommendation to mercy is no part of the verdict. *Trebilcock, Dears. & B. C. C.* 453 (1858). Cf. this and *Peat*, p. 529.

Taking under a fair claim of right.] Of course if the prisoner believe that he has a right to the goods there can be no larceny, even if the goods be taken by force; because though the seizure be wrongful, the intent to steal is wanting. See 2 *East P. C.* 659. Thus where the owner of land takes a horse damage feasant, "or the lord seises it as a stray, tho perchance he hath no title so to do," yet these circumstances explain the intent, and show that it was not felonious; but these facts may be rebutted, as by showing that the horse was marked anew, in order to disguise him. *Ib.* 1 *Hale P. C.* 506, 507. *Knight*, p. 314.

Whether the taking of corn by gleaners is to be considered as a trespass only, or whether it is to be regarded as a felony, must depend upon the circumstances of the particular case. In some places a custom, authorising the practice of gleaning, is said to exist; in others, it is sanctioned by the permission of the tenant of the land; and even where no right whatever exists, yet if one carry away the corn under a mistaken idea of right, the act would not amount to larceny, the felonious intent being absent. A conviction is said to have taken place at the Old Bailey about 1808, upon an indictment for the exercise of this supposed right; but the circumstances of the case are not stated. 2 *Russ. Cri.* 217. See *Price*, 4 *Burr.* 1925 (1766), *Steel* v. *Houghton*, 1 *H. Bl.* 51 (1788).

Larceny of goods found.] Difficulty has been caused by cases of goods obtained by finding. It will be useful to consider both what is the right of a person who finds goods, and what is necessary to constitute larceny.

The right of a person who finds goods is to take possession of them, if they have no apparent owner.

If at the time the property be taken possession of there be no apparent owner, the subsequent discovery of one will not render the original taking unlawful, nor will it render the finder a bailee for the true owner. No conversion of the property, therefore, subsequent to the discovery of the true owner, will render the finder guilty of larceny.

In order, therefore, to constitute a larceny of lost goods, there must be a

felonious intent *at the time of the finding*, coupled with reasonable means at that same time of knowing the owner. It will be found that this is the result of the authorities.

The great question, therefore, is to discover when the property can be said to have no apparent owner. That has been the main subject of discussion in the following cases.

A gentleman left a trunk in a hackney coach, and the coachman, taking it, converted it to his own use, this was held to be larceny; for the coachman must have known where he took the gentleman up, and where he set him down, and ought to have restored it. *Lamb*, 2 *East P. C.* 664 (1694). A man having had his hat knocked off in a quarrel with a third person, the prisoner picked it up and carried it home. Being indicted for larceny, Parke J. said, "If a person picks up a thing, when he knows that he can immediately find the owner, and instead of restoring it to the owner, he converts it to his own use, this is a felony. *Pope*, 6 *C. & P.* 346 (1834).

In *Merry* v. *Green*, an action of trespass for false imprisonment, a person purchased at a public auction a bureau, in which he afterwards discovered, in a secret drawer, a purse containing several sovereigns, &c. The contents of the bureau when sold were not known to any one. The purchaser having appropriated the money to his own use, it was held that there was a taking which amounted to a trespass, and that he was guilty of larceny; but that a declaration by the auctioneer that he sold all that the bureau contained, would have given the purchaser "a colourable right" to the contents, in which case the abstraction of the money would not have been felonious. Parke B. said, "Suppose a person finds a cheque in the street, and in the first instance takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it. . . . If the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion *animo furandi* constitutes a larceny. . . . It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems, also, from *Wynne's case*, 1 *Leach* 413; 2 *East P. C.* 664 (1786), that if, under the like circumstances, he acquire possession and mean to act honestly, but afterwards alter his mind, and *open* the parcel, with intent to embezzle the contents, such unlawful act would render him guilty of larceny." 7 *M. & W.* 623; 10 *L. J. M. C.* 154 (1841).

The whole law with reference to this subject was considered in *Thurburn*, 1 *Den. C. C. R.* 387; 18 *L. J. M. C.* 140 (1849); 3 *Cox C. C.* 277, 453, where it is reported as *Wood*, p. 729. The prisoner found a bank-note, "which had been accidentally dropped on the high road. There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. [The prisoner meant to appropriate it to his own use when he picked it up.] The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property before he thus changed the note": he was convicted. The court held that the conviction was wrong, and that "the original taking" not being "innocent in one sense"

made no difference. There seems to be no evidence for the statement in brackets.

The above case was followed in *Glyde*, 37 *L. J. M. C.* 107; *L. R.* 1 *C. C. R.* 139; 11 *Cox C. C.* 103 (1868), where a man found a sovereign, and had no means of knowing the owner, but (probably) intended at the time of finding to keep it as against the owner, and upon the owner being found, refused to give it up. It was held that this was no larceny. See also *Matthews*, 12 *Cox C. C.* 489 (1873), *C. C. R.* (larceny by a bailee).

In *Preston*, 2 *Den. C. C. R.* 353; 21 *L. J. M. C.* 41; 5 *Cox C. C.* 390 (1851), a case of a lost bank-note with the owner's name on it found by a person who appropriated it to his own use, it was decided "that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether, at the time he took possession of it, he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind or resolution to appropriate to his own use would amount to larceny." See further on this point the judgments in *Ashwell*, p. 533.

Where the prisoner was indicted for stealing a watch, which he had found, and the jury returned the following special verdict: "Not guilty of stealing the watch, but guilty of keeping possession of it in the hope of reward *from the time he first had the watch*," this was held to amount to "not guilty." *York*, 1 *Den. C. C. R.* 335; 18 *L. J. M. C.* 38; 3 *Cox C. C.* 181 (1848); see p. 190. So, also, where a boy found a cheque and the prisoner obtained it from him, knowing to whom it belonged, and kept it in the hope of getting a reward for it, refusing to deliver it to either of them; it was held that this was not a larceny. *Gardner*, 32 *L. J. M. C.* 35; 9 *Cox C. C.* 253 (1862), *C. C. R.* Where the jury found that the notes were lost, that the prisoner did not know the owner, but that it was probable that he could have traced him, it was held that the prisoner was not bound to do that, and that he had been wrongfully convicted of stealing the notes. *Dixon*, 25 *L. J. M. C.* 39; 7 *Cox C. C.* 35 (1855), *C. C. R.*

The question as to what is lost property was considered in *West*, 1 *Dears. & P. C. C. R.* 402; 24 *L. J. M. C.* 4; 6 *Cox C. C.* 415 (1854). A purse containing money was left by a purchaser on the prisoner's stall. A third person afterwards pointed out the purse to the prisoner, supposing it to be hers. She put it in her pocket, and afterwards concealed it; and on the return of the owner denied all knowledge of it. The jury found that the prisoner took up the purse knowing that it was not her own, and intending at the time to appropriate it to her own use, but that she did not know who was the owner at the time she took it. It was held, in these circumstances, that the purse was not lost property, but mislaid in circumstances in which the owner could find it, and that the prisoner was properly convicted of larceny.

In *Christopher*, 1 *Bell C. C.* 27; 28 *L. J. M. C.* 35 (1858), the court distinctly laid down the principle, that in order to convict the finder of property of larceny, it is essential that there should be evidence of an intention to appropriate the property, *at the time* of finding. In that case a chairman had told the jury that a felonious intent was necessary to every larceny, but that the intent might be inferred from acts subsequent to, as well as immediate upon, the finding, and that if the prisoner, when he discovered the owner, did not take measures to make restitution, they might from his behaviour infer such an intention: prisoner had, in fact, said on arrest, "I know I've done wrong." The Court for C. C. R., however, held this direction wrong, as it was calculated to lead the jury to suppose that a felonious intent subsequent to the finding was sufficient, and not merely that they might

look at the subsequent circumstances, with a view of seeing what was the intention *at the time of finding*.

In *Deaves*, 11 *Cox C. C.* 227 (1869), *C. C. R.*, Ireland, the prisoner's child found six sovereigns and brought them to her; she told the bystanders she had found one sovereign only, and offered to treat them. She also found a half sovereign and a bag at the same spot. The same evening she told a woman, who came to inform her that the owner was found, to mind her own business, and next day gave her half a sovereign. Four judges thought there was no evidence to show that the prisoner knew at the finding the property could be traced to an owner, while three of them thought the fact of concealing the amount at the time of finding and buying the silence of those who knew of the matter, was evidence that the prisoner believed that the owner could be found.

In *Moore, L. & C.* 1; 30 *L. J. M. C.* 77; 8 *Cox C. C.* 416 (1861), the prisoner was indicted for stealing a 10*l.* bank-note. A customer dropped the note in the prisoner's shop. Prisoner stated and proved that he had bought a 10*l.* note for gold in his shop about the time of the loss by the customer (but apparently this was not believed, as nothing more about it appears in the case). When the customer asked about it next day, he denied all knowledge of it, but parted with it that day. In answer to questions put to them, the jury found. (1) that the prisoner found the note in his shop; (2) that the prisoner at the time he picked up the note did not know, nor had he reasonable means of knowing who the owner was; (3) that he afterwards acquired a knowledge of who the owner was, and after that he converted the note to his own use; (4) that the prisoner intended when he picked up the note to take it to his own use, and deprive the owner of it, whoever he might be; (5) that the prisoner believed at the time he picked up the note, that the owner could be found. The Court for C. C. R. held that the prisoner was rightly convicted of larceny. It is difficult to reconcile the fifth finding with the second; but the court probably considered that, taken together, the two findings came to this, that there were no marks apparent on the face of the note indicating who was the owner, but that the prisoner must, nevertheless, have known that the owner would come back to inquire. At any rate, there is no indication that the court had any intention of overruling the previous cases. It is perhaps very doubtful whether the property was, strictly speaking, lost property at all. See *West*, above.

Where a chattel is found on private land it would seem that there is a presumption that it belongs to the possessor of the land. *South Staffordshire Water Co.* v. *Sharman*, 1896, 2 *Q. B.* 44; 65 *L. J. Q. B.* 460. If this is so, it would seem that in cases such as *Moore*, and *Merry* v. *Green*, above, no larceny was committed. See this case fully discussed in the Appendix to *Clerk and Lindsell on Torts*, 3*rd ed.*

As to cattle taken by mistake, or straying into a field and subsequently appropriated, see pp. 530, 531, and, generally, p. 318.

Larceny by the owner.] It is of course in ordinary circumstances impossible for a man to commit larceny by taking possession of *his own* property. But there is a passage in the *Year Book*, 7 *H.* 6, *f.* 43, 18 at end, in which it is said, "if I bail to you certain goods to keep, and then retake them feloniously, I shall be hung, and yet the property was in me: and Norton said that this was law," &c. This passage, however, must be understood with the qualification found in all the criminal treatises, that it is felony if the goods be taken with a fraudulent design to charge the bailee with the value. 1 *Hale P. C.* 513; *Foster C. C.* 123; 2 *East P. C.* 558, 654; 4 *Bl. Com.* 231; 2 *Russ. Cri.* 254. In *Wilkinson and Marsden*, *Russ. & Ry.* 470 (1821), the prosecutors, Marsh & Co., were lightermen, and were employed by C., a merchant, to pass

nux vomica through the custom-house. Marsh & Co. entered it for a vessel about to sail, then lying in the London Dock, and having done what was necessary, delivered back the cocket bill and warrants to C., and joined with C. in a bond to government to export these goods (for which there was no duty); they then employed the prisoners to convey the goods to the ship, and lent them one of their lighters for the purpose. W. accordingly took the nux vomica on board the lighter, but instead of delivering it on board the ship, he, in company with and assisted by Marsden, emptied the bags and refilled them with cinders; the nux vomica was then sent by them to London, and the bags of cinders delivered on board as and for the nux vomica. There was a large duty on the home *importation*. The prisoners were indicted for stealing nux vomica, *the property of Marsh & Co.*, but it appeared at the trial that it was really the property of the prisoner, M., and that C. had only lent his name to facilitate the passing of the goods at the custom-house. It was also proved that the object of the transaction was to defraud the government of the duty. The case was considered by eleven judges. Four of them thought that it was no larceny, as there was no intent to cheat or to charge Marsh & Co., but only the crown. Seven of the judges held it larceny, because Marsh & Co. had *a right to the possession until the goods reached the ship*; and they had also an interest in that possession, and the intent to deprive them of their possession wrongfully and against their will was a felonious intent as against them, because it exposed them to a suit upon the bond. In the opinion of some of the seven judges this would have been larceny, although there had been no felonious intent against Marsh & Co., but only an intention to defraud the crown.

It may be doubted whether the law was not somewhat distorted in this case in order to punish a flagrant fraud. If the prisoner, who was the true owner of the goods, had demanded them, the prosecutors could scarcely have refused to deliver them to him; so that the decision at least comes to this, that the prisoner obtaining possession of his own goods, to which possession he has an undeniable right, by a false pretence, with intent to defraud, is guilty of larceny.

There might be a difference in cases where the bailee has a right to retain the property as a pledge or security, as in that case he has more than the bare possession; he has what is called a *special property* in the goods; but it is extremely difficult to reconcile even this case with any accurate view of the offence of larceny; and, moreover, *Wilkinson* stands almost, if not quite, alone, Cf. p. 561.

Larceny by part owners.] As with owners so with part owners, *e.g.* joint tenants, a larceny cannot in general be committed of the goods which they have in common, for "one tenant in common taking the whole doth but what by law he may do." 1 *Hale P. C.* 513. This, upon principles of common law, would not apply to a larceny of the goods of a corporation (p. 561) by a member, because an individual member has no right of property or possession in the goods of the corporation; and it might be doubtful whether it applied where by mutual arrangement the part owner had no right to the possession of the goods, or when it was clear that there was an intention by the part owner to deprive his partners entirely of their property; the passage in Hale means no more than that a part owner, in the absence of any arrangement to the contrary, may assume the entire possession without committing a trespass. The state of the law has now, however, been materially altered by 31–2 V. 116, 1, p. 524. It has been held that although goods may be stolen under that s. yet the receiving of such goods (stolen by a partner) is not within 24-5 V. 96, 91, p. 732, on account of the words, "either at common law or by virtue of this Act." *Smith, L. R.* 1

C. C. R. 266; 39 *L. J. M. C.* 112; 11 *Cox C. C.* 511 (1870), followed in *Streeter*, p. 557. See also *Robson*, p. 382; and see p. 381.

In *Bramley, Russ. & Ry.* 478 (1822), the prisoner was indicted for burglary. It appeared that she was a member of a female friendly society, and that the money of the society was kept in a box at the house of N. She broke into the house and carried off the box—at a moment when it was doubtful whether she was a member or not. The property was laid in one count as belonging to N.; and in the other as belonging to the three stewardesses of the society. The judges were clear that as N. *was responsible for the loss of the property* the conviction was right. In *Webster*, 1 *L. & C.* 77; 31 *L. J. M. C.* 17; 9 *Cox C. C.* 13 (1861), *C. C. R.*, p. 203; the same point arose as in *Bramley*. There H. was the sole manager of the business of a friendly society, and, as such, carried on a shop, in the profit and loss of which all the members shared. H. was responsible for all the moneys of the society coming into his possession. The prisoner was also a member, and assisted H. in the shop. The prisoner took some marked sovereigns, &c. from the till and appropriated them. It was held that the prisoner might be convicted on an indictment laying the property in H. alone. So *Burgess*, *L. & C.* 299; 32 *L. J. M. C.* 185 (1863); cf. pp. 559–60. Cf. *Stainer*, p. 379, and *Tankard*, p. 379.

Friendly and other societies.] See the statutes, pp. 525–6. The effect of these is to vest the property in the trustees as against the members of the society. *Cain*, 2 *Moo. C. C.* 204 (1841). See also 7 G. 4, 64, 14, p. 524.

"Any person who has an interest in a sum of money is a 'beneficial owner' within . . . 31–2 V. 116, 1. Where then a number of persons have a right to have a fund applied to the extinction of their liability under a guarantee, these persons are all 'beneficial owners,' and any one of them who misappropriates the fund to his own use may be properly convicted of stealing it. A. was a member . . . of a committee which had guaranteed the expenses of an entertainment. He, in the discharge of his duty, obtained possession of the entrance moneys and paid the amount into the banking account of one B. Subsequently, by means of false representations, he obtained a cheque for the amount from B., cashed it, and absconded with the proceeds. Held that he was properly convicted under 31–2 V. 116, 1, of stealing moneys of which he with others was the beneficial owner. Held, also, that a count . . . which charged that A. had stolen the moneys of the members of the committee was bad." Headnote to *Neat*, 19 *Cox C. C.* 424 (1899), *C. C. R.* There can be no doubt that Wright J. was right in thinking that the crime was "obtaining a cheque from" B. "by false pretences."

Partnerships.] In cases of partnerships not proved to be incorporated, it is sufficient to state that the property is the property of one of the partners by name, and others. See 7 G. 4, 64, 14, and 31–2 V. 116, 1, p. 524. As to incorporated companies, see p. 561. Cf. pp. 381–3.

A Bible had been given to a society of Wesleyan dissenters, and was bound at the expense of the society. No trust deed was produced. The Bible having been stolen, the indictment charged the property to be in A. and others. A. was a trustee of the chapel and a member of the society. Parke J. held the indictment right. *Boulton*, 5 *C. & P.* 537 (1833). It is not requisite that a "strict legal property" or partnership should exist. Where C. and D. carried on business in partnership, and the widow of C., upon his death, without taking out administration, attended to the business as partner, and the stock was afterwards divided between her and the surviving partner, but before the division, part of the stock was stolen; it was held that the

goods were properly described as the joint property of the surviving partner, and the widow (and that there was no need to join her children or the ordinary). *Gaby, Russ. & R.* 178 (1810), p. 560. And where a father and son took a farm on their joint account, and kept a stock of sheep, their joint property, and, upon the death of the son, the father carried on the business for the joint benefit of himself and his son's children, who were infants; it was held, upon an indictment for stealing sheep bred from the joint stock, some before and some after the death of the son, that the property was well laid in the father, and his son's children. *Scott, Russ. & R.* 13; 2 *East P. C.* 655 (1801), p. 560.

As to banks under 1–2 V. 96, 1, 5–6 V. 85, and 7 G. 4, 46, see p. 524. As to subsequent statutes, see pp. 235, 424, 717; and *Index* under *Banks, &c.*

In an indictment for larceny from a banking company consisting of more than twenty persons, the property of the goods stolen was laid in the public officer. Upon failure of proof of the appointment of the public officer and of the registration of the company, an amendment was asked for, and made, stating the property to be in "W. and others," it being proved that W. was one of the members of the company. It was held by the Court for C. C. R. that, under 7 G. 4, 64, 14, p. 524, the allegation of ownership, as amended, was right; and that 7 G. 4, 46, 9, *ib.*, was merely permissive, and did not make it absolutely imperative that the property belonging to a banking company should be laid in their public officer; if it was obligatory, it was modified by the later Act of the same year. *Pritchard*, p. 203.

Larceny by wife.] Very akin to the case of larceny by part owners was that of larceny by a wife. By the common law if a wife took goods of which the husband was the joint or sole owner, the taking was not larceny, because they were in law but "one person; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause, even a stranger cannot commit larceny in taking the goods of the husband by the delivery of his wife; as he may by taking away the wife by force and against her will, together with the goods of the husband." 1 *Hawk. P. C.* Bk. 1, ch. 33 (pt. 1), s. 32. Therefore, where the wife of a member of a friendly society stole money belonging to the society, lodged in a box in her husband's custody, under the locks of the stewards of the society, it was held by the judges not to be larceny, the property being laid in the husband amongst the other thirty or forty members, all named. *Willis*, 1 *Moody C. C.* 375 (1833). Cf. p. 559. But where the prisoner, a married woman, was intrusted with goods and she stole them, the husband being entirely innocent, it was held that she was guilty of either simple larceny or larceny as a bailee. *Robson, L. & C.* 93; 9 *Cox C. C.* 29 (1861), p. 544.

Whether, where a stranger and the wife jointly stole the husband's property, it was larceny in the stranger, was the subject of contradictory decisions. *Clark* (1818), 1 *Moo. C. C.* 376 *n.*; *Tolfree*, 1 *Moody C. C.* 243 (1829), p. 818. See the distinction in *Hawk. P. C.*, above. It is clear that in the case of a joint taking by a wife and her paramour the presumption of her agency for her husband is rebutted. In *Thompson*, 1 *Den. C. C. R.* 549; 4 *Cox C. C.* 191 (1850), the prisoner went away with the prosecutor's wife, and took with them from his house several articles belonging to him. The jury found the prisoner guilty; adding that they did so on the ground that there was a joint taking by the prisoner and the wife; and the court were unanimously of opinion that the conviction was right. In *Featherstone*, p. 203, the prosecutor's wife had taken from his bedroom thirty-five sovereigns, and on leaving the house called out to the prisoner, who was in a lower room, "George, it's all right, come on." The prisoner left a few minutes afterwards, and he and she were traced to a public-house where they passed the night.

When taken into custody the prisoner had twenty-two sovereigns upon him. The jury found the prisoner guilty, stating that they did so "on the ground that he received the sovereigns from the wife, and that she took them without the authority of her husband." The court held that the conviction was right. It is the same whether the adultery be actually committed or only intended. (*Tollett and*) *Taylor, Car. & Marsh.* 112 (1841); *Thompson*, above. And the fact that the man was in the husband's service, and acted under the wife's directions in removing the property, is no answer to a charge of stealing. *Mutters, L. & C.* 511; 34 *L. J. M. C.* 54 (1865). But the male prisoner cannot be convicted of stealing the husband's money (missed on his and the wife's departure) unless he be proved to have taken some active part in removing the goods or spending the money. *Taylor*, 12 *Cox C. C.* 627 (1874). If the wife and the adulterer take away only the wife's necessary wearing apparel it is not larceny. *Fitch, Dears. & B. C. C.* 187; 26 *L. J. M. C.* 169 (1857). Where there was no evidence of a taking of the goods by any one other than the wife, it was held, under the old law, that the prisoner could not be convicted of receiving the property, knowing it to have been stolen, though he was found with the wife in Ireland in actual possession of some of the husband's property, and it was also held that whether the wife had committed adultery or not she could not steal her husband's goods. *Kenny*, 2 *Q. B. D.* 307; 46 *L. J. M. C.* 156 (1877); *C. C. R.* There must be a joint possession within the jurisdiction of the court in order to convict the male prisoner. *Prince*, 11 *Cox C. C.* 145 (1868), p. 563, where the goods were taken from Notting Hill, and the prisoner and the woman were found at Liverpool.

A change, however, has now taken place in the law, for the effect of 45-6 V. 75, 12, 16, p. 107, is that a husband may prosecute his wife—and *vice versâ*—for *any offence* against his property, except for acts done while they were living together, unless the property was taken in view of an imminent desertion, if she is living apart; but if they are living together he cannot take any criminal proceeding by virtue of this Act. Thus, the case of a wife taking her husband's goods and running away is clearly met, and, moreover, if she runs away with an adulterer, as she can now be found guilty of stealing, so he may be of receiving or of jointly stealing.

By s. 12, "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso, hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife." Cf. p. 561.

By s. 16, "A wife doing any act with respect to any property of her husband, which if done by the husband with respect to the property of the wife would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband."

S. 12 does not entitle a wife to take criminal proceedings against her husband for libel, as such proceedings are not for "the protection and security of her own separate *property*" which "her fair fame is not." *Lord Mayor of London*, 16 *Q. B. D.* 772; 55 *L. J. M. C.* 118; 16 *Cox C. C.* 81 (1886), p. 570. In order to clear up the question which arose in *Brittleton*, 12 *Q. B. D.* 266 (1884), *C. C. R.*, whether the husband was competent to give evidence against his wife upon a charge of stealing his goods (when it was held that he could not), it was enacted by 47-8 V. 14, 1: "In any such criminal proceeding against a husband or a wife as is authorised by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence." And this is equally clear from 61-2 V. 36, 4 (1), p. 830.

A wife stealing from her husband is only guilty of larceny under ss. 12, 16; but such taking is not larceny at common law nor by virtue of 24-5 V. 96. *Streeter*, 1900, 2 *Q. B.* 607; 19 *Cox C. C.* 570; *C. C. R.*, pp. 554, 788. The result of this is important in receiving cases; see p. 741.

An indictment is not bad against a wife for not averring that she was the prosecutor's wife or that the theft took place when she was deserting her husband, the proviso to s. 12 merely affording a defence and the circumstances stated therein not requiring to be negatived. *James*, 20 *Cox C. C.* 156 (1902), *C. C. R.*, p. 741; cf. p. 279.

Larceny by husband.] See s. 12, p. 556.

Distinction between larceny, embezzlement, and false pretences.] The cases distinguishing between larceny and embezzlement have been stated, pp. 385, 544. It must be borne in mind that, though by 24-5 V. 96, 72, p. 376, a prisoner on an indictment for larceny, may be found guilty of embezzlement, and on an indictment for embezzlement may be found guilty of larceny, yet the verdict must be found according to the facts, and a prisoner cannot be legally convicted of one of these offences on facts which constitute the other. *Gorbutt*, p. 385. See p. 385.

If the prisoner be indicted for obtaining money or goods by false pretences, and the offence turn out to be larceny, the prisoner is not entitled to be acquitted of the misdemeanor; so that there is no difficulty in this case analogous to that which was the subject of decision in *Gorbutt*, above, but, at the same time, on an indictment for false pretences, the false pretences must be proved as laid in the indictment. See *per* Crompton J., *Bulmer*, p. 424. If, however, the prisoner be indicted for larceny, and it appears that the offence was really an obtaining by false pretences, the prisoner must be acquitted. It is necessary, therefore, to distinguish the offences. The cases illustrating this distinction will be found at pp. 533, 535, 538-9. See also p. 409. But, of course, if a prisoner has been convicted of obtaining credit by false pretences, he cannot afterwards be convicted for larceny of the same goods in respect of which he obtained credit. *King*, p. 198.

Value.] The rule that evidence of some value must be given, for which it is usual to quote *Phipoe*, pp. 754, 803, was qualified by Parke B. in *Morris*, 9 *C. & P.* 349 (1849), in that the value need not be that of any coin known to the law. In *Watts*, p. 545, several counts charged the stealing of a piece of paper (cheques). Three pigs which had been bitten by a mad dog were shot and buried, and were the same evening dug up by the prisoner and sold by him for 9*l.* odd; it was argued that the pigs had been abandoned, and were of no value to the owner, but the jury found that the pigs were not abandoned, and the court upheld the conviction. *Edwards*, 13 *Cox C. C.*

384 (1877). Neither is it necessary that the property should be of value to third persons, if valuable to the owner. Therefore a man may be convicted of stealing bankers' re-issuable notes, which have been paid. *Clarke*, 2 *Leach* 1036 (1810); *Ranson*, *ib.* 1090; *Russ. & Ry.* 232 (1812), p. 712, followed in *West, Dears. & B. C. C.* 109 (1856). In *Walsh*, *Russ. & Ry.* 215 (1812), the judges held that a cheque in the hands of the drawer is of no value, and could not be the subject of larceny, p. 803. But where the prisoner, a clerk, received from his employers a cheque on their bankers, payable to a creditor, for the purpose of giving it to such creditor, and the prisoner got the cheque cashed and appropriated the money: being found guilty of stealing the cheque, the judges affirmed the conviction. *Metcalf*, 1 *Moo. C. C.* 433 (1835), p. 803.

In certain statutory felonies, the article stolen must be *proved* to be of a certain value; *e.g.* trees, pp. 795–6. See p. 371. As to allegations of value in the indictment, see pp. 74, 76.

Proof of ownership—cases where it is unnecessary to allege or prove ownership.] In some cases, in consequence of certain sections, it is unnecessary either to allege or prove the ownership of the property stolen, as upon an indictment under 24–5 V. 96, 31, p. 433, where lead was stolen from Hendon church, many of the judges thought that the right way "of laying the case was, to allege the lead to have been 'fixed to a certain building, being the parish church, &c.,' without stating the property to be in any one." *Hickman*, 2 *East P. C.* 593; 1 *Lea.* 318 (1784). As to stealing, &c., a will, see 24–5 V. 96, 29, p. 801; as to stealing records, s. 30, *ib.* Cf. p. 76.

Ownership not changed by any number of tortious takings.] "It is a rule of law, equally well-known and established, that the possession of the true owner cannot be divested by a tortious taking; and, therefore, if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property, because these acts of theft do not change the possession of the true owner," *per* Gould J., *Wilkins*, p. 541. "If A.," says Hale, "steals the horse of B., and after C. steals the same horse from A., in this case C. is a felon, both as to A. and as to B., for, by the theft by A., B. lost not the property, nor in law the possession of his horse or other goods, and therefore in that case C. may be . . . indicted of felony" in taking the horse of B. 1 *Hale P. C.* 507. But if A. steals the horse of B., and afterwards *delivers it* to C., who was no party to the first stealing, and C. rides away with it, *animo furandi*, "yet C. is no felon to B., because tho the horse was stolen from B., yet it was stole by A., and not by C., for C. *non cepit*, neither is he a felon to A., for he had it by his delivery." *Ib.* The doctrine as to property not being changed by felony, holds also with regard to property taken by *fraud*, for otherwise a man might derive advantage from his own wrong. *Noble* v. *Adams*, 7 *Taunt.* 59 (1816); *Kilby* v. *Wilson*, *Ry. & Moo. N. P. C.* 178 (1825); *Irving* v. *Motly*, 7 *Bing.* 543 (1831). See pp. 196–7 and cf. p. 739.

Ownership of goods in custodiâ legis.] Goods seized by the sheriff under a *fi. fa.* remain the property of the defendant until "execution executed: the execution is not executed till actual seizure under the writ." *Lucas* v. *Nockells*, 10 *Bing.* 158 (1833), *H. L.*, at 182, *per* Littledale J. interpreted as meaning "until execution and sale by the sheriff." 1 *Chit. Archb. Prac.* 14*th ed.*, ch. 74, 805, 838. A sheriff's officer seized goods under a *fi. fa.* against J. S., and afterwards stole part of them. The indictment against him described the goods as the goods of J. S., upon which it was objected that they were no longer the goods of J. S., and should have been described

as the goods of the sheriff; but upon the point being reserved, the judges held, that notwithstanding the seizure, the general property remained in J. S., and the loss would fall upon him if they did not go to liquidate the debt; that the seizure left the debt as it was, and that the whole debt continued until the goods were applied to its discharge. *Eastall*, 2 *Russ. Cri.* 263, 320 (1822).

Ownership of goods of a felon.] As to forfeiture, see p. 124. The goods of a "convict," that is, of a person still under judgment of penal servitude or death, will vest in the administrator of his estate appointed under the 33–4 V. 23, 10; p. 199. Cf. p. 309.

Goods in possession of children.] "Cloaths and other necessaries provided for children by their parents are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way." 2 *East P. C.* 654; 2 *Russ. Cri.* 266. Where a son, nineteen years of age, was apprenticed to his father, and in pursuance of the indentures was furnished with clothes by the father, it was held that the clothes were the property of the son exclusively, and ought not to have been laid as that of the father. *Forsgate*, 1 *Leach* 463 (1787); see note there. Where the prisoner was indicted for stealing a pair of trousers the property of J. Jones, and it appeared that J. Jones bought the cloth of which the trousers were made, and paid for it, but the trousers were made for his son, who was seventeen years of age, and lived with his father; Patteson J. said, "I think the property is well laid. It may be laid in these cases either in the father or the child, but the better course is to lay it in the child." *Hughes*, *Carr. & M.* 593 (1842). In *Green*, p. 171, it appeared that A. was a boy of fourteen years of age living with and assisting his father; that the boots which the prisoner was charged with stealing were the property of the father, but that at the time they were stolen A. had the temporary care of the stall from which they were taken. It was held that the ownership of the goods could not be properly laid in A.

Goods in possession of bailee, &c.] "Any one who has a special property in goods stolen, may lay them to be his in an appeal or indictment for larceny, as a bailee, pawnee, lessee for years, carrier, or the like; *à fortiori*, they may be laid to be the property of the respective owners; and the indictment is good either way. But if it appear in evidence that the party, whose goods they are laid to be, had neither the property nor the possession (and for this purpose the possession of a *feme covert* or servant is, generally speaking, the possession of the husband or master), the prisoner ought to be acquitted on that indictment." 2 *East P. C.* 652; following 1 *Hale P. C.* 512–13. This passage is criticised 2 *Russ. Cri.* 258–9. See below, and p. 561. Many cases have been decided on this principle.

Goods stolen from a *washerwoman*, who takes in the linen of other persons to wash, may be laid to be her property; "for persons of this description have a possessory property, and are answerable to their employers, and could all maintain an appeal of robbery or larceny, and have restitution." *Packer*, 2 *East*, *ib.*; 1 *Leach* 357 *n.* (1714). So an *agister*, who only takes in sheep to agist for another, may lay them to be his property; for he has the possession of them, and may maintain trespass against any who takes them away. *Woodward*, *ib.* (1796). A *coach-master* in whose yard a carriage is placed, and who is answerable for it, may lay the property in himself. *Taylor*, *ib.* (1785). Goods at an *inn*, used by a guest, when stolen, may be laid to be either the property of the innkeeper or the guest. *Todd*, *ib.* (1711). Where the landlord of a public house had the care of a box belonging to a benefit society, and by the rules he ought to have had a key, but in fact had

none, and two of the stewards had each a key; the box being stolen, upon an indictment laying the property in the landlord, Parke J. held, that there was sufficient evidence to go to the jury of the property being in the landlord alone. *Wymer*, 4 *C. & P.* 391 (1830); cf. p. 554. See also *Bird*, pp. 299, 315.

When property is parted with by a bailee under a mistake, his special property in it is not divested; and if a larceny of it be committed, it may well be laid as the property of such bailee. *Vincent*, 2 *Den. C. C. R.* 464 (1852); cf. p. 531.

Goods in possession of carriers.] See *East*, above, p. 559. So the property may be laid in the driver of a stage-coach. *Deakin*, 2 *Leach* 862 (1800), p. 561; *East, ib.*; 2 *Russ. Cri.* 265.

Goods of deceased persons.] Where a person dies intestate, and the goods of the deceased are stolen before administration granted, the property must be laid as "*bona episcopi de D.* ordinary of the diocese": but if he dies, leaving a will, and making executors, the property may be laid in them, though they have not proved the will; and it is not necessary that they should "show specially their title as ordinary or executor," because "it is of their own possession." 1 *Hale P. C.* 514; 2 *East P. C.* 652. Where the deceased had appointed executors who would not prove the will, Bolland B. and Coleridge J. held, that the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration. *George Smith*, 7 *C. & P.* 147 (1835); cf. *Johnson, Dears. & B. C. C.* 340; 27 *L. J. M. C.* 52 (1857), below. "There can be no property in a dead corpse," and though "a very high misdemeanor," the stealing of it is no felony. See p. 364. "A shroud stolen from the corpse must be laid to be the property of the executors, or whoever else buried the deceased, and not of the deceased himself." So, the coffin may be laid to be the goods of the executors. "But if it do not readily appear who is the personal representative of the deceased, laying it to be the goods of a person unknown is sufficient." 2 *East P. C.* 652. A knife was stolen from the pocket of A. as he lay dead on the road in the diocese of W. A.'s last place of abode was at T. in another diocese, but Patteson J., the jury finding the theft took place after death, held, that there was sufficient proof to support a count for larceny of the property of the Bishop of W. *Tippin, C. & M.* 545 (1842).

For the property of an intestate described as that of the person in actual possession, see *Gabey, Scott*, p. 555.

The prisoner was charged with stealing a number of articles laid as the property of the Bishop of P. It was shown that an unsuccessful search had been made for a will in the boxes and drawers of the deceased, and that no administration had been taken out in the proper court. As to some of the articles charged, it was shown that they were in the possession of the deceased at the time of her death; but as to the majority there was no evidence of this, but it was shown that on the day of the funeral they were taken by the prisoner to the house of a witness. The court, at the trial, refused to confine the case to the things shown to have been in the possession of the deceased at the time of her death, and the jury found the prisoner guilty. It was held that there was sufficient evidence of the intestacy of the deceased, and that the property was in the ordinary; and that the conviction was right: it was quite enough to prove one article was in possession of the deceased at her death. *Johnson*, above; cf. p. 72.

Goods of lodgers.] Where a room and the furniture in it, are let to a lodger, he has the sole right to the possession, and if the goods are stolen, it

has been held that the property must be laid in the lodger. *Belstead*, *Russ. & Ry.* 411 (1820); *Brunswick*, 1 *Moo. C. C.* 26 (1824).

Goods of married women.] See 2 *East P. C.* 652, cited p. 559, and *French*, and *Wilford*, p. 309. But where the wife's separate property is in question, under 45–6 V. 75, 12, p. 556, it is sufficient to allege it to be hers. As to a woman's change of name on marriage, see *Turner*, p. 74.

Goods of persons unknown.] Felony may be committed in stealing goods, though the owner is not known, and they may be described in the indictment as "the goods of a person to the jurors unknown." 2 *East P. C.* 651; 1 *Hale P. C.* 512. "But if the owner be really known, an indictment alleging the goods to be the property of a person unknown would be improper. *East, ib.*

"In prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino*; for it is not enough that the prisoner is unable to give a good account how he came by the goods." *East, ib.*, and 657; 2 *Hale P. C.* 290. See also *Robinson*, p. 75, and 2 *Russ. Cri.* 269.

Goods in the possession of servants.] See 2 *East P. C.* 652, cited p. 559, and 2 *Russ. Cri.* 261. Upon an indictment for stealing goods from a dissenting chapel, laying the property in one Evans, it appeared that Evans was the servant of the trustees; that he had a salary of 5*l.* a year, with the care of the chapel, &c., to clean and keep in order; that he held the only key of the chapel, but that the minister had a key of the vestry, through which he might enter the chapel. The judges were of opinion that the property of the goods taken could not be considered as in Evans. *Hutchinson*, *Russ. & Ry.* 412 (1820). So where the prisoner was convicted of larceny from the house of W., and at the trial B. proved that he managed the property for W., who resided at Patras; that he received the rent in W.'s absence, and let the house, it was held that there was sufficient evidence of W.'s ownership to support the conviction. *Brummitt*, *L. & C.* 9 (1861). But in some cases, as against *third persons*, a person who, as against his employer, has the bare *charge* of goods, may be considered as having the possession, *e.g.* the driver of a stage-coach. *Deakin*, p. 560. As to stealing from one's own servant, see p. 552.

Goods of corporations.] See pp. 524, &c., 553. The goods of a corporation must be described as their goods, by their corporate name. Where in an indictment the goods were laid to be the property of A. B., C. D., &c., they the said A. B., C. D., &c., being the churchwardens of the parish church; and it appeared that the churchwardens were statutorily incorporated by the name of "the churchwardens of the parish church of Enfield," the court held the variance fatal. *Patrick*, 1 *Leach* 253 (1783). But where trustees were appointed by Act, but not incorporated, for providing a workhouse, and the property stolen from them was laid to be the property of "the trustees of the poor of," &c., without naming them, the court held it wrong; for as the Act had not incorporated the trustees, and by that means given them collectively a public name, the property should have been laid as belonging to A., B., C., &c., by their proper names, and the words "trustees of the poor of," &c., subjoined as a description of the capacity in which they were authorised to act. *Sherrington*, 1 *Leach* 513 (1789). Certain inhabitants in seven parishes were incorporated by the name of "the guardians of the poor of," &c. Twelve directors were to be appointed out of the guardians, and the property

belonging to the corporation was vested in "the directors for the time being," who were to execute the powers of the Act. The prisoner was indicted for embezzling the moneys of "the directors of the poor," &c. The judges held, that the money should have been laid, either as the money "of the guardians of the poor," by their corporate name, or of the directors for the time being, in their individual names. *Beacall*, p. 378. See *Jones*, pp. 463, 474.

In *Frankland*, *L. & C.* 276; 32 *L. J. M. C.* 69 (1863), it was objected that the indictment (embezzlement) laid the property in A. B. and others, "his masters," whereas there was evidence to go to the jury that the prosecutors were an incorporated company. If they had been proved to be so, they ought to have been alleged to be so in the indictment, and then the indictment under ss. 68, 71, 72, pp. 376–7, would have been good under 24–5 V. 96, 81, p. 717, and not triable at Quarter Sessions, by s. 87, pp. 164, 717. But the court held that there was not sufficient evidence of the incorporation; which might be proved by the certificate of incorporation under the Joint Stock Companies Acts, but could not be presumed from the fact that persons purported to be a trade corporation and acted as such, whatever might be the case with respect to a corporation "for public purposes" or by prescription.

In *Langton*, p. 120, it was held that it was not necessary to produce the certificate of incorporation of a company, but that the existence of the company was sufficiently proved by evidence that it had carried on business as such.

The prisoners were convicted of stealing some brass, described in the indictment as the property of H. The evidence was that the brass was the property of a trading company (limited) in course of being wound up, and that H. was the official liquidator, in proof of which a copy of the *London Gazette* was produced, containing an advertisement of a meeting of the company in which a resolution that the company be wound up and H. and S. be appointed official liquidators had been passed, but there was no further evidence that the brass was the property of H., or that he had dealt with it as his property. The conviction was quashed on appeal, the court holding that the evidence failed to show that H. had ever taken possession of the brass, although he might have had a title to the property. *Bell*, 13 *Cox C. C.* 623 (1877), *C. C. R.*

As to certificates under 40–1 V. 26, 6, proving themselves, see p. 144.

Goods in a church.] See *Wortley*, p. 764, and cf. p. 434.

Venue.] See 24–5 V. 96, 114, set out, p. 218. See also s. 115, p. 215. An indictment for larceny must formerly have been tried in the county in which the offence was, either actually, or in contemplation of law, committed. But where goods stolen in one county were carried by the offender into another or others, he might be indicted in any of them, "for the continuance of the asportation is a new caption," *i.e.* "the offence is complete" in all: "but if he be indicted of robbery, it must be in the county where the force and putting in fear was." Cf. p. 753. 1 *Hale P. C.* 507–8; 4 *Bl. Com.* 305; 1 *Moo. C. C.* 47, *n.*; 1 *Hawk. P. C.* Bk. 1, ch. 33 (pt. 1), s. 52. Thus there was a conviction in Durham where property was stolen on the 4th November, 1823, in Yorkshire, and carried into Durham on the 17th March, 1824. *Parkin*, p. 189. This rule did not, however, hold with regard to compound larcenies (see p. 523), in which case the prisoner could only be tried for the simple larceny in the second county. Thus, where the prisoner robbed the mail of a letter, either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted in that county, the judges held, that he could not be convicted capitally out of the county in which the letter was taken from the mail. *Thomson*, 2 *Russ. Cri.* 283 (1795), "the felony travels,"

i.e. but not the aggravation. So if A. *rob* B. in the county of C., and carries the goods into the county of D., A. could not be convicted of *robbery* (p. 753) in the latter county, but he might be indicted for larceny there. *Hale* 2 *P. C.* 163, and above. Where the theft from the person was at Swindon (Wilts.), Jelf J. held he had no jurisdiction to try in the city of Gloucester (where the arrest was) and that the jury could not find simple larceny on the indictment for compound larceny (see p. 70). He also doubted whether he could amend under 14–15 V. 100, 1, p. 176, by striking out the words "from the person." *Fenley and others*, 20 *Cox C. C.* 252 (1903). "If the thing stolen is altered in character in the first county, so as to be no longer what it was when stolen, an indictment in the second county must describe it according to its altered, and not according to its original, state." 2 *Russ. Cri.* 283; see *Edwards*, pp. 74, 428. Thus an indictment in the county of H., for stealing "one brass furnace," is not supported by evidence that the prisoner stole the furnace in the county of R., and there broke it to pieces, and brought the pieces into the county of H. *Halloway*, p. 428. A joint original larceny in one county may become a separate larceny in another. Thus where four prisoners (probably) stole goods in the county of Gloucester, and divided them in that county, and then carried their shares into the county of Worcester, in separate bags, it was ruled by Holroyd J. that the joint indictment against all the prisoners could not be sustained as for a joint larceny in the county of Worcester; and he put the counsel for the prosecution to his election, as to which of the prisoners he would proceed against separately. *Barnett*, 2 *Russ. Cri.* 284 (1818), and *note*. Cf. p. 175. But where a larceny was committed by two, and one of them carried the stolen goods into another county, the other still accompanying him, without their ever having been separated, they were held both indictable in either county, the possession of one being the possession of both in each county, as long as they continue in company. *M'Donagh*, *Car. Suppl.* 23, *3rd ed.* (1824).

A man may be indicted for larceny in the county into which the goods are carried, although he did not himself carry them thither. The prisoners, C. and D., laid a plan to get some coats under pretence of buying them. The prosecutrix had them in Surrey, at a public-house; the prisoners got her to leave them with D. while she went with C., that he might get the money to pay for them. In her absence D. carried them into Middlesex, and C. afterwards joined him there, and concurred in securing them. The indictment was against both in Middlesex, and the judges were unanimous that as C. was present aiding and abetting in Surrey at the original larceny, his concurrence afterwards in Middlesex, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in Middlesex. *County*, 2 *Russ. Cri.* 285 (1816).

See also as to joint possession within the jurisdiction of the court, *Prince*, p. 556.

The prisoner was tried in Kent for stealing two geldings in that county. The horses were stolen in Sussex. The prisoner was apprehended with them at Croydon, in Surrey. The only evidence to support the charge of stealing in Kent was, that when the prisoner was apprehended at Croydon, he made excuses that the horses belonged to his brother in Kent, and being conveyed thither with an officer on the horses, he made his escape thence, without the horses. The prisoner was convicted, but sentence was not passed. The judges were unanimously of opinion that there was no evidence to be left to the jury of stealing in Kent, and that no judgment ought to be given upon the conviction, but that the prisoner should be removed to Surrey. *Simmonds*, 1 *Moody C. C.* 408 (1834). The prisoner was indicted at common law for stealing a quantity of lead in Middlesex. The lead was stolen from the roof of the church of Iver, in Bucks. The prisoner being

indicted at the Central Criminal Court, which had jurisdiction in Middlesex, and not in Bucks. (p. 219), the court held that he could not be convicted there, "on the ground that the original taking not being a larceny [at common law], but created by statute a felony, the subsequent possession could not be considered a larceny." *Millar*, 7 *C. & P.* 665 (1837), p. 434, cf. p. 764.

Rogers and Byatt were indicted at the Middlesex sessions for stealing and receiving a watch: the latter pleaded guilty, the former was convicted of stealing. The watch was stolen at Liverpool, and was sent by railway next day and delivered to Byatt in Middlesex. Rogers had by letter advised Byatt of his sending the watch, but it was not proved that he had left Liverpool. It was held that Rogers was still constructively in possession of it in Middlesex, and, therefore, triable there. *Rogers*, *L. R.* 1 *C. C. R.* 136; 37 *L. J. M. C.* 83 (1868).

"If the original taking be one of which the common law cannot take cognisance, as if the goods be stolen at sea, the thief cannot be indicted for larceny in any county into which he may carry them." 2 *Russ. Cri.* 286, citing 3 *Inst.* 113. See p. 213. And so where the goods are stolen abroad, though within the King's dominions (as in Jersey), carrying them into an English county will not render the offender indictable here. *Prowes*, 1 *Moody C. C.* 349 (1832); *Debruiel*, 11 *Cox C. C.* 207 (1861). So where the goods are stolen in France. *Madge*, 9 *C. & P.* 29 (1839). See *Stroud's Dictionary*, as cited p. 218, and cf. *Garrett*, p. 409.

LIBEL.

Blasphemous libels—at common law.] "All blasphemies against God or the Christian Religion, or the Holy Scriptures, are indictable at common law. . . . So are all impostors in religion; such as falsely pretend to extraordinary missions from God, or terrify or abuse the people with false denunciations of judgments. . . . In like manner all malicious revilings, in public derogation and contempt of the established religion, are punishable by the common law, inasmuch as they tend to a breach of the peace." 1 *East P. C.* 3. So it has been said, "Christianity in general is parcel of the common law of England," and that to write against Christianity *in general* is clearly an offence at common law, but the court laid stress on the words "*in general*," and "did not intend to include disputes between learned men on particular controverted points," but "interpose only where the very root of Christianity it self is struck at." *Woolston, Fitzgib.* 66; 2 *Str.* 834 (1739), where *Taylor*, 1 *Vent.* 293 (1677), was cited; but see *Ramsay and Foote*, below. It is an indictable offence at common law to publish a blasphemous libel of and concerning the Old Testament. *Hetherington*, 5 *Jur.* 529 (1841). Cf. *Petcherini*, 7 *Cox C. C.* 79 (1855), where a Catholic priest in Ireland was acquitted of the common law charge (Irving, *Annals of our Time*, December 7, 1855), of contemptuously burning in public a Protestant Bible.

As to the limits of religious or Biblical controversy, it has been observed: "A malicious and mischievous intention, or what is equivalent to such an intention, in law as well as morals—a state of apathy and indifference to the interests of society—is the broad boundary between right and wrong.

If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy, or even to weaken men's sense of religious or moral obligations, to insult those who believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete." *Starkie* on *Slander, &c.*, 625, *6th. ed.* (1897), part of a passage cited with approval by L. Coleridge C.J. in *Ramsay and Foote*, below. Upon an information alleging, amongst others, a libel to the effect that "Jesus Christ was an impostor, and a murderer in principle, and a fanatic," a juryman inquired whether a work "which denied the divinity of our Saviour was a libel," Abbott C.J. replied, that "a work speaking of Jesus Christ in the language" *here* used "was a libel," and the defendant was found guilty. Upon a motion for a new trial, on the ground that this was a wrong answer to the question put, the K. B. held the answer correct. *Waddington*, 1 *B. & C.* 26 (1822), p. 567. The question whether writing against Christianity without levity or scurrilous abuse is libellous was discussed at length in *Bradlaugh*, p. 109, and in *Ramsay and Foote*, 15 *Cox C. C.* 231; 48 *L. T.* 733; 1 *Cab. & E.* 126 (1883), —practically one case—where the summing up of L. Coleridge C.J. covered the whole legal and philosophical ground which may, perhaps, be summarised in his express *ruling* "that if the decencies of controversy are observed,

even the fundamentals of religion may be attacked without the writer being guilty of blasphemy," and this, he believed, "always has been the law" (*Cox* 238); and (though, perhaps, it is going too far to say, with some earlier editions of this work, that) it is certain that no case can be found in which a person has been convicted of a blasphemous libel merely for a denial of the truth of Christianity without levity or indecency, yet even Stephen J. who publicly dissented from L. Coleridge's view of the law, says, "Most of the cases are old and I do not think that, in fact, any one has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity." *Digest of Crim. Law*, note to ch. 17, art. 179, where the conflicting views are set out with complete impartiality in parallel columns (the statement of that of L. Coleridge having been authorised by him), and with abundant references to authorities.

Blasphemous libels—statutes.] By 1 E. 6, 1, persons reviling the sacrament of the Lord's Supper "shall suffer imprisonement of his or their bodies and make fyne and ransome at the king's will and pleasure." By 1 Eliz. 2, 3, applied to the *present* Book of Common Prayer by 14 Car. 2, 4, 20 (to which it is annexed: see *The Statutes Revised*, *2nd ed.*, note to s. 1), any one who "shall in anye entreludes playes songes rymes or by other open woordes declare or speake anye thing in the derogation depraving or despising of the same booke, or of any thing therein conteyned or any parte therof" is punishable as therein mentioned. See also 13 Eliz. 12; 3 J. 1, 21 (repealed 6–7 V. 68, 1). See p. 743.

By 9–10 W. 3, 35 (otherwise 32), 1: "if any person or persons having been educated in or at any time having made profession of the Christian religion within this realm shal, by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or shal assert or maintain there are more gods than one, or shal deny the Christian religion to be true or the Holy Scriptures of the Old and New Testament to be of divine authority, and shal upon indictment or information in any of his Majestie's courts at Westminster or at the assizes be thereof lawfully convicted by the oath of two or more credible witnesses such person or persons for the first offence shal be adjudged incapable and disabled in law to all intents and purposes whatsoever to have or enjoy any office or offices imployment or imployms. ecclesiastical civil or military or any part in them or any profit or advantage appertaining to them or any of them. And if any person or persons so convicted as aforesaid, shal at the time of his or their conviction enjoy or possess any office place or imployment such office place or imployment shall be voyd, and is hereby declared voyd. And if such person or persons shall be a second time lawfully convicted as aforesaid of all or any the aforesaid crime or crimes that then he or they shal from thenceforth be disabled to sue prosecute plead or use any action or information in any court of law or equity or to be guardian of any child or executor or administrator of any person or capable of any legacie or deed of gift or to bear any office civil or military, or benefice ecclesiastical for ever within this realm and shall also suffer imprisonment for the space of three years without bail or mainprize [= delivering to sureties], from the time of such conviction."

By s. 2, information of such words must be given upon oath before a justice, within four days after such words spoken, and the prosecution of such offence be within three months after such information.

By s. 3, persons convicted shall for the first offence (upon renunciation of "such offence or erronious opinions" in the court where they were convicted, within four months after such conviction) be discharged from all penalties and disabilities incurred by such conviction.

So much of 1 W. & M. 18, 17, and 9–10 W. 3, 32 (above), as relates

to persons denying the doctrine of the Trinity, was repealed by 53 G. 3, 160 (itself repealed S. L. R. Act, 1873); 9–10 W. 3, above, has been held not to affect the common law offence, but to be cumulative. *Richard Carlile*, 3 *B. & Ald.* 161; 1 *Chit.* 451 (1819), p. 574. *Waddington*, p. 565.

It was held by L. Coleridge C.J. that 6–7 V. 96, 7, p. 576, applies to blasphemous libels. *Bradlaugh*, pp. 109, 565.

Indecent libels.] Although an opinion formerly prevailed that the publication of an obscene or indecent writing or, indeed, any writing not containing reflections upon any individual was not a libel nor an indictable offence (though "the author may be bound to his good behaviour as a scandalous person of evil fame"); 2 *Hawk. P. C.* Bk. 1, ch. 73, s. 9; yet a different rule has been since established (p. 570), and it is now clear that an indictment at common law may be maintained for any offence which is against public morals or decency. *Sidley, Sid.* 168 (1664); *Wilkes*, 4 *Burr.* 2527 (1764: information for the Essay on Woman); *Holt* on *Libel*, 73, *2nd ed.* (1816), who says, "Under this head of obscene exhibition may be comprehended every species of representation, whether by writing, by picture, or by any manner of sign or substitute which is indecent and contrary to public order, and natural feeling." Cf. *Grey*, p. 660. The principle of the cases also seems "to comprehend other indecent and immoral communications, especially when made before a large assembly, such as the performance of an obscene play, which offence, it seems, has formed the ground of many prosecutions. *Str.* 790" [*Curl* in 1727]; 2 *Stark.* on *Slander*, 159, *2nd ed.* (1830); cf. *6th ed.*, p. 632 (1897); *Holt*, above. In an indictment for publishing an obscene book, it was formerly not sufficient to describe the book by its title only, but the words alleged to be obscene had to be set out. *Bradlaugh* v. *R.*, p. 199. But now by 51–2 V. 64, 7, it is not necessary to set out in the indictment the obscene matter, but the book, &c., with particulars, must be deposited.

A summary power of searching for obscene books, pictures, and other articles, and punishing persons in whose possession they are found, is given by 20–1 V. 83, p. 660. See p. 570.

Libels on government.] "It is the undoubted right of every member of the community to publish his own opinions on all subjects of public and common interest, and so long as he exercises this inestimable privilege, candidly, honestly, and sincerely, with a view to benefit society, he is not amenable as a criminal. This is the plain line of demarcation: when this boundary is overstepped, and the license is abused either for the wanton gratification of private malice, in aiming a stab at the private character of a minister under colour and pretence of discussing his public conduct, or where either public men or their measures are denounced in terms of obloquy and contumely, under pretence of exposing defects, and correcting errors, but, in reality, for the purpose of obstructing and impeding the administration of public affairs, or of alienating the affections of the people from the king and his government, and by weakening the ties of allegiance and loyalty, to pave the way for sudden and violent changes, sedition, or even revolution; in these and similar instances, where public mischief is the object of the act, and the means used are calculated to effect that object, the publication is noxious and injurious to society, and is therefore criminal." 2 *Stark.* on *Slander*, 183, *2nd ed.*; 650, *6th. ed.* With great respect to this very learned writer, it may be doubted whether the "line of demarcation" *is* "plain." Cf. 1 *Russ. Cri.* 622; *Lambert and Perry*, 2 *Campb.* 398 (1810), p. 578; *Tuchin, Holt Rep.* 424 (1704); 14 *St. Tr.* 1095; *Holt* on *Libel*, cc. 5–7; *Collins*, 9 *C. & P.* 456 (1839); *Lovett, ib.* 462 (1839), p. 573; *Sullivan and Pigott*, 11 *Cox C. C.*

44 (1868), p. 582, where, *per* Fitzgerald J. "Lord Kenyon has quaintly said 'a man may publish whatever a jury of his countrymen think is not blamable.'"

Libels on the administration of justice.] Cf. p. 697. Where a person either by writing, by publications in print, or by any other means calumniates the proceedings of a court of justice, "the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the Constitution itself." *Per* Buller J., *Watson*, 2 *T. R.* 199 (1788). It certainly is lawful, "with decency and candour, to discuss the propriety of the verdict of a jury or the decisions of a judge . . ." but if the writing impugned "contained no reasoning or discussion, but only declamation and invective, and were written, not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice," it is punishable. *Per* Grose J., *White*, 1 *Campb.* 359 (1808).

Libels upon individuals.] "A libel in a strict sense is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead (p. 569), or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule." 2 *Hawk. P. C.* Bk. 1, ch. 73, s. 1. "Though the words impute no punishable crimes," yet if "they contain that sort of imputation which is calculated to vilify a man and to bring him, as the books say, into hatred, contempt, and ridicule," an indictment lies. *Per* Mansfield C.J., *Thorley* v. *L. Kerry*, 4 *Taunt.* at 364 (1812); *Digby* v. *Thompson*, 4 *B. & Ad.* 821 (1833). "No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals or of society be interrupted, or even exposed by types and figures, the act, by the law of England, is a libel." *Per* L. Ellenborough, *Cobbett*, 29 *St. Tr.* at 50–1 (1804). Thus an information was granted against Smollett, the novelist, for a libel in the "Critical Review," upon Admiral Knowles, insinuating that he wanted courage and veracity, and suggesting that he was "of a conceited, obstinate, and incendiary disposition, &c." *Smollett* (1759), *Holt* on *Libel*, 224 *n.* So an information was granted against the printer of a newspaper "for a ludicrous paragraph" giving an account of the Earl of Clanricard's marriage with an actress at Dublin. *Kinnersley*, 1 *W. Bl.* 294 (1760). And for a libel on the Bishop of Derry contained in a paragraph which represented him as a "bankrupt." *Anon.* (1812); *Holt*, as above, 224 *n.* It has been held by five judges that "the rule to be collected from the modern decisions is that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, and not at the suit of private persons." *Labouchere*, 12 *Q. B. D.* 320; 15 *Cox C. C.* 415, p. 570, where cf. *Peltier.*

A letter containing immodest proposals to a young woman has been held to be a libel, on the ground that, in the circumstances, it was of a character to provoke a breach of the peace. *Adams*, 22 *Q. B. D.* 66; 58 *L. J. M. C.* 1; 16 *Cox C. C.* 544 (1888); *C. C. R.*

It is extremely difficult to define the boundaries beyond which reflections upon the character of an individual are commonly cognisable. It is said by Mr. Holt, 218 (as above), "where there is no imputation on the moral character of the plaintiff; no words of ridicule or contempt; nothing which can affect his reception in life, or exclude him from general society, it is no libel." An alleged libel was this: "The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." This libel was published in the "Cassino room" at

Southwold, by posting it on a paper. It was held, that the paper and mode of promulgating it did not amount to a libel: 1st, because "it did not, by any necessary or probable implication, affect the moral fame of the plaintiff; 2nd, that it was the regulation of a subscription assembly, and the paper might import no more than that the plaintiff was not a social and agreeable character in the intercourse of common life; 3rd, that the words charged him with nothing definite, threw no blemish on his reputation, and implied no unfitness for general society." *Robinson* v. *Jermyn*, 1 *Price*, 11 (1814); "*sed quaere*," *Odgers on Libel*, 20, 4th edn.

In *Gregory* v. *B.*, p. 192, the Exchequer Chamber held the following words indictable for libel (on B.): "Why should T. be surprised at anything Mrs. W. does? if she chooses to entertain B. she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all infatuated foreigners who crowd our streets to her table if she thinks fit." Where a placard to the following effect was posted up: "B. Oakley, of Chillington, game and rabbit destroyer, and his wife, the seller of the same in country and town," Quain J. ruled that this was not *primâ facie* libellous; and, as there was no innuendo showing that it charged an indictable offence, or that it related to the calling of B. O., quashed the indictment. *Yates*, 12 *Cox C. C.* 233 (1872). It is a *defamatory* libel to write of a person who has been convicted of felony that he is "a convicted felon," if he has received a pardon, or suffered his sentence, for he is by law no longer a felon. *Leyman* v. *Latimer*, 3 *Ex. D.* 352; 47 *L. J. Ex.* 470 (1878); *C. A.* Cf. *Hay* v. *Justices of Tower Division*, p. 125.

There seems to be no precise legal distinction between the *crime* of libel and the *tort of* libel. It is stated that L. Hardwicke "puts actions and indictments for libels precisely on the same footing." *Holt*, 215–16 (as above); see 1 *Russ. Cri.* 597, thereon. Dr. Kenny (*Outlines*, ch. 21, which see) points out that the criminal and the civil rules are "fundamentally . . . similar," but differ in "some five minor points," which will be dealt with in their place, below. As to modern practice, he observes, "The judges of the present day desire to see indictments for defamation restricted to those cases in which the libel is aggravated either by its intrinsic gravity or by its obstinate repetition."

Slander.] If a man write or print, and publish, of another that he is "a swindler," *T'Anson* v. *Stuart*, 1 *T. R.* 748 (1787), p. 662, &c.; or "villain," *Bell* v. *Stone*, 1 *B. & P.* 331 (1798), it is an actionable libel; but if these words were merely spoken, they would not be actionable without special damage. *Savile* v. *Jardine*, 2 *H. Bl.* 531 (1795). But no indictment will lie for mere words not in writing; *Beare*, 1 *L. Raym.* 414; *Carth.* 407; 2 *Salk.* 417 (1698), p. 573; *Langley*, 6 *Mod.* 125 (1704), where Holt C.J. said, "Words that directly tend to breach of peace may be indictable; but otherwise, to encourage indictments for words would make them as uncertain as actions for words are;" *unless* they be seditious, or blasphemous, or obscene, or reflect on the administration of justice, or convey a challenge to fight. *Kenny*, at 313 (as above).

Libel on the dead, foreigners, &c.] It has been held, that a writing, reflecting on the memory of a dead person, not alleged to be published with a design to bring scandal or contempt on the family of the deceased, or "to induce them to break the peace in vindicating the honour of the family," is not indictable. *Topham*, 4 *T. R.* 126 (1791), p. 580; and see *Taylor*, 3 *Salk.* 198; 2 *L. Raym.* 879 (1704), where the conviction was rather for seditious words in favour of regicide than for defamation of Charles I., Charles II., James II., or William III.; *Holt* on *Lib.* 230, *2nd ed.*; and *semble*, that an indictment or criminal information for a libel upon a deceased person made by his representative will be refused—unless the circumstances are exceptional.

Labouchere, below. However, in 1692, *Anthony Wood* was prosecuted in the court of the Vice-Chancellor of the University of Oxford by the second Earl of Clarendon for having libelled the first earl, his father, the Lord Chancellor at the Restoration, by the statement that he had sold offices, and was condemned in costs and expelled the University. 4 *Wood's Life and Times*, by *A. Clark* (Oxford Historical Society, 1895), pp. 1–50.

A libel upon a foreigner is indictable. Thus L. George Gordon was found guilty upon an information for a libel on the Queen of France, 22 *St. Tr.* 213 (1787); and informations have also been granted and convictions obtained for libels upon the characters of the Emperor of Russia, *Vint, &c.*, 27 *St. Tr.* 627 (1799), and of Napoleon Buonaparte, then Chief Consul of the French Republic, *Peltier*, 28 *St. Tr.* 530 (1803), p. 574. In *Peltier*, L. Ellenborough appears to have considered the rank of the individual as forming one ground of the decision, saying, "I lay it down as law that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries." Cf. *Labouchere* (p. 568). The fact that the applicant for such information does not reside in this country is a strong reason for rejecting the application. *Ib.*

It is not necessary that the libel should reflect upon the character of any particular individual, provided, if it reflects "on a body, class, or sect," it immediately tend to produce tumult and disorder; *Stark.* on *Slander*, 744, *6th ed.*; although the contrary was formerly held, p. 567. Thus an information was granted for a libel, containing an account of a murder of a child (and, perhaps, a woman) by certain Jews lately arrived from Portugal; and the affidavits set forth that certain persons in different parts of the city had been attacked by the mob, and barbarously treated in consequence of the libel. *Osborne*, 2 *Barnard. K. B.* 138, 166; *W. Kelynge*, 230 (*2nd part*); 25 *Engl. R.* 584 (1732).

"Informations at the suit of public bodies upon the application of certain individuals presiding over them, have been frequently granted" by the King's Bench. *Campbell* (1808: College of Physicians); *Bell* (1808: Foundling Hospital); *Holt* on *Lib.* 240, *2nd ed.*; *Williams*, 5 *B.* & *Ald.* 595 (1822: Clergy of Durham diocese).

A wife cannot take criminal proceedings against her husband for libel. *Lord Mayor of London*, p. 557.

Indictment.] An indictment under s. 5, below, charged the defendant with "unlawfully" publishing a libel, but omitted the word "maliciously"; it was held that that s. did not create an offence, but awarded the punishment for one existing at common law, and as an averment of malice was unnecessary at common law, the indictment was good; and further that even if it had been necessary the defect would have been cured by verdict. *Munslow* 1895, 1 *Q. B.* 758; 64 *L. J. M. C.* 138; 18 *Cox C. C.* 112, *C. C. R.*

It is clear that an indictment for *defamatory* libel must set out the words alleged (*Bradlaugh* v. *R.*, pp. 69, 567, &c.). But if it does not, and is bad *pro tanto*, it still may be good for *obscene* libel, if it charges the unlawful publication of obscene matter, even although it does not conclude (as it ought to do) "to the manifest corruption of the morals of his Majesty's subjects." *Barraclough*, 21 *Cox C. C.* 91 (1905), *C. C. R.*, whence it seems that the deposits (books, particulars, &c., p. 567) are sufficient though not actually handed over with the indictment, if they are already in the custody of the law.

Punishment.] The punishment for a libel, at common law, was fine or imprisonment, or both.

Now by L. Campbell's Act, 6–7 V. 96, 4: "If any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction, for any term not exceeding two years, and to pay such fine as the court shall award."

By s. 5: "If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year."

On an indictment for publishing a defamatory libel, "knowing the same to be false," the defendant may be convicted of merely publishing a defamatory libel. *Boaler* v. *R.*, 21 *Q. B. D.* 284; 57 *L. J. M. C.* 85; 16 *Cox C. C.* 488 (1888).

Costs.] By s. 8: "In the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried." This will include costs before the filing of the information, *e.g.* those of unsuccessfully opposing the rule *nisi* for the information. *Steel*, 1 *Q. B. D.* 482; 45 *L. J. Q. B.* 391; 13 *Cox C. C.* 159 (1876). An appeal was dismissed, on the ground that there is no appeal to the Court of Appeal in a criminal case except for error on the record. 2 *Q. B. D.* 37; 46 *L. J. M. C.* 1; 13 *Cox C. C.* 354 (1876): p. 204.

Under s. 8, if judgment be given for the defendant, he is entitled to recover from the prosecutor the costs sustained by reason of the indictment or information, although the only plea is not guilty (and not the special one under s. 6, p. 582), and the judge certifies (under 4–5 W. & M. 18, 2, now repealed) that there was reasonable cause for exhibiting the information, for that Act is superseded (by 6–7 V. 96). *Latimer*, 15 *Q. B.* 1077; 20 *L. J. Q. B.* 129 (1850).

Such costs can be recovered only by action in one of the superior courts. See *Richardson* v. *Willis*, *L. R.* 8 *Exch.* 69; 12 *Cox C. C.* 351 (1873).

Proof of introductory averments.] Where the indictment contains introductory averments, inserted for the purpose of explaining and pointing the libel, such averments must be proved as laid. It frequently happens that the libel is directed against the prosecutor in a particular character, and an intent to libel him in that character is averred. In such case, it must be made to appear that the prosecutor bore that character. But in general, where the character is a public one, it will be sufficient if it appear that the prosecutor has acted in it, and it will not be necessary to give strict evidence of his appointment, pp. 6, 16. See *Berryman* v. *Wise*, p. 6; *Stark.* on *Slander*, 423–4, *6th ed.*

"Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation, trade, or business is, of course, the only evidence which the fact admits of." *Stark. ib.* 434.

Whether a person practising as a physician, and libelled in his character as such, was bound to prove, by strict evidence, the introductory averment that he was a physician, was long a matter of doubt. In one case, Buller J. required such proof to be given; *Pickford* v. *Gutch*, 8 *T. R.* 305, *n.* (1787);

but in a subsequent case, the Court of Common Pleas was equally divided upon the point. *Smith* v. *Taylor*, p. 6 (1805). It has, however, been decided that to support an averment that plaintiff is a physician, it is necessary to give regular evidence, not only that he practised, but that he possessed lawful authority to do so. *Collins* v. *Carnegie*, 1 *A. & E.* 695; 3 *Nev. & M.* at 710 (1834).

In order to prove the defendant to be an attorney, an examined *copy* of the roll of attorneys, signed by him, is sufficient. So the books from the master's office containing these names copied from the original roll, produced by the officer in whose custody it is kept, is good evidence. It seems that after admission proof of the right to practise is unnecessary. *Crossley*, 2 *Esp.* 526 (1797); *Lewis* v. *Walter*, 3 *B. & C.* 138 (1822); 4 *B. & Ald.* 605 (1821), p. 582; *Jones* v. *Stevens*, 11 *Price* 235 (1822). Cf. pp. 139–40. The stamp-office certificate, countersigned by the master of the Court of King's Bench, is sufficient *primâ facie* evidence of the party being an attorney of that court. *Sparling* v. *Haddon*, 9 *Bing.* 11 (1832). The matter is now regulated by 23–4 V. 127, 22, by which the *Law List* is *primâ facie* evidence.

In all cases where the libel itself is an admission of the particular character alleged, further proof thereof is unnecessary. Thus, where in an action for words spoken of an attorney, it appearing that they contained a threat to have the plaintiff struck off the roll of attorneys, it was held unnecessary to give any proof that plaintiff was an attorney. *Berryman* v. *Wise*, p. 6. So where the words were, "He is a pettifogging, blood-sucking attorney." *Armstrong* v. *Jordan* (1826); 2 *Stark.* on *Slander*, 11 *n.*, *2nd ed.* Cf. *Bagnall* v. *Underwood*, 11 *Price* 621 (1823).

So where the declaration averred that the plaintiff had been appointed envoy by certain persons exercising the powers of government in the republic of Chili, the libel, stating that the plaintiff had colluded to obtain money in the matter of a loan for Chili, was held to be sufficient proof of the existence of such a state. *Yrisarri* v. *Clement*, 3 *Bing.* 432 (1826). So where a libel alleged that certain acts of outrage had been committed, which was set forth in an introductory averment, it was held that the latter required no further proof. *Sutton*, 4 *M. & S.* 532 (1816).

If an introductory averment be immaterial, it may be rejected as surplusage, and need not be proved; and in general, where it is not matter of description, it is divisible, and part of it only may be proved. See p. 71.

The averment that the libel was published "of and concerning" the prosecutor, or "of and concerning" the particular matters averred, must be proved as laid.

Evidence.] The declarations of spectators [explained (*T.* s. 576) as "the natural or inseparable concomitants of the principal fact in controversy"; cf. *ib.* s. 579], while viewing a libellous picture publicly exhibited, were admitted by L. Ellenborough (who held that the artist was criminally liable) as evidence to show that the figures pourtrayed were meant to represent the persons alleged to have been thus libelled. *Dubost* v. *Beresford*, 2 *Camp.* 511 (1810), p. 27. Cf. p. 577.

Proof of publication—in general.] "It may be laid down generally that all who are concerned in composing, writing, and publishing a libel are guilty of a misdemeanor, unless the part they had in the transaction was a lawful or an innocent act." 1 *Russ. Cri.* 632, citing *Bac. Abr. Libel* (*B.*) 1; but the writing or composing of a libel without a publication of it is not an offence; if one confine it to his own closet, and neither circulate nor read it to others, it is not punishable. *Paine*, 5 *Mod.* 165, 167 (1695), p. 59, as interpreted by *Russ.* 633 (as above); but the court distinctly said (167), "The making a libel is an offence though never published; and if one dictate and another write, both are guilty of making it." This probably refers to the

crime (the contrary having been expressly argued, 165); for the *tort* there must be publication. See below, and *Burdett*, pp. 578, 579, where a headnote is: "*Qu.* whether the writing and composing of a libel with intent to publish but not followed by publication be an offence." According to *Kenny, Outlines* (ch. 21), "a publication to the actual person defamed is quite sufficient to support an indictment," and this is the view of Starkie and Odgers in their well-known works. Some support is given to the opposite view in a note in *Russ. Cri.* as above. Perhaps the two views may be reconciled for, though the maker of the libel may not publish but keep it by him, there must be publication to some one, *e.g.* the finder, before it can be known to be a libel. The taking a copy of a libel is not a publication of it unless the copier publishes it. *Com. Dig. Libel* (*B.* 2).

"The question of publication is ordinarily one of mere fact, to be decided by the jury; but this, like all other legal and technical terms, involves law as well as fact; and it is a question for the court in doubtful cases whether the facts, when proved, would constitute a publication in point of law." *Stark.* on *Slander*, 809, *6th ed.*

Production of a libel, and proof that it is in the handwriting of the defendant, afford a strong presumption that he published it, if "the author of it is not known; he is taken in the manner [= *manu opere, mainœuvre*, i.e. "redhanded"], and that throws the proof upon him . . . if he cannot produce the composer." *Per* Holt C.J. *Beare*, p. 569. So if the manuscript of a libel be proved to be in the handwriting of the defendant, and to have been printed and published, this is evidence to go to a jury that it was published by him, although there be no evidence that the printing and publication were by his direction. *Lovett*, p. 567. But he may show that the publication was without his authority or knowledge; see p. 580. So "*printing* a libel may be an innocent act; but, unless qualified by circumstances, shall, *primâ facie*, be understood to be a *publishing*. It must be delivered to the compositor and the other subordinate workmen." *Per Exch. Chamber*, *Baldwin* v. *Elphinston*, 2 *W. Bl.* 1037 (1775). So a libel copied out by a clerk in the ordinary course of business is a publication to him. *Pullman* v. *Hill*, 1891, 1 *Q. B.* 524; *C. A.* A delivery of a newspaper (containing a libel) to the officer of the stamp-office, has been held a publication, such delivery being directed by statute (repealed), for the officer at all events had an opportunity of reading it. *Amphlit*, 4 *B. & C.* 35 (1825); cf. *Cook* v. *Ward*, 6 *Bing.* 409 (1830). If a libellous letter is produced with the postmark upon it and the seal broken, that is *primâ facie* evidence of its having reached the addressee and been published to him. *Warren* v. *Warren*, 1 *C. M. & R.* 360; 4 *Tyr.* 850 (1834), p. 579; *Shipley* v. *Todhunter*, 7 *C. & P.* 680 (1836). It was said by Fortescue J. to have been ruled that the finding a libel on a bookseller's shelf was a publication of it by the bookseller. *Dodd*, 2 *Sess. Ca.* 33 (1724); cf. *Almon*, p. 576, and *Nutt*, p. 580. The reading of a libel in the presence of another, without knowing it before to be a libel, does not amount to a publication. 5 *Bac. Ab. Libel, B.* 2. But, it is said, if a person who has either read a libel himself, or heard it read by another, afterwards maliciously reads or repeats any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it. 2 *Hawk. P. C.* Bk. 1, ch. 73, s. 10, p. 576.

"Also it hath been resolved that the sending of a letter full of provoking language to another without publishing it, is highly punishable; and if the bare making of a libel be an offence, whether it be published or not, as it seemeth to be holden in some books, surely the sending of it to the party reflected upon must be a much greater crime, inasmuch as it so manifestly tends to a disturbance of the peace." *Hawk. ib.* s. 11; 1 *Russ. Cri.* 633–4. For instance, see *Wegener*, 2 *Stark. N. P. C.* 245 (1817), p. 578.

Where the libel is in a foreign language, it must be set out in the indictment, both in the original and in a translation, and the translation must be proved to be correct. In *Peltier*, p. 570 (*St. Tr.* 561), an interpreter being called, swore that he understood French, and that the translation was correct, and then read aloud the whole of that which was charged to be a libel, in the original, and then the translation was read by the clerk at nisi prius. *Selw. N. P.* 991 and 996, 13*th ed.*

A printed copy of a libel may be read without notice to produce. *Watson*, pp. 1, 4, 10. In order to show that the defendant had caused a libel to be inserted in a newspaper, a reporter was called, who proved that he had given a written statement to the editor, the contents of which had been communicated by the defendant for the purpose of publication; and that the newspaper produced was exactly the same, with the exception of one or two slight alterations not affecting the sense; it was held that what the reporter published in consequence of what passed with the defendant might be considered as published by the defendant, but that the newspaper could not be read in evidence without producing the written statement delivered by the reporter to the editor. *Adams* v. *Kelly*, *Ry. & Moo.* 157 (1824); and see *Cooper*, 8 *Q. B.* 533; 15 *L. J. Q. B.* 206 (1846); and *Fryer* v. *Gathercole*, 4 *Ex. R.* 262; 18 *L. J. Ex.* 389 (1849).

Where a libel is printed the sale of each copy is a distinct publication, and a fresh offence; and a conviction or acquittal on an indictment for publishing one copy, will be no bar to an information for publishing another. *Carlile*, p. 567 (*Chit.*); *Stark.* on *Slander*, 732, 6*th ed.*, where there were informations by the attorney-general and indictments by a private prosecutor.

Proof of publication of libels in newspapers.] S. 19 of 6–7 W. 4, 76 (repealed), has been embodied in 32–3 V. 24, sched. 2, and is: "If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made."

The Newspaper Libel and Registration Act, 1881, 44–5 V. 60, 1, runs: "The word 'newspaper' shall mean any paper containing public news, intelligence or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically or in parts or numbers, at intervals not exceeding twenty-six days, between the publication of any two such papers, parts, or numbers. Also any paper printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements. . . ."

The word 'proprietor' shall mean and include as well the sole proprietor of any newspaper as also, in the case of a divided proprietorship, the persons who as partners or otherwise represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person."

Ss. 2 and 3 are repealed by the Law of Libel Amendment Act, 51–2 V. 64, 2, 8; of which s. 3 is: "A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority

shall, if published contemporaneously with such proceedings, be privileged; provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter."

By s. 4, newspaper reports of proceedings of public meetings, and of certain bodies and persons, are privileged under certain conditions.

By s. 8: "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers being first had and obtained.

"Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against any such application." There is no appeal from this order. *Ex parte Pulbrook*, 1892, 1 *Q. B.* 86; 61 *L. J. M. C.* 91.

Yates, 11 *Q. B. D.* 750; 52 *L. J. M. C.* 778 (1883), where a majority (three against two) were unanimously affirmed on appeal; *Yates* v. *R.*, 14 *Q. B. D.* 648; 54 *L. J. Q. B. D.* 258; 15 *Cox C. C.* 686 (1885), decided that 44–5 V. 60, 3 (and therefore s. 8 of 51–2 V. 64, *Odgers* on *Libel*, 688, 4*th ed.*) does not apply to *criminal informations* for libel filed by the order of the court at the instance of private prosecutors; neither does it apply to *criminal informations* filed by the attorney-general.

"I hereby allow the prosecution of the publisher, proprietor, or editor of the *Freethinker*, or any other person responsible for the publication therein of blasphemous articles between the dates of March 26, and June 11, 1882," was held (apparently on the authority of a divisional court, *Cox* 221-2) to be a sufficient fiat within the Act, though no one was mentioned by name. *Bradlaugh*, pp. 109, 565, 567. But the exact reverse was held by a majority in *Allison*, 16 *Cox C. C.* 559; 53 *J. P.* 215 (1888), *C. C. R.* Names must be mentioned. No fiat can authorise the prosecution of the (mere) printer. *Ib.*

By 44–5 V. 60, 4, 5, inquiry may be made by a court of summary jurisdiction as to the libel being for the public benefit or being true, or as to the report being fair and accurate and without malice, and if it thinks a jury would acquit, may dismiss the case, or if it thinks the libel was of a trivial character, it may ask the defendant if he consents to being dealt with summarily.

The Vexatious Indictments Act applies: see p. 160.

S. 4, above, appears to have been inserted in consequence of the decision in *Carden*, 5 *Q. B. D.* 1; 49 *L. J. M. C.* 1 (1879), that a magistrate had no jurisdiction to inquire into the truth of a libel. In *Duffy*, 2 *Cox C. C.* 45; 9 *Ir. L. Rep.* 329 (1846); *Ir. Q. B. D.*, p. 583, it was held that L. Campbell's Act, 6–7 V. 96, 6, p. 582, has no application to seditious libels, and the same has been held with regard to 44–5 V. 60, 4, as it is said to be absurd to suppose sedition to be for the benefit of the public. *O'Brien*, 15 *Cox C. C.* 180; *Ir. Q. B. D.*, where it seems to have been assumed and not disputed that the libel was seditious. Further, it is said in *Duffy*, above (*Ir. L. R.* 333), that s. 6 did not apply to blasphemous libels, and L. Coleridge C.J. in *Bradlaugh*, p. 109 (at 226), said that there were some sections as to which a serious argument might be raised whether they had any application to the case of a blasphemous libel.

By subsequent ss. of 44–5 V. 60, provision is made for the registration of the names of newspaper proprietors, and by s. 15, copies are made evidence. See p. 144.

The production of a certified copy of the affidavit lodged at the stamp-office, and of a newspaper corresponding in title, printer, publisher, &c., exactly with those in the affidavit, was sufficient evidence of publication. *Mayne* v. *Fletcher*, 9 *B. & C.* 382 (1829); *Hunt*, p. 71 (*St. Tr.* 375). But where the affidavit and the newspaper varied in the place of residence of the

proprietor, *Murray* v. *Souter* (1829), *cited* 6 *Bing.* 414, or in the name of the printing place, *Franceys*, 2 *A. & E.* 49 (1834), it was held insufficient. See as to what was sufficient evidence of the identity of the newspaper under 6–7 W. 4, 76, 8, *Baker* v. *Wilkinson*, *Carr. & M.* 399 (1842); see also *Woolmer*, 12 *A. & E.* 422 (1840); *Duke of Brunswick* v. *Harmer*, 3 *C. & K.* 10; 14 *Q. B.* 185; 19 *L. J. Q. B.* 10 (1850); and *Gathercole* v. *Miall*, pp. 8, 582.

The purchase of a copy at the office eighteen years after the date of the libel was held to be sufficient publication. *Duke of Brunswick* v. *Harmer*, above (*Q. B.*).

The old procedure (stamp-office, &c.) applied to criminal informations. *Dounison*, 4 *B. & Ad.* 698 (1833); *Franceys*, above. Where the printer swore that a copy of a newspaper produced was part of an issue published in the ordinary way, that copy was given in evidence, though it had not been published, and was unstamped. *Pearce*, 1 *Peake* 106 (1791); cf. pp. 150, 460. As to the special defences of newspapers, see p. 582.

Proof of publication —by admission of the defendant.] On an information for a blasphemous libel, the witness who produced it stated, that he showed it to the defendant, who admitted that he was the author of the book. It was objected that this evidence did not entitle the crown to read the book, the admission not being absolute, there being errors in printing, &c.; but Pratt C.J. allowed it to be read, and said he would put it upon the defendant to prove material variances. *Hall*, 1 *Str.* 416 (1709). An admission of the signature to a libel is no admission of its having been published, "still less" of its publication, by the signer, in a particular county. *Case of the Seven Bishops*, 12 *St. Tr.* 183 (1688), at 309, 319; *Stark.* on *Slander*, 811, 6*th ed.* See p. 579. An admission of being the editor of a periodical cannot be extended beyond the date of such admission. *M'Leod* v. *Wakley*, 3 *C. & P.* 311 (1828).

Constructive publication.] It was well established at common law that, in order to render a person guilty of publishing a libel, it was not necessary that he should be the actual publisher of it, or that he should even have a knowledge of its contents; not only was a person who procured another to publish a libel himself guilty of the offence, 2 *Hawk. P. C.* Bk. 1, ch. 73, s. 10, p. 573, but a bookseller or publisher, whose servant published a libel, was criminally answerable for that act, though it was done without his knowledge. *Almon*, 5 *Burr.* 2686 (1771), p. 577; cf. *Dodd*, p. 573, and *Nutt*, p. 580. In this state of the common law, 6–7 V. 96, was passed. By s. 7, p. 567: "Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part." At the trial of a criminal information against the defendants for a libel published in their newspaper, it was proved that each of them managed a different department of the newspaper, but that the duty of editing the literary department was left by them entirely to G. whom they had appointed. A libel was inserted by G. without the express authority, consent, or knowledge of the defendants. Two judges held that it was a question for the jury, the libel being published without the defendants' "authority, consent, or knowledge," on a true construction of s. 7, whether the publication arose from any "want of due care or caution" on their part. Cockburn C.J. said that s. 7 was

intended to meet the anomaly of holding a man criminally responsible for something in which he had taken no part, and of which, in fact, he was not even cognisant. Mellor J. dissented, holding that the defendants having, for their own benefit, employed an editor to manage a particular department, and given him full discretion as to the articles to be inserted, must be taken to have consented to the publication of the libel by him, and that s. 7 had no application to the facts proved, and that the jury were rightly directed to convict. *Holbrook*, 3 *Q. B. D.* 60; 47 *L. J. Q. B.* 35; 13 *Cox C. C.* 650 (1877). There was a new trial, and on a motion for a second new trial, on the grounds of verdict against evidence and misdirection, it was held, the same judges being divided as before, that the general authority given to G. was not *per se* evidence within s. 7, that the defendants had authorised or consented to the libel, and another new trial was ordered. 4 *Q. B. D.* 42; 48 *L. J. Q. B.* 113; 14 *Cox C. C.* 185 (1878).

Where the libel is published by an agent of the defendant, the authority of that agent must be strictly proved. In the case of booksellers and publishers, proof that the person actually selling the libel was a servant in the ordinary way of business, is sufficient; for in such case an authority to sell will be implied, but it is not so with regard to other persons. Thus, where the libel was in the handwriting of the defendant's daughter, who was usually employed by him to write his letters of business, but there was no evidence that the defendant had authorised her to write the libellous document, it was held to be no evidence of publication against him. *Harding* v. *Greening*, 8 *Taunt.* 42 (1817).

Proof of innuendos.] Where, in order to bring out the libellous sense of the words, innuendos, *i.e.* averments of the construction put by the prosecution on words, &c., alleged (from *innuere*, to hint), are inserted in the indictment, they must, if material, be proved by witnesses acquainted with the persons and the circumstances. It is sufficient if such witnesses speak in the first instance as to their *belief* with regard to the intended meaning of the words, without giving reasons; the grounds of such belief may be inquired into on cross-examination. *Stark.* on *Slander*, 464, *6th ed.* If the witness derives his conclusion from the terms of another libel, with the publication of which the defendant is not connected, this ought to be "laid out of the case." *Bourke* v. *Warren*, 2 *C. & P.* 307 (1826). If a good innuendo, ascribing a particular meaning to certain words, is not supported in evidence, it will not be permitted to ascribe another meaning to those words. *Williams* v. *Stott*, p. 378; cf. *Archbishop of Tuam* v. *Robeson*, 5 *Bing.* 17 (1828); but see *Harvey* v. *French*, 1 *Crom. & M.* 11 (1832). Thus, where the words in fact imputed either a fraud or a felony, but according to the innuendo, the latter, L. Ellenborough ruled that the plaintiff must prove that they were spoken in the latter sense. *Smith* v. *Carey*, 3 *Campb.* 461 (1813). If a libel contains blanks, the jury ought to acquit the defendant, unless they are satisfied that those blanks are filled up in the information according to the true sense and meaning of the writer. *Per* L. Mansfield, *Almon*, p. 576. It is said by Tindal C.J. that where words spoken import in themselves a criminal charge, and the innuendo introduces matter which is merely useless, it may be rejected as surplusage. *Day* v. *Robinson*, 1 *A. & E.* 554 (1834); see also *Williams* v. *Gardiner*, *Tyr. & G.* 578; 1 *M. & W.* 245 (1836); *West* v. *Smith*, *Tyr. & G.* 825 (1836). And see *Hoare* v. *Silverlocke*, 12 *Q. B.* 624 (1836). As to pictures, see p. 572.

Malice.] Where a man publishes a writing, which upon the face of it is libellous, the law presumes that he does so with that malicious intention which constitutes an offence, and it is unnecessary on the part of the prosecution to give evidence of any circumstances from which malice may be inferred.

Thus it was said by Abbott C.J. that a person who publishes what is slanderous concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously intended to effect, unless he can show the contrary. *Harvey*, p. 20; cf. *Burdett*, p. 14. In such case it is incumbent upon the defendant to show that the publication was made in circumstances which justify it.

It is, however, frequently necessary, where the expressions are ambiguous, or the intentions of the defendant doubtful, to show the malice which prompted the publication. Thus, where the occasion of the publication would, *primâ facie*, justify the defendant, yet, if the libel be false and malicious, it is an offence; in such case evidence of the malice must be given on the part of the prosecution to rebut the presumed justification. "Where such a doubt exists, and where the material question is whether the defendant was justified by the occasion, or acted from express malice, it seems, in principle, that any circumstances are admissible which can elucidate the transaction, and enable the jury correctly to conclude whether the defendant acted fairly and honestly according to the occasion, or *malâ fide* and vindictively, for the purpose of causing evil consequences." *Stark.* on *Slander*, 483, *6th ed.* Upon this principle, in an action for libel in a weekly paper, evidence was allowed of the sale of other numbers in other weeks, with the same title at the same office, for the purpose of showing that the papers were sold deliberately, and in the regular course of circulation, for public perusal (and not by mistake). *Plunkett* v. *Cobbett*, p. 132. So where, in an action for libel in a newspaper, *subsequent* publications by the defendant in the same paper were tendered to show *quo animo* the defendant published the libel, L. Ellenborough said, "No doubt they would be admissible in the case of an indictment." *Stuart* v. *Lovell*, 2 *Stark. N. P. C.* 93 (1817). Again, in an action against the editor of a monthly periodical for a libel, articles published from month to month alluding to the action, and attacking the plaintiff, are admissible to show *quo animo* the libel was published, and that the defendant considered it as applying to the plaintiff. *Chubb* v. *Westley*, 6 *C. & P.* 436 (1834). In *Barrett* v. *Long*, 3 *H. L. Cas.* 395 (1851), other publications of the defendant, going back more than six years before the libel, were held to be admissible to prove malice. So it was held by L. Ellenborough, that any words or any act of the defendant subsequent to the slander are admissible ["as evidence of *actual malice*, or of *deliberate publication*," *T.* s. 340], in order to show *quo animo* he spoke the words in issue. *Rustel* v. *Macquister*, 1 *Campb.* 49 (1807). So either side is entitled to have extracts read from different parts of the same paper or book which contains the libel, relating to the same subject, "although locally disjoined." *Lambert* and *Perry*, p. 567.

When the publication is "*primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it or have a right to expect it, malice in fact must be proved." *Per* Bayley J., *Bromage* v. *Prosser*, 4 *B. & C.* 247, 256 (1825); and see *M'Pherson* v. *Daniels*, 10 *B. & C.* at 272 (1829). "Where a man has a right to make a communication, you must either show malice intrinsically from the language of the letter, or prove express malice." *Per* Parke B., *Wright* v. *Woodgate*, *Tyr. & G.* 12. See p. 581.

Proof of intent.] Where the malicious intent is by averment pointed to a particular individual, or to a particular act or offence, it must be proved *as laid*. Thus, where the indictment alleged a libel with intent to disparage and injure the prosecutor *in his profession as an attorney*, it was held that proof of a publication to *him* was not enough, but that the intent to provoke him to a breach of the peace would have been. *Wegener*, p. 573. The allegation of intent is divisible, p. 72.

Venue.] The libel must be proved to have been published in the county in which the venue is laid. Where the libel is once published, the procurer thereof is guilty of a publication in every county in which it is afterwards published. *Johnson*, 7 *East* 65 (1805), where the *Case of the Seven Bishops* on this point is explained. Cf. *Buller N. P.* 6. Upon an information for a libel, in the county of Leicester, it appeared that it was written in that county, on August 22, and delivered on the 24th by A., who was not called, to B. in Middlesex, a hundred miles off. It was inclosed in an open envelope, addressed to A. with instructions or a request to forward it to B., and there was no trace of a seal or postmark. There was no evidence that A. was about that time in Leicestershire. The judge directed the jury, that as B. had it open, they might presume that A. received it open, and that, as the defendant wrote it in the county of Leicester, it must be presumed that A. received it in that county. The defendant having been found guilty, it was urged, on a motion for a new trial, that there was no evidence of a publication in Leicestershire; but the King's Bench held that the direction of the judge was proper, and that if the delivery open could not be presumed, a delivery sealed, with a view to and for the purpose of publication, was a publication: and they held that there was sufficient to presume some delivery, either open or sealed, in the county of Leicester. *Burdett*, pp. 14, 573, 578. It was also discussed whether it was essential that the whole offence must have been committed in the venue county. Three judges expressed an opinion that the composing and writing a libel in the county of L., and afterwards publishing it in M., though not in L., gave jurisdiction to a jury of the county of L., as well as to one in M., and that the composing and writing with intent afterwards to publish was a misdemeanor (cf. *Beare*, pp. 569, 573; *Knell*, 1 *Barnard. K. B.* 305 in 1729; see p. 573); but Bayley J. (at 155) held that the whole *corpus delicti* must be proved within one county, and that there was no distinction in this respect between felonies and misdemeanors. Abbott C.J. said, "To write and publish a libel is a misdemeanor compounded of distinct parts, each of which parts (for I am speaking of a published libel) being an act done in prosecution of one and the same criminal intention is a misdemeanor . . . and the whole may be tried in that county wherein any part can be proved to have been done."

Post-marks (proved) are evidence that the letters on which they are were in the offices named at the times denoted by the marks. *Plumer, Russ, & Ry.* 264 (1814), p. 712. Cf. *Warren* v. *Warren*, p. 573, and see *Odgers* on *Libel*, 676, *4th. ed.*

Witnesses for the defendant.] By 51–2 V. 64, 9 (p. 107): "Every person charged with the offence of libel before any court of criminal jurisdiction, and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge." See p. 104.

The Defence.] It is competent to the defendant, in all cases to show the absence of malice on his part. He cannot, it is true, give in evidence matter of justification—that is to say, he cannot admit the publication to be malicious, and then rely for his defence upon circumstances which show that he was justified, however malicious the libel may be; but he is not precluded from giving evidence of those circumstances which tend to prove that the original publication of the libel was without malice. [This is, perhaps, put by *Odgers* (as above), 443, thus: "A defendant . . . may give evidence to show that the alleged libel was privileged by reason of the occasion; unless such privilege be absolute the prosecutor may rebut this defence by evidence of malice, precisely as in civil cases."] It may, perhaps, be laid

down as a rule that the matters which might be given in evidence under the general issue in an action in order to disprove malice, are also admissible for the same purpose upon the trial of an indictment or information.

The defendant may, therefore, show that the publication was merely accidental, and without his knowledge (p. 573), as where he delivers one paper instead of another, or delivers a letter without knowing its contents. *Topham*, p. 569; see also dicta in *Nutt. Fitzg.* 47; 1 *Barnard. K. B.* 306 (1728)—the same point as in *Dodd*, p. 573, and *Almon*, p. 576; *L. Abingdon*, 1 *Esp.* 225 (1794: peer publishing in newspaper his defamatory speech in House of Lords), below; *Day* v. *Bream*, 2 *Moo. & R.* 54 (1837), where Patteson J. held that a porter, who in the course of his business delivered parcels containing libellous handbills, was though *primâ facie* liable, yet, if he was shown to be ignorant of the contents, entitled to a verdict. Cf. 6–7 V. 96, p. 7, 576, and *Holbrook*, p. 577.

So the defendant, under the plea of not guilty, may show that the libel "was published on an occasion which the law recognises as constituting either an absolute privilege or excuse, independently of the question of intention; or a conditional privilege, dependent on the actual intention and motive of the defendant." *Stark.* on *Sland*, 805, *6th ed.* Thus, he may argue (as was done by Pollexfen and Levinz) that the alleged libel was presented *bonâ fide* to the king as a petition for the redress of grievances; *Case of the Seven Bishops* (pp. 576, 579), at 371, 392; or to parliament; 2 *Hawk. P. C.* Bk. 2, ch. 73, s. 8; or that it was contained "in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice." *Ib.* "It seemeth to have been holden by some, that no want of jurisdiction in the court to which such complaint shall be exhibited will make it a libel, because the mistake of the proper court is not imputable to the party, but to his counsel. Yet if it shall manifestly appear from the whole circumstances of the case, that a prosecution is intirely false, malicious and groundless, and commenced, not with a design to go through with it, but only to expose the defendant's character under the show of a legal proceeding," it would form "a good ground of an indictment at the suit of the king, as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party whether the court had a jurisdiction of the cause or not." *Ib.*

Though it is a defence to show that the alleged libel was published by a person in a privileged capacity, as by a member of parliament in his place, or by some judicial person, yet if the publication took place by him when not in the privileged capacity, or by a third person, this furnishes no defence. Thus a member of parliament who, after delivering his speech in parliament, publishes it, is criminally responsible for a libel; *L. Abingdon*, above; *Creevey*, 1 *M. & S.* 273 (1813); though by Act of parliament the members are protected from all proceedings against them "in any court or place out of Parlyament" for anything said in either house. 1 *W. & M. Sess.* 2, *c.* 2, but see below. So it was held by the Queen's Bench that it is no defence in law to an action for libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the house, and thereupon became part of the proceedings of the house, and which was afterwards, by orders of the house, printed and published by the defendants; and that the House of Commons heretofore resolved, declared, and adjudged, "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it." On the demurrer to a plea suggesting such a defence, it was also held that a court of law is competent to determine whether or not the House of

Commons has such privileges as will support the plea. *Stockdale* v. *Hansard*, 7 *C. & P.* 731; 2 *Moo. & Rob.* 9 (1837); 9 *A. & E.* 1; 8 *Dowl.* 148; 2 *P. & D.* 1; 3 *Jur.* 905 (1839); but see now 3–4 V. 9, and *Stockdale* v. *Hansard*, 11 *A. & E.* 253, 297; 8 *Dowl.* 522 (1840). And it has been held that the publication in a newspaper of a faithful report of a debate in either House of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate, and reproduced in such report. Nor is he liable for the publication of fair comments upon the debates so reported. *Wason* v. *Walter*, *L. R.* 4 *Q. B.* 73; 38 *L. J. Q. B.* 34; 32 *J. P.* 773; 33 *J. P.* 149; 17 *W. R.* 169 (1868), p. 582. So as to reports of proceedings in Courts of Justice, even in parts, *e.g.* the judgment without the evidence. *Macdougall* v. *Knight*, 25 *Q. B. D.* 1 (1890), *C. A.*; see pp. 582–3.

It will, upon the same principle, be a defence that the supposed libel was written *bonâ fide* with the view of investigating a fact in which the party is interested, *provided* the limits necessary for making such inquiry are not exceeded. *Delany* v. *Jones*, 4 *Esp.* 190 (advertisement, 1802); *Finden* v. *Westlake*, *Moo. & Malk.* 461 (handbill, 1829); *Brown* v. *Croome*, 2 *Stark. N. P. C.* 297 (advertisement to creditors of bankrupt, 1817). So where the libel was an advertisement for the discovery of the plaintiff, supposed to be an absconding debtor, published at the request of the person who had sued out a *capias*, for the purpose of enabling the sheriff to take him. *Lay* v. *Lawson*, 4 *A. & E.* 795 (1836). So the showing of a libel to the person reflected on, with the *bonâ fide* intention of giving him an opportunity for making an explanation, or with a friendly intention to enable him to exculpate himself, or seek his legal remedy, is no offence. *Stark.* on *Slander*, 845, *6th ed.*; *B. N. P.* 8; *M'Dougall* v. *Claridge*, 1 *Campb.* 267 (1808), a case of a confidential communication between two interested parties; or a letter of friendly advice. *Ib.* Thus a letter to a mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the proposed husband, is a privileged communication, unless malice be shown. *Todd* v. *Hawkins*, 2 *Moo. & R.* 20 (1837). But an unnecessary publicity would render such a communication libellous, "though the pretence be reformation," as if the letter were published in a newspaper. *Knight* (1736), 5 *Bac. Ab. Libel*, *A.* 2, 197 (*n.*). So a representation made *bonâ fide* by the defendant to a public officer respecting the conduct of a subordinate is not *primâ facie* actionable. *Blake* v. *Pilfold*, 1 *Moo. & R.* 198 (1832). So a letter to the postmaster-general, complaining of misconduct in a postmaster, is not libellous if it contains a *bonâ fide* complaint. *Woodward* v. *Lander*, 6 *C. & P.* 548 (1834). See also *Hopwood* v. *Thorn*, 8 *C. B.* 293 (1849); *Harrison* v. *Bush*, 25 *L. J. Q. B.* 25 (1855); *Cooke* v. *Wildes*, 1 *Jur. N. S.* 610 (1855). Upon the same principle, the defendant may show that the supposed libel was written *bonâ fide* for the purpose of giving the character of a servant. *Edmondson* v. *Stephenson* (1786), *Bull. N. P.* 8, cf. p. 578; *Weatherston* v. *Hawkins*, 1 *T. R.* 110 (1786); *Pattison* v. *Jones*, 8 *B. & C.* 578 (1828); *Child* v. *Affleck*, 9 *B. & C.* 403 (1829); *Somervill* v. *Hawkins*, 10 *C. B.* 583 (1851); *Taylor* v. *Hawkins*, 16 *Q. B.* 308 (1851); and *Harris* v. *Thompson*, 13 *C. B.* 333 (1853, secretary of a company). Where the occasion is privileged, the burden of proof is on the plaintiff to show that the defendant did not honestly believe his own statements to be true. If he did honestly believe them to be true, the defendant can claim the privilege, although he had no reasonable grounds for such belief. *Clark* v. *Molyneux*, 3 *Q. B. D.* 237; 47 *L. J. Q. B.* 230 (1877); *C. A.* So where the wife of a tradesman, being informed that a female assistant of her husband's was dishonest, wrote at his request a letter accusing her of theft, &c., it was held that the occasion was privileged, and that therefore in the absence of malice the defendant

was not liable: also that the terms of the letter in the circumstances should not be too nicely criticised. *Perry*, 15 *Cox C. C.* 169 (1883).

Newspaper Reports.] The publication of the proceedings in a public court of justice correctly and *fully* given, *e.g.* in a newspaper (p. 581), though containing a libel, upon an individual (but see below), is not actionable. *Lewis* v. *Walter*, p. 572 (libel avowedly copied from another newspaper, below) *Ryalls* v. *Leader*, *L. R.*, 1 *Exch.* 296; 35 *L. J. Exch.* 185 (1866), where a bankruptcy registrar held his court in a gaol. "It is now well established," said Cockburn C.J. (*Wason* v. *Walter*, p. 610, *Q. B.* at 87), "that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. . . . The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." With respect to *ex parte* proceedings, the court said that though they had been regarded "as a probable exception" from the rule, "Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected." See also *Usill* v. *Hales*, 3 *C. P. D.* 319; 47 *L. J. C. P.* 323 (1878). See now 51–2 V. 64, 3, p. 574.

The publication of a seditious libel will not be privileged on the ground that it is copied from another newspaper, above. It is a question for the jury whether it was so copied as an item of news or for a seditious purpose, and they may consider the surrounding circumstances in order to arrive at the intention of the publisher. *Sullivan*, p. 567, at 46; *Pigott*, *ib.*, at 61.

The conduct and management by the clergyman of a parish of a charitable society in a parish, from the benefits of which dissenters are by his sanction excluded, is not the lawful subject of public comment in a newspaper so as to excuse the publication of untrue and injurious matter respecting the clergyman in relation to the charity. *Gathercole* v. *Miall*, pp. 8, 576. On showing cause against a rule for a criminal information for a blasphemous and seditious libel, it was urged that it was, as it was, a correct report of a judicial proceeding; yet the court held that if that involved anything blasphemous, indecent, &c., the right had gone. *Mary Carlile*, 3 *B. & Ald.* 167 (1819). Cf. p. 580. Where a newspaper libel stated that there was a riot at C., and that a person fired a pistol at an assemblage of persons, and upon this imputed neglect of duty (to prevent a riot) to the magistrates, Patteson J. held, that on a criminal trial for this libel, defendant's counsel could not, with a view of showing that the libel did not exceed "the bounds of free discussion," go into evidence to prove that there was in fact a riot, and a pistol fired. *Brigstock*, 6 *C. & P.* 184 (1833).

Before 6–7 V. 96, the defendant could not, on indictment, give evidence of the *truth* of the libel; but, by s. 6 thereof, "on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and to entitle the defendant to give evidence of the truth of such matters charged, as a defence

to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged, in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and if, after such plea, the defendant shall be convicted on such indictment or information, it shall be competent to the court in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: provided always, that the truth of the matters charged in the alleged libel complained of, by such indictment or information, shall in no case be inquired into without such plea of justification: provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel."

Thus, "the truth alone is no defence in a criminal case; the defendant must also show that it was for the public benefit that the matters charged should be published. In *Warnsborough*, 4 *T. L. R.* 520 (1888), Baron Huddleston is reported to have ruled that, while the issue of truth was for the jury, it was for the judge to decide whether the publication was or was not for the public benefit. (*Sed quære:* see the judgment of the same learned judge in *Pankhurst* v. *Sowler* (1886), 3 *T. L. R.* 193)." *Odgers* on *Libel*, *4th ed.*, at 679. For an analogous judgment by L. Alverstone C.J. as to "public mischief," see *Brailsford*, 1905, 2 *K. B.* 730; 21 *T. L. R.* 727; 21 *Cox C. C.* 16, p. 349; criticised 22 *L. Q. R.* 34 (No. 85). On a similar point, see p. 628.

Where a defendant pleads the truth of the libel under this s. he cannot give evidence that the same charges had been previously published, and that the prosecutor had not taken proceedings against the publisher. *Newman*, p. 114, where it was also held that the defendant is bound to prove the truth of all the material allegations contained in such plea, *i.e.* the allegations in a plea of justification are not divisible (see, however, *Labouchere*, 14 *Cox C. C.* 419 (1880), at 432), and if he fail to do so, it is no ground for a new trial that, as to some of the allegations upon which the jury found against him, their finding was against the weight of the evidence, for unless the entire plea is sustained there must be judgment for the crown; but the court, in pronouncing sentence, must consider that plea and the evidence on both sides (under the s. above), and form their own conclusion.

This s. does not apply to seditious libels. *Duffy* and *O'Brien*, p. 575.

Where the plea of justification stated that the prosecutor had "earned the reputation of a scandalous friar," a witness for the defendant was allowed to be asked what was the prosecutor's moral character. *Newman*, above.

Fox's Act.] By 32 G. 3, 60, reciting that "doubts have arisen whether, on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the king and the defendant or defendants on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue," s. 1: "on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge before whom such indictment or information shall be

tried, to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." By s. 2: "On every such trial the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases." By s. 3: "Nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict in their discretion, as in other criminal cases." And by s. 4: "In case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment on such ground and in such manner as by law he or they might have done before the passing of this Act."

Publishing a libel to extort money.] See *Threats*, p. 786.

MACHINERY, INJURING, ETC.

Attempting to blow up machinery.] See 24–5 V. 97, 10, 45, p. 394.

Riotously destroying or damaging machinery.] See 24–5 V. 97, 11, 12, p. 747.

Destroying or damaging machinery.] By 24–5 V. 97, 14 (for the first part of which see p. 607); "whosoever . . . shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing, or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life . . . or to be imprisoned . . . [see p. 198], and if a male under the age of sixteen years, with or without whipping.

By s. 15: "Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . [see p. 198], and if a male under the age of sixteen years, with or without whipping."

Destroying or damaging machinery used in mines.] See 24–5 V. 97, 29, p. 608.

Malice against owner unnecessary.] See 24–5 V. 97, 58, p. 241.

Persons in possession injuring the property liable to be convicted.] See 24–5 V. 97, 59, p. 241.

Form of indictment.] See 24–5 V. 97, 60, p. 241.

Proof of damaging machinery.] Where the prisoner indicted under 28 G. 3, 55 (repealed), for entering a shop by force and maliciously *damaging* a certain frame used for the making of stockings, had unscrewed and carried away (but without injuring) a part of the frame, called the *half-jack*, an essential part of the frame, without which it is useless, but which can be at once replaced, this was held, by all the judges, a *damaging* within the s.

Tacey, Russ. & Ry. 452 (1821). And where the prisoner screwed up the working parts of the engine of a threshing machine, and had reversed the plug of the pump which supplied the boiler, and had also stopped up one of the pipes, so that the machine was temporarily useless and could not be again set in motion without great difficulty, and if it had been left in the state in which the prisoner left it, the boiler would have burst; it was held to be a damaging with intent to render useless within s. 15, p. 585, and that the damage in such cases need not be of a permanent nature. *Fisher, L. R.*, 1 *C. C. R.* 7; 35 *L. J. M. C.* 57 (1865).

Where the machine is taken to pieces.] Even where the machine at the time it is broken has been taken to pieces and is in different places, so long as it is capable of being fitted together again, an offence against 7–8 G. 4, 30 (repealed) was committed by damaging any part. *Mackerel*, 4 *C. & P.* 448 (1831); *Special Commission.* So where the machine was taken to pieces, which were removed a quarter of a mile, leaving only the water-wheel and its axis standing, and the wheel was destroyed by the prisoners. *Fidler*, 4 *C. & P.* 449 (1831); *Spec. Comm.* Where certain sideboards were wanting to a machine at the time it was destroyed, but did not render it so defective as to prevent it altogether from working, though it would not work so effectually, it was still held to be a machine within the statute. *Bartlett*, 2 *Deac. Dig. C. L.* 1517 (1831); *Spec. Comm.* So where the owner removed a wooden stage belonging to the machine, on which the man who fed the machine was accustomed to stand, and had also taken away the legs, so that though the machine could not be conveniently worked without some such stage, yet a chair or table would do nearly as well, and it could also be worked without the legs, it was held to be within that statute. *Chubb, ib.* (1831); *Spec. Comm.* But where the owner had not only taken the machine to pieces, but broken the wheel, for fear of its being set on fire; and it appeared that, without the wheel, the engine could not be worked; this was held not to be within that statute, as the rest did not constitute a threshing machine. *West, ib.* 1518 (1831); *Spec. Comm.*

MAINTENANCE, &c.

Nature of the offence.] "Maintenance is commonly taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right." 2 *Hawk. P. C.* Bk. 1, ch. 83, s. 1. A man may officiously intermeddle either with regard to matters in a suit depending "which no way belongs to him," or may stir up "quarrels and suits . . . wherein he is in no way concerned," *e.g.* by taking or holding lands to assist another's claim to them. *Ib.* ss. 2, 3. It is an indictable offence "against public justice," punishable at common law with fine and imprisonment, *ib.* s. 38, and is forbidden by various statutes. 1 E. 3, st. 2, c. 14 (1326–7); 1 R. 2, c. 4 (1377), both confirmed 7 R. 2, 15 (1383); 32 H. 8, c. 9, s. 3 (1540). These Acts, however, are only declaratory of the common law, with additional penalties. *Pechell* v. *Watson*, 8 *M. & W.*, at 700 (1841).

According to the old authorities, whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bears him out in the whole or any part of his suit, or by his friendship or interest saves him that expense which he might be otherwise put to, or opens the evidence to the jury, or gives evidence "officiously" without being called upon to do so, or speaks in another's cause "as one of counsel with the party," or retains an attorney for him, or being "of great power and interest, says publicly that he will spend twenty pounds on one side or . . . to labour the jury, whether in truth he spend one penny or not," or stand by the party at the bar while his cause is tried—this is maintenance, for it discourages the other party from going on in his cause and intimidates juries. 2 *Hawk. P. C.* Bk. 1, ch. 83, ss. 4, 5, 6, 7. It may be doubted, however, whether, at the present day, some of these acts would be held to be indictable, unless they were plainly accompanied with a corrupt motive. "A bare promise to maintain another is not in itself maintenance, unless it be either in respect of the public manner in which, or the power of the person by whom it is made." *Ib.* s. 8. So the mere giving of "friendly advice what action is proper . . . to bring for the recovery of a certain debt," is not maintenance. *Ib.* s. 11. The result of the cases was thus summed up: "to bind oneself after the commencement of a suit to pay the expenses of another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance. . . . It is said, however, that this general statement requires two qualifications: first, that the acts of the maintainer must be immoral, and that the maintainer must have been actuated by a bad motive; next, that if he has, or believes himself to have, a common interest with the plaintiff in the result of the suit, his acts, which would otherwise be maintenance, cease to be so." *Per* L. Coleridge C.J. in *Bradlaugh* v. *Newdegate*, 11 *Q. B. D.* at 9; 52 *L. J. Q. B.* 454 (1883).

In order to justify maintenance of a suit there must either be a common interest recognised by the law in a matter at issue or the case must fall within one of the specific exceptions established by the authorities. *Alabaster* v. *Harness*, 1894, 2 *Q. B.* 897; 1895, 1 *Q. B.* 339; 64 *L. J. Q. B.* 76; *C. A.*

Maintenance in respect of interest.] Those who have a certain interest, or an equitable, even a bare contingent interest, in the matter in variance, may maintain another in an action concerning it; as in the case of landlord and tenant, trustee and *cestui que trust*. 2 *Hawk. P. C.* Bk. 1, ch. 83, ss. 19, 20, 21. So where A. at the request of B. defended an action for money in which B. claimed an interest, upon B.'s indemnifying him from the consequences of such action, this was held not to be maintenance. *Williamson* v. *Henley*, 6 *Bing.* 299 (1829). So "wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit relating to the same." 2 *Hawk. P. C.* Bk. 1, ch. 83, s. 24. See also *Bradlaugh* v. *Newdegate*, p. 587.

Maintenance by master of servant, and vice versâ.] A master may go with his servant to retain counsel, or to the trial and stand by him (but ought not to speak for him in the court), or if arrested may assist him with money. *Hawk. ib.*, ss. 31, 32. So a servant *mutatis mutandis*, but he cannot lawfully lay out his own money to assist his master in his suit. *Ib.* s. 34.

Maintenance through kindred or affinity.] "Whoever is in any way of kin or affinity to either of the parties . . . may lawfully stand by him at the bar, and counsel and assist him"; but unless he be either father or son, or heir-apparent, or the husband of . . . an heiress, he cannot justify laying out his own money in the cause. *Ib.* s. 26.

Maintenance through poverty.] "Any one may lawfully give money to a poor man to enable him to carry on his suit." *Ib.* s. 36; *Harris* v. *Briscoe*, 17 *Q. B. D.* 504 (1886).

Maintenance by counsel and attorneys.] "Counsel can no more justify giving a client money to maintain a suit than any one else, but an attorney may lay out his money for his client," to be repaid again. But no counsel or attorney "can justify the using any deceitful practice in the maintenance of a client's cause, and they are liable to be severely punished for all misdemeanors of this kind." 2 *Hawk. P. C.* Bk. 1, ch. 83, ss. 38, 39, 41. See p. 697. And by 3 E. 1, Stat. West. 1, c. 29 (1275), "if any serjeant, pleader, or other, do any manner of disceit or collusion in the king's court, or consent unto it, in disceit of the court, or to beguile the court or the party, and thereof be attainted, he shall be imprisoned for a year and a day." Procuring an attorney to appear for a man, and to confess judgment without a warrant, has been held within this statute. *Ib.* s. 46. So bringing "a *præcipe* [a writ] against a poor man, knowing that he had nothing in the land, on purpose to get the possession from the true tenant." *Ib.* s. 45.

Champerty.] "Champerty [from *campi partitio* = division of the soil] is a species of maintenance . . . being a bargain with a plaintiff or defendant . . . to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." 4 *Bl. Com.* 135; 1 *Russ. Cri.* 482. Champerty may be in personal as well as in real actions; 2 *Hawk. P. C.* Bk. 1, ch. 84, s. 5; and to maintain (not only a plaintiff but) a defendant may be champerty. *Ib.* s. 8. By 31 Eliz. 5, 4 (repealed), the offence of champerty may be laid in any county at the pleasure of the informer.

Where a bill was filed to set aside an agreement with navy agents made by the legatees of a seaman, for the sale of their chance of getting prize-money in a suit, Sir William Grant, M.R., expressed an opinion that the agreement was

void from the beginning, as amounting to champerty, viz. the unlawful maintenance of a suit, in consideration of a bargain for a part of a thing, or some profit out of it. *Stevens* v. *Bagwell*, 15 *Ves.* 139 (1808). So it has been held, that an agreement to communicate such information as should enable a person to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, was illegal. *Stanley* v. *Jones*, 7 *Bingh.* 369; (1831); 5 *Moore & P.* 193 (1831); see *Potts* v. *Sparrow*, 6 *C. & P.* 749 (1834), and *Bradlaugh* v. *Newdegate*, p. 587.

Embracery.] Embracery, likewise, is another species of maintenance. "Any attempt whatsoever to corrupt or influence, or instruct a jury, or any way to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence, and the arguments of the counsel in open court at the trial of the cause, is a proper act of embracery, whether the jurors . . . give any verdict or not, or whether the verdict given be true or false." 2 *Hawk. P. C.* Bk. 1, ch. 85, s. 1. The giving of money to a juror after the verdict, without any preceding contract, "is an offence savouring of" embracery; but it is otherwise of the payment of a juror's travelling expenses "which may fairly be expected by them from either side that shall prevail." *Ib.* s. 3. Embracery is punishable on indictment like any other maintenance (by fine and imprisonment). *Ib.* s. 7.

Analogous to the offence of embracery is that of persuading a witness from attending to give evidence, or advising a prisoner to stand mute, an offence punishable with a fine and imprisonment. It is not material that the attempt has been unsuccessful. 1 *Hawk. P. C.* Bk. 1, ch. 21, s. 15; *Lawley*, 2 *Str.* 904 (1731); 1 *Russ. Cri.* 486.

Indictment.] The names of the jurors to be influenced, &c., must be set out: it is not enough to allege embracery of a jury—otherwise the indictment will be quashed. *Baker*, 113 *Cent. Crim. Ct. Sess. Pap.* 374 (1891). Whether the means by which they were to be influenced, &c., must be set out was not decided. On a proper indictment prisoner was convicted. *Ib.* 589.

MALICIOUS INJURY TO PROPERTY.

By 24–5 V. 97, 51, pp. 21, 296: "Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning shall be liable . . . to be kept in penal servitude . . ." (see p. 198).

Some of the terms of s. 52 (p. 296) are the same as in s. 51; hence the three following cases on s. 52 may apply to s. 51. An incorporeal right, such as that to "herbage," is not "real or personal property," which applies only to tangible property. *Laws* v. *Eltringham*, 8 *Q. B. D.* 283; 51 *L. J. M. C.* 13 (1881). There must be proof of actual damage to the realty itself; mere damage to uncultivated roots or plants growing upon the realty, *e.g.* mushrooms, is insufficient. *Gardner* v. *Mansbridge*, 19 *Q. B. D.* 217 (1887). But where damage to the grass to the value of 6*d.* had been done by a trespasser, the conviction was upheld, *Gayford* v. *Chowler*, 1898, 1 *Q. B.* 316.

Where the defence to an indictment under s. 51 set up is a claim of right (a recognised defence under s. 52), the jury, if they are of opinion that the defendants did more damage than was reasonably necessary to assert such right, must convict the defendants of *malicious* damage. *Clemens, &c.*, 1898, 1 *Q. B.* 556; 19 *Cox C. C.* 18, *C. C. R.* Cf. *Brooks* v. *Hamlyn*, 19 *Cox C. C.* 231 (1899).

On s. 51, see especially *Pembliton*, pp. 21, 618; see also *Martin*, pp. 22, 495, 618; *Faulkner*, pp. 22, 246, 618; and cases cited, p. 20–1.

MANSLAUGHTER.

"THERE is no offence known to our law so various in its circumstances and so various in the considerations applicable to it as that of manslaughter," *per* Denman J. in *Towers*, p. 593. The law on the subject can necessarily only be fully understood in connection with that of murder.

Punishment.] By 24–5 V. 100, 5 (as in *The Statutes Revised, 2nd ed.*): "Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . [see p. 198], or to pay such fine as the court shall award, in addition to or without any such other discretionary punishment as aforesaid." See p. 329.

Form of indictment.] See 24–5 V. 100, 6, p. 610.

Manslaughter abroad.] See 24–5 V. 100, 9, p. 217.

Manslaughter where the death is caused abroad.] See 24–5 V. 100, 10, p. 216.

Distinction between manslaughter and murder.] "Manslaughter . . . is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter . . . the act being imputed to the infirmity of human nature." 1 *East P. C.* 218; *Foster C. C.* 290. "Murder is unlawful homicide with malice aforethought. Manslaughter is unlawful homicide without malice aforethought." *Per* Stephen J., *Doherty*, pp. 186, 617; cf. pp. 592–3. As to the other distinction that there cannot be any accessories before the fact to manslaughter, see *Gaylor*, p. 151, and Erle J. on Hale, *ib.*, and *Russ. Cri.* 171. See also *Taylor*, p. 153.

It is clear that there may be accessories after the fact to manslaughter. *East*, above.

Where A. was indicted for the wilful murder of B., and C. was indicted for receiving, harbouring, and assisting A., well knowing that he had committed the murder, Tindal C.J. held that if A. was only guilty of manslaughter, C. might, notwithstanding, be found guilty as an accessory after the fact. *Greenacre*, pp. 48, 65, 151, 617, 650. See also *Richards*, p. 151.

Provocation.] "Whenever death ensues from sudden transport of passion or heat of blood, if upon a reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder." 1 *East P. C.* 232; cf. *Foster C. C.* 313. See the cases collected, p. 623. A useful rule is: "All struggles in anger, whether by fighting, or wrestling, or any other mode—all kinds of contests in anger, are unlawful," *per* Patteson J., *Canniff*, 9 *C. & P.* 359 (1840).

Mutual combat.] See p. 633 where the cases are collected.

Resistance to officers of justice, &c.] Cf. pp. 222, 516; see pp. 636–7. Cf. *Ball*, p. 487.

Killing by unlawful or negligent act.] See pp. 617–9. If a person commits an unlawful act which he knows may produce serious injury, and he is indifferent and reckless as to the consequences, though without any intent to do bodily harm, it is manslaughter at the least. *Foster C. C.* 261. See *Bradshaw*, p. 594. As to the normal question between murder or manslaughter, see p. 617.

Thus if one in wantonness or sport throw stones down a coal-pit, large enough to break the scaffolding, whereby, indirectly, a man is killed, this is manslaughter, though the latter was only a trespasser. "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. . . . [Here] the act was one of mere wantonness, and sport, but still the act was wrongful, it was a trespass," *per* Tindal C.J. *Fenton*, 1 *Lewin C. C.* 179 (1830), p. 619. So where a lad, as a frolic, without any intention to do any harm, took the trapstick out of the front part of a cart, in consequence of which it was upset, and the carman was pitched backward and killed, two judges held that he was guilty of manslaughter. *Sullivan*, 7 *C. & P.* 641 (1836). So if an improper quantity of spirits be given to a child in brutal sport, and death ensues, it will be manslaughter. *Martin*, 3 *C. & P.* 211 (1827).

Where a mother, being angry with one of her children, took up a small poker, and threw it after him, but hit another child who happened to be entering at the moment, who was killed, Park J. held this to be manslaughter, although it appeared that the mother *only* intended to frighten the former child; saying, "If a blow is aimed at an individual unlawfully —and this was undoubtedly unlawful, as an improper mode of correction— and strikes another and kills him, it is manslaughter; and there is no doubt if the child at whom the blow was aimed had been struck and died it would have been manslaughter, and so it is under the present circumstances." *Conner*, 7 *C. & P.* 438 (1836). The prisoner requested deceased, who had entered his house in his absence, to go, but he refused. Upon this words arose, and the prisoner, becoming excited, used force, and, by a kick which he gave him, caused an injury which produced his death. Alderson B. said, "A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, he is guilty of manslaughter." *Wild*, 2 *Lew. C. C.* 214 (1837). A man was in possession, under the sheriff. One of the prisoners, of whose goods he was in possession, assisted by the other prisoner, plied the man with liquor, themselves drinking freely also. When he was very drunk they put him into a cab, and caused him to be driven about the streets; after about two hours he was found dead. Parke B. told the jury, that if the prisoner, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. *Packard, &c., Carr. & M.* 236 (1841). Cf. pp. 616–7. If A. and B. agree together to assault C. with their fists, and C. receives an "unlucky" blow of the fists from either of them, causing death, both A. and B. are guilty of manslaughter. But should A. of his own impulse, kill C. with a weapon suddenly caught up, B. would not be responsible for the death, he being only liable for acts done in pursuance of the common design of himself and A. *Per* Lush, J. *Caton*, 12 *Cox C. C.* 624 (1874); cf. p. 612.

The prisoner having the right to the possession of a gun which had been wrongfully taken by and was in the hands of the deceased, demanded it back, and on being refused attempted to take it away by force, though he knew it to be loaded. In the struggle which ensued the gun went off accidentally and killed the deceased. L. Campbell directed the jury that, though the prisoner had a right to the possession of the gun, to take it away by force was unlawful; and, as the discharge of the gun, though accidental, was the result of this unlawful act, it was their duty to find the prisoner guilty of manslaughter. *Archer*, 1 *F. & F.* 351 (1857), p. 648.

But the death must be the direct and not the indirect consequence of the unlawful act. The prisoner was a maker of fireworks, and he made and kept them in a manner contrary to the provisions of a repealed statute at his own house. During his absence, by the negligence of one of his servants, the fireworks became ignited, by which a neighbouring house was set fire to, and a person therein burnt to death. It was held that the prisoner was not indictable for manslaughter, as the death was caused by the negligence of the servant. *Bennett*, 1 *Bell C. C.* 1; 28 *L. J. M. C.* 27 (1858). Where a station-master despatched trains at too short an interval after each other, but a signal-man caused the collision by a mistake with the signals, Erle C.J. advised the grand jury to throw out the bill against the station-master, because his negligence was not the proximate and efficient cause of the deaths. *Ledger*, 2 *F. & F.* 858 (1862); see p. 598. A. in unlawfully assaulting B., who at the time had in her arms an infant, so frightened the infant that it died after six weeks; A. is guilty of manslaughter if the jury think that the assault on B. was the direct cause of death. *Per* Denman J., *Towers*, 12 *Cox C. C.* 530 (1874), p. 591; cf. with this case, *Brown*, p. 625. See as to the negligent omission of a duty, *Hughes*, 1 *Dears. & B. C. C.* 248; 26 *L. J. M. C.* 202 (1857), pp. 601, 622, where L. Campbell C.J. said, "What constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence." Cf. p. 591.

As to manslaughter committed by the captain and mate of a vessel on one of the crew, see *Leggett*, 8 *C. & P.* 191 (1838), where it was admitted that discipline must be strict.

Lawful or unlawful sports.] Where death ensues from such sports or recreations, as are innocent and allowable, it falls within the rules of excusable homicide, p. 516, because bodily harm is not the motive on either side. *Foster C. C.* 259; 1 *East P. C.* 268. "Therefore persons playing at cudgels, *Comb.* 408, or foils or wrestling, *Lane* (1717), are excusable if death ensue." *East, ib.* Hale, says Foster, *ib.*, appears to be of a different opinion. He says, "Regularly he that voluntarily and knowingly *intends hurt to the person of a man*, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder or manslaughter at least; as, if A. intends to beat B. but not to kill him, yet if death ensues, this is not *per infortunium*, but murder or manslaughter, as the circumstances of the case happen. And, *therefore*, I have known it ruled, that if two men are playing at cudgels together, or wrestling, by consent, if one with a blow or fall kill the other, it is manslaughter, and not *per infortunium*, tho Mr. Dalton [cap. 96, ch. 148 in edition of 1742] seems to doubt it; and accordingly it was resolved, *P.* 2 *Car.* 2, by all the judges, upon a special verdict, from Newgate, where two friends were playing at foils at a fencing school, one casually kild the other; resolved to be manslaughter." 1 *P. C.* 472. The questions in these cases appear to be two, 1st, whether the sport was lawful; and 2nd, whether the parties engaged in it with a friendly mind, or with intent to do each other some bodily harm. The cases mentioned by Hale seem to proceed upon the latter supposition, and on this ground they are distinguished by Foster J. (and East),

from "the case of persons who in perfect friendship engage by mutual consent in . . . recreations for a trial of skill or manhood, or for improvement in the use of their weapons." But if there be dangerous weapons used in such sports, and there be any negligence in the use of them, such negligence may render causing a death manslaughter. Sir John Chichester, fencing with his servant, made a pass at him, which the servant parried off with a bedstaff. In the heat of the exercise, the chape of the scabbard flew off, and the man was killed by the point of the sword. It was held that this was manslaughter, "because altho the act which occasioned the death intended no harm, nor could it have done harm, if the chape had not been stricken off by the party kild, and tho the parties were in sport, yet the act itself, the thrusting at the servant, was unlawful." *Hale*, above (1671); *Aleyn*, 12; see p. 516, and cf. *Keilw.* 108, 136. Foster J. *ib.*, puts this decision on another ground, viz. that the defendant did not use the degree of caution which common prudence would have suggested; "and therefore the fact *so circumstanced* might well amount to manslaughter, though the exercise itself with proper weapons might have been otherwise lawful."

Death in the course of a friendly contest may also amount to manslaughter if any undue advantage has been taken. Thus, "if two were engaged to play at cudgels, and the one made a blow at the other likely to hurt, before he was upon his guard, and without warning, from whence death ensued; the want of due and friendly caution would make such act amount to manslaughter." 1 *East P. C.* 269.

If death is caused by an injury received in a friendly sparring-match with gloves, which is not a thing likely to cause death, it is not manslaughter, unless the parties fight on until the sport becomes dangerous. *Young and others*, 10 *Cox C. C.* 371 (1866). But if the combatants met intending to fight for money till one gave in from exhaustion or injury received, the contest would be a prize-fight, although gloves were used. *Orton and others*, 14 *Cox C. C.* 226; 39 *L. T. R.* 293 (1878); *C. C. R.*, pp. 234, 252, where pugilists and spectators were convicted of an unlawful assembly, p. 751. "Charging" in football, knowing that charging in the manner adopted is likely to produce serious injury to another, and being reckless and indifferent as to the consequences, would be an unlawful act, and if death was thereby caused, it would be manslaughter: no "Association" or other rules could make an unlawful act lawful, but "if a man is playing according to the rules and practice of the game, and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury," *per* Bramwell L.J. *Bradshaw*, 14 *Cox C. C.* 83 (1878), p. 592.

"Though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger to be reasonably apprehended, if death casually ensue, it is but misadventure." *East, ib.* Therefore, if a person be shooting at game or butts, or other lawful object, or "if he be cleaving wood, and the axe flies from the helve," and a bystander be casually killed, it is only misadventure. 1 *Hale P. C.* 38, 39, 472; 1 *East P. C.* 269. But quite otherwise, if the sport, &c., be unlawful; "a man at the diversion of cock-throwing at Shrovetide, which hath too long prevailed, missed his aim, and a child looking on received a blow from the staff, of which he soon died, I once in the circuit ruled it manslaughter." *Foster*, 261. Cf. *Brown*, p. 625.

"Prize-fighting, and publick boxing-matches . . . the like, which are exhibited for lucre," are not lawful sports, for they "serve no valuable purpose, but, on the contrary, encourage a spirit of idleness and debauchery." *Foster*, 260. "In such cases, the intention of the parties is not innocent in itself,

each being careless of what hurt may be given, provided the promised reward or applause be obtained. And again, such meetings have a strong tendency in their nature to a breach of the peace. And, therefore, in *Ward's case* (1789), who was challenged to fight by his adversary, for a public trial of skill in boxing, and were also urged to engage by taunts, although the occasion were sudden, yet, having killed his opponent, he was holden guilty of manslaughter." 1 *East P. C.* 270. The prisoner was charged with being present, aiding and abetting a murder (in a prize-fight): there had been a fight between the deceased and another person, at which a great number of persons were assembled, by whom, in the course of the fight the ring was broken in several times: they had sticks which they used with great violence. The deceased died in consequence of the blows he received on this occasion. There was contradictory evidence as to the prisoner having acted as second. Littledale J. said, "—— the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter if they encouraged it by their presence; I mean if they remained present during the fight. . . . If they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything. . . . If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of manslaughter; but if the death ensued by violence unconnected with the fight itself—that is, by blows given not by the other combatant, but by persons breaking in the ring, and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter. The case is at most one of manslaughter only, and the charge of murder is not at all supported." See p. 635. *Murphy*, 6 *C. & P.* 103 (1833), cf. p. 634. (It has been ruled, however, that persons present at a fatal prize-fight are not such accomplices as that their evidence requires confirmation (p. 110); *Hargrave*, 5 *C. & P.* 170; 1831.) The summing up of Littledale J. in *Murphy*, as above reported, was considered by the majority of the Court for C. C. R. to be misleading, because it led to the inference as *a matter of law* that mere presence at a fight renders the spectator guilty of an assault in aiding, &c., in such fight, and the jury, as they expressly said, only found "guilty" on this account, believing that in fact prisoners did not aid, &c. The proposition was directly overruled by eight judges to three: the latter, on the other hand, were of opinion that the legal inference to be drawn from mere presence as a voluntary spectator at a prize-fight is, in the absence of other evidence to rebut such inference, that he is encouraging, aiding, &c., and, therefore, guilty of assault. *Coney, &c.*, pp. 158, 234, 252, 253, where the prisoners were amongst a crowd of people surrounding two men, who fought in a ring formed by ropes supported by posts: the prisoners took no active part in the management of the fight nor did they say or do anything. The ground on which the majority, who quashed the conviction, proceeded was thus put by Cave J.: "Where presence may be entirely accidental, it is not even evidence of aiding or abetting. Where presence is *primâ facie* not accidental, it is evidence, but no more than evidence, for the jury." (*Q. B. D.* 540.)

Accidents in ordinary employment through carelessness.] See p. 622. Where death casually ensues in the course of a lawful employment, and there s a want of due caution on the part of the person from whom it proceeds, it will not be misadventure, but manslaughter. "A., having deer frequenting his cornfield out of the precinct of any forest or chace, sets himself in the night-time to watch in a hedge, and sets B., his servant, to watch in another corner of the field with a gun, charged with bullets, giving him order to shoot when he hears any bustle in the corn by the deer, the master himself improvidently rushes into the corn, the servant, supposing it to be the deer,

shoots, and thereby kills his master." This was held to be only chance-medley (p. 516), for "the servant was misguided by his master's own direction. . . . But it seemed to me that if the master had not given such direction . . . it would have been manslaughter to have shot at a man, tho by mistaking it for a deer, because he did not" use due diligence "to discover his mark." 1 *Hale P. C.* 476, who seems to have tried the case. "The criterion," says East (262), "in such cases is to examine whether social duty would, under the circumstances, have suggested a more circumspect conduct."

An iron founder being employed to make some cannon, to celebrate the passing of the Reform Bill, after one of them had burst, and had been returned to him in consequence, sent it back in so imperfect a state that, on being fired, it burst again, and killed a man; he was found guilty of manslaughter. *Carr*, 8 *C. & P.* 163 (1832).

East's canon, above, is illustrated by the instance of workmen throwing down stones from the top of a house on which they are working, according as there is a small probability—or a great (as in populous towns)—of persons passing by. So *Foster*, 262. Cf. 1 *L. Raym.* 143, and see p. 619.

Negligent driving frequently causes death; p. 480. "A. was driving a cart with horses in the highway at Whitechapel; and he, being in the cart, and the horses upon a trot, they threw down a woman who was going the same way with a burthen upon her head, and killed her. Holt C.J." and three other judges, in 1704, "held this to be only misadventure. But by L. Holt, if it had been in a street where people usually passed, this had been manslaughter. . . . It must be taken for granted from this note of the case that the accident happened in an highway *where people did not usually pass*; for otherwise the circumstance of the driver's being in his cart, and going so much faster than is usual for carriages of that construction, savoured much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly in order to avoid any person who could not get out of the way in time. And indeed such conduct in a driver of such heavy carriages might under such circumstances be thought to betoken a want of due care if any though but few persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it to be required; but whoever seeks to excuse himself for having unfortunately occasioned by any act of his own the death of another, ought at least to shew that he took that care to avoid it which persons in similar situations are most accustomed to do." 1 *East P. C.* 263; see p. 622. The deceased was walking along the road in a state of intoxication. The prisoner was driving a cart drawn by two cantering horses, without reins: he was sitting in front of it. On seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and was killed. Found, on direction as to the unusually rapid pace, guilty of manslaughter. The judge added, that it is the duty of every man who drives any carriage to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur. *Walker*, 1 *C. & P.* 320 (1824), p. 598. Clearly each case of driving must depend upon its circumstances. Thus, it was ruled that a carter by sitting inside the cart instead of being at the horse's head, was guilty, when it ran over a child, of manslaughter. *Knight*, 1 *Lewin C. C.* 168 (1828). There were two omnibuses racing: the prisoner was driving that on which the deceased sat, and was whipping his horses just before his omnibus upset. Patteson J. said, "The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could in order to get past the other omnibus? and had he urged his horses to so rapid a pace that he could not control them? If you are of that opinion, you ought to convict him." *Timmins*, 7 *C. & P.* 499 (1836). As to contributory negligence, see p. 598.

To make the captain of a steam-vessel guilty of manslaughter in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain, and a mere omission on his part in not doing the whole of his duty is not sufficient. But if there be sufficient light, and the captain of the steamer is either at the helm or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. *Green*, 7 *C. & P.* 156 (1835). A mere mistake in judgment will not be sufficient. *Elliott*, 16 *Cox C. C.* 710 (1889), where a guard caused a railway accident without any wilful disobedience to rules, &c. See below, p. 601.

The prisoner's duty was to attend a steam-engine; he stopped it and went away. During his absence a person came to the spot and put it in motion, and being unskilled was unable to stop it again; in consequence whereof the deceased was killed. Alderson B. stopped the case, observing that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after the prisoner went away, and that it was necessary, in order to a conviction for manslaughter, that the negligent act which caused the death should be that of the accused. *Hilton*, 2 *Lew. C. C.* 214 (1838). But cf. *Lowe*, p. 601, and see *Bennett*, p. 593.

Negligent use of dangerous weapons.] It is sometimes very difficult to trace the boundaries between manslaughter and misadventure, *e.g.* a man found a pistol in the street which he had good reason to believe was not loaded, he having tried it with the rammer. He carried it home and showed it to his wife, when it went off and killed her. "It was holden by us all that this was manslaughter, and not only misadventure." *Rampton* (1664), *Kel.* 41: marginal note "*quære*," by Holt (according to Foster, 263). "Admitting," says Foster J. *ib.*, "that the judgment was strictly legal, it was, to say no better of it, *summum jus*. . . . I think it was not, for the law in these cases doth not require the *utmost* caution that *can be* used; it is sufficient that a reasonable precaution, what is *usual and ordinary* in the like cases, be taken. . . . I once upon the circuit tried a man for the death of his wife by a like accident. Upon a *Sunday* morning the man and his wife went a mile or two from home with some neighbours, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was. He taking it up touched the trigger, and the gun went off and killed his wife, whom he dearly loved. It came out in evidence that while the man was at church a person belonging to the family privately took the gun; charged it, and went after some game; but before the service at church was ended, restored it *loaded* to the place whence it was taken, and where the defendant, who was ignorant of all that had passed, found it, to all appearance, as he left it. I did not inquire whether the poor man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury that if *they* were of the same opinion they should acquit him, and he was acquitted." *Foster*, 265. "If a man take a gun, not knowing whether it is loaded or unloaded, and using no means to ascertain, and fires it in the direction of any other person, and death ensues, he is guilty of manslaughter," *per* Keating J. *Campbell*, 11 *Cox C. C.* 323 (1869), p. 619. Now, to point a gun in the direction of another, even with most reasonable grounds of a negative character for believing it to be unloaded, is only an act of folly, and it is not too much to require that a man

should take positive means to ascertain that it is not loaded before he points it in the direction of another person. And see the questions asked of the jury by Cockburn C.J. in *Weston*, pp. 185, 627. See *Salmon*, p. 152.

Contributory negligence.] This is no defence in *criminal* law. Assuming the negligence of the deceased, if the death was caused also by negligence on the part of the defendant, he is guilty. It has been distinctly ruled in several cases, that it is no ground of defence that the death was partly caused by the negligence of others, for they may all be guilty; *Ledger*, p. 593; *Haines*, 2 *C. & K.* 368 (1847), p. 601; *Barrett*, 2 *C. & K.* 343 (1846), where others *could have* done the duty neglected; *Benge*, 4 *F. & F.* 504 (1865)—railway accident through negligence of several. Nor is it that the death was partly caused by the negligence of the deceased himself; *Swindall*, 2 *C. & K.* 230 (1846), where two men, each furiously driving and urging one another on in separate carts, were convicted, though possibly only one ran over the deceased; and it would not have mattered even if the latter "was deaf or drunk or negligent or in part contributed to his own death." See also *Walker*, p. 596; *Kew*, 12 *Cox C. C.* 355 (1872), where little children on a road in no one's charge were run over; as to the person driven in the cart, who was indicted with the driver, the judge remarked "a word from him might have prevented the accident." *Jones*, 11 *Cox C. C.* 544 (1870), where it was held that if the deceased interfered with the management of the horse, the accused driver, who was drunk at the time, ought to be acquitted, but that he could claim no indulgence because he was drunk; p. 631. *Longbottom*, 3 *Cox C. C.* 439 (1849), where a deaf man walking in the middle of a country road at night was run over; *Hutchinson*, 9 *Cox C. C.* 555 (1864), p. 160, where a bill was preferred against a commanding officer, not personally superintending, one of whose men in firing practice killed a passer-by, but the bill was ignored. As to superior orders, see p. 646. There is, however, some doubt as to the extent to which this doctrine can be carried. A man turned out a horse, which he knew to be vicious, on the common, over which he knew people were in the habit of passing, as they had a right to do by certain unfenced paths. A child was killed by the horse, either on or very near one of the paths. It was held that the owner was rightly convicted of manslaughter, and some of the judges were disposed to think that it would have made no difference if the child had been on any part of the common on which people were in fact accustomed to go, whether rightfully or not. *Dant, L. & C.* 567; 34 *L. J. M. C.* 119 (1865). See p. 615. See also *Benge*, above. Upon the other hand, in *Birchall*, 4 *F. & F.* 1087 (1866), Willes J. said that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, and "until he saw a decision to the contrary he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action." But as to this case Lush J. said, in *Jones*, above, that it was quite at variance with what he had always heard laid down; and in *Shaw*, 1868, the same learned judge ruled that at all events a child could not be guilty of such contributory negligence as to afford any defence to a defendant, who had negligently run over it (*8th ed.* of this work). In *Kew*, above, Byles, J., said, contributory negligence either of a child or of an adult was no defence. In *Gregory*, 2 *F. & F.* 153 (1860), the death may have been due entirely to the negligence of the deceased, and it was not shown that the prisoner was negligent at all. As Pollock C.B. said in *Swindall*, above, where there is loss of life "each party is responsible for any blame that may ensue, however large the share [? whole] may be, and so highly does the law value human life that it admits of no justification wherever life has been lost and

the carelessness or negligence of any one person has contributed to the death of another person." It has often been pointed out that a trial for manslaughter is a prosecution by the crown, and not a suit between parties.

By surgeons, doctors, &c.] Where a person, acting as a medical man, &c., whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention, so as to cause death, it is manslaughter, but if there is no gross negligence it is not. Cases of great difficulty have arisen where medicines have been carelessly or unskilfully administered by incompetent persons. The law is thus laid down by Hale: "If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a chirurgeon. 3 *E.* 3 *Coron.* 163. And I hold their opinion to be erroneous that think, if he be no licensed chirurgeon or physician that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgeons, and therefore, if they be not licensed according to the statute of 3 *H.* 8 *cap.* 11 [in force] or 14 *H.* 8 *cap.* 5 [repealed], they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter." 1 *Hale P. C.* 429. Blackstone concurs with Hale, saying, "but it hath been holden that if it be not a *regular* physician or surgeon who administers the medicine or performs the operation it is manslaughter at the least. Yet Sir M. Hale very justly questions the law of this determination." 4 *Bl. Com.* 197. The correctness of Hale's opinion has been often recognised. Thus, in *Van Butchell*, p. 31, Hullock B. ruled that it made no difference whether the operator was a regular or an irregular surgeon; "indeed, in remote parts of the country many persons would be left to die, if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where from the manner of the operation even malice might be inferred." So Park J. observed, that whether the person was licensed or unlicensed, is of no consequence except in this respect, that he may be subject to pecuniary penalties for acting contrary to charters or Acts of Parliament. *Long*, 4 *C. & P.* 398 (1830), first case. But whether he be licensed or unlicensed, if he display gross ignorance, or gross inattention, or gross rashness, in his treatment, he is criminally responsible. Where a person who, though not educated as an accoucheur, had been in the habit of acting as a man-midwife, and had unskilfully treated a woman in childbirth, in consequence of which she died, was indicted for the murder, L. Ellenborough said that there was no evidence that the prisoner was guilty of murder, but it was for the jury to consider whether he was of manslaughter. "To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter." *Williamson*, 3 *C. & P.* 635 (1807), cited with approbation and repeated in *Long*, above. In *Long*, a case was cited by counsel where a man who was drunk delivered a woman, who, by his mismanagement, died, and he was sentenced to six months' imprisonment. And where a person grossly ignorant, undertook to deliver a woman and killed the child in the course of the delivery, it was resolved by the judges that he was rightly convicted of manslaughter. *Senior*, 1 *Moo. C. C.* 346 (1832), p. 611. The rule is thus laid down by Bayley J.: "It matters not whether a man has received a medical education or not. The thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of

caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying . . . that if a man be guilty of gross negligence in attending to his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter." *Long*, 4 *C. & P.* 423 (1831), second case. A sailor had been discharged from an infirmary as cured, after undergoing salivation, and went to the prisoner for an emetic, "to get the mercury out of his bones." The prisoner was an old woman who occasionally dealt in medicines. She gave him a solution of corrosive sublimate, which she declared she had got from some one else, one dose of which caused his death. Bayley J. said, "I take it to be perfectly clear, that if a person, not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequence in a case where medical assistance may be obtained. If he does so, it is at his own peril. It is immaterial whether the person administering the medicine prepares it, or gets it from another." *Simpson*, 4 *C. & P.* 407 (*n.*); 1 *Lewin C. C.* 172 (1829). These cases were closely followed in *Catherine Spiller*, 5 *C. & P.* 333 (1832). Where a surgeon and accoucheur was convicted of neglecting to take due care of a woman after her delivery, Tindal C.J. said: "You are to say, whether in the execution of that duty which the prisoner had undertaken to perform he is proved to have shewn such a *gross* want of care, or such a *gross* and *culpable* want of skill, as any person undertaking such a charge ought not to be guilty of; and that the death . . . was caused thereby." *Ferguson*, 1 *Lewin C. C.* 181 (1830): six months' imprisonment. So L. Lyndhurst C.B. where prisoner, a publican, with the best intentions, had administered quack pills (for which he was agent) to a sufferer from small-pox: "In these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a licence. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine, takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. . . . I shall leave it to the jury to say whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicines, he acted either with a criminal intention, or from any gross ignorance." In answer to the contention that death was due to small-pox, and that the pills alone could not have caused it (as to which the medical witnesses offered no opinion), L. Lyndhurst said it was enough if they accelerated the death; cf. *Morby*, p. 602. See 1 *Hale P. C.* 428, and pp. 616–7. *Webb*, 1 *Moo. & Rob.* 405; 2 *Lew. C. C.* 196 (1834), pp. 126 and 602: guilty. See also *Markuss*, 4 *F. & F.* 356 (1864): "herbalist's" case. A properly qualified accoucheur, of great experience and repute, used, according to medical evidence, a dangerous instrument at an improper time, and with great want of skill, whereby death ensued. Coleridge J. told the jury that the questions for them to decide were, whether the instrument had caused the death of the deceased, and whether it had been used by the prisoner with due and proper skill and caution, or with gross want of skill or gross want of attention. The prisoner was convicted, and sentenced to six months' imprisonment. *Spilling*, 2 *Moo. & R.* 107 (1838). The apprentice to a chemist by mistake

delivered laudanum to a customer, who asked for paregoric; the laudanum being administered to a child caused its death. The apprentice being indicted for manslaughter, Bayley J. directed the jury that if they thought him guilty of negligence, they should find him guilty; which they did, and he was fined five pounds. *Tessymond*, 1 *Lewin C. C.* 169 (1828). See also *Carr*, p. 596.

Neglect of Duty.] A person "may, by a neglect of duty render himself liable to be convicted of manslaughter or even of murder," *per* L. Campbell C.J. where an engineer, employed to manage a steam-engine to draw up miners from a coal-pit, left the engine in charge of a boy who, he knew, was incapable of managing it, as it required some skill, and in consequence one of the miners was killed; the engineer was convicted of manslaughter. *Lowe*, 3 *C. & K.* 123 (1850), p. 597, see below. See also *Haines*, p. 598; *Hughes*, pp. 593, 622; and *Barrett*, p. 598.

Trustees for the repair of roads are not chargeable with manslaughter if a person, using such a road, is accidentally killed in consequence of its being out of repair through their neglect. *Pocock*, 17 *Q. B.* 34 (1851), where an inquisition convicting trustees was quashed, and L. Campbell said he had passed "a severe sentence" in *Lowe*, above.

In *Waters*, 1 *Den. C. C. R.* 356; 18 *L. J. M. C.* 53 (1848), pp. 612, 621, the prisoner was held after verdict to be properly convicted of the manslaughter of her infant child of such tender age as to be incompetent to take care of herself, on a count which stated the death to have been caused by exposure, whereby she became mortally chilled, &c., though it omitted to aver the child's inability to take care of itself.

Where one *voluntarily* undertakes the charge of an infant, or any other helpless human being (*Instan*, below), he must execute such charge "without (at all events) *wicked* negligence," said Brett J. ". . . Mere negligence will not do, there must be . . . negligence so great" as to satisfy a jury that the offender "had a wicked mind" in the sense of being reckless and careless whether death occurred or not. *Nicholls*, 13 *Cox C. C.* 75 (1874). A very old woman maintained her niece; no one else lived with them; the latter, when the former fell ill, neglected her and did not provide proper food or call in a doctor (though there was abundant means, food, &c.), and undoubtedly accelerated her death. It was held that there was a clear common law duty on the niece, and she was rightly convicted of manslaughter. *Instan*, 1893, *Q. B.* 450; 62 *L. J. M. C.* 86; 17 *Cox C. C.* 602; *C. C. R.* Cf. murder by neglect, p. 620 and p. 518.

But where there is no legal duty to give that assistance which would have saved life, withholding it appears not to be criminal, see *Shepherd*, p. 330. It is, perhaps, the duty of a husband to supply his wife, though living apart, with shelter, if he knows that the want of it is likely even to accelerate her death. *Plummer*, p. 66.

Failure of a woman to have assistance at her confinement, whereby the child dies, is not manslaughter; there must be neglect after the birth. *Izod*, 20 *Cox C. C.* 690 (1904).

On the other hand, a wilful neglect of a duty imposed by statute may amount to manslaughter. See as to apprentices, pp. 620, 623.

The prisoner, who belonged to the sect of "peculiar people," was indicted for the manslaughter of his child by neglecting to call in medical advice when the child was ill. The child, after being ill and wasting for eight or nine months, had died. The prisoner, in accordance with the custom of the sect, did not call in medical aid, but called in women friends and the elders of the church to pray over the sick child; he also consulted one of them as to the proper treatment, but neither of them had any medical skill. They thought

the child was teething, and gave it such diet as they thought suitable. The prisoner had sufficient means to procure medical advice, which was easily obtainable. It was found by the jury, that the prisoner wilfully neglected to provide medical aid, where it was in fact reasonable so to do, and he had the ability, and that death was caused by such neglect—and that prisoner honestly believed that it was unnecessary and wrong to call in medical aid; upon a conviction for manslaughter, it was held that the prisoner was properly convicted, on the ground that 31–2 V. 122, 37 [repealed], imposed a positive duty (and a punishment on summary conviction) to provide medical aid when necessary, and that death was due to that duty having been wilfully neglected. *Downes*, 1 *Q. B. D.* 25; 45 *L. J. M. C.* 8; 13 *Cox C. C.* 111 (1875); *C. C. R.* Confirmed in *Senior*, 19 *Cox C. C.* 219 (1898), *C. C. R.*, under 57–8 V. 41, 1 (repealed: see now, p. 325), where it was also held that withholding medical aid to a sick child would support a common law indictment.

But there must be positive evidence (*Webb*, p. 600) that the death was caused or accelerated by the neglect of duty. Where in another "peculiar people" case the medical evidence only went to show that proper medical aid, &c., *might* have saved or prolonged the child's life, and would have increased its chance of recovery, but that it might have been of no avail, it was held that, although there was a neglect of duty (under s. 37, above), yet the conviction for manslaughter must be quashed, and that the judge should not have left the jury to find (as they did) what the skilled witness could not, viz. that life was in fact shortened. *Morby*, 8 *Q. B. D.* 571; 51 *L. J. M. C.* 85; 15 *Cox C. C.* 35 (1882); *C. C. R.* It was laid down by Martin B., after consulting Erle C.J., that if parents have not the means of providing food, &c., for their infant children, it is their duty to apply for the assistance provided by the poor law, and that if their children die through the wilful neglect of that duty, at any rate, for four or five days, they will be criminally responsible. They also held that there was not "a particle of evidence" against the husband though there was no doubt he was "morally guilty; as he was spending the money 'he earned' on himself." *Mabbett and wife*, 5 *Cox C. C.* 339 (1851). Evidence of means to provide food and medicine for a child at a date before the neglect or death may be given, and the jury may infer means at the date. *Jones*, 19 *Cox C. C.* 678 (1901). See p. 329.

Correction by parent or others.] "Parents, masters, and other persons having authority *in foro domestico* may give reasonable correction to those under their care, and if death ensueth without their fault it will be no more than accidental death. But if the correction exceedeth the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter according to the circumstances." *Foster C. C.* 262. See p. 623. Cf. pp. 253, 329.

Killing in defence of person or property.] See pp. 254, 647–8. "A man may repel force by force, in defence of his person, habitation, or property, against one who manifestly intends or endeavours by *violence or surprise* to commit a *known felony*, such as murder, rape, robbery, arson, burglary, and the like upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing it is justifiable self-defence [p. 516]; as, on the other hand, the killing by such felons of any person so lawfully defending himself will be murder. But a bare fear of any of these offences, however well grounded; as that another lies in wait to take away the party's life, unaccompanied with any overt act, indicative of such an intention; will not warrant him in killing that other by way of prevention; there must be an actual danger at the time." 1 *East P. C.* 271, 272. Cf. p. 625. Not only is the

person himself, whose person or property is the object of the attack, justified in thus resisting, but "a servant or any other person present may lawfully interpose to prevent the mischief intended. . . . Thus, in the instances of arson and burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do, subject, however, to the same limitations." See p. 254, and cf. p. 606. "In this respect . . . I see no difference between the case of the person assaulted, and those who come in aid against such felons. And the legislature itself seems to have considered them on the same foot; for in the case of the Marquis de Guiscard, who [in 1711] stabbed Mr. Harley sitting in council, they discharged the party who gave the mortal wound from all manner of prosecution on that account; and declared the killing to be a *lawful and necessary action*." *East, ib.* 289; *Foster*, 273–4, referring to 9 An. 16 (repealed), which "saved harmless" *Wilcocks*, the queen's messenger, who had been returned by the coroner's inquisition for the murder of Guiscard, and all who had assisted in Harley's defence. A prisoner within "the Rules" of the K. B., a mere lodger or sojourner, in repelling an invasion of the house, is not guilty, if he kill the assailant. Cf. *Cooper, Cro. Car.* 544 (1639). Cf. p. 748.

"It is only such felonies as are attended with force or any extraordinary degree of atrocity which in their nature betoken such urgent necessity, as will not allow of any delay," that the rule extends to. Of this sort are what are called "*known*" felonies, in contradistinction to "secret felonies," *i.e.* such as may be committed without violence or resistance by the felon, *e.g.* picking the pocket, &c. Where an open attempt is made to murder, ravish, or commit other felonies, "attended with force or surprize," the attacked may lawfully kill, but it must "not be left in doubt." *East, ib.* 273; *Foster*, 273–4.

The rule extends to *felonies* only. Thus, "if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet if he kill him, it is manslaughter." *East*, 272; 1 *Hale P. C.* 485, 486. See *Odgers*, p. 496; cf. p. 648 and below.

It is enough if the felony is reasonably suspected as imminent. Cf. p. 644–5. Levett being in bed and asleep, his maid-servant, who had procured Freeman to help her in her work, went to the door about midnight, to let her out, and conceived she heard thieves about to break into the house. Upon this she awakened her master, telling him what she apprehended. He took a drawn rapier, and the girl fearing that Freeman would be seen, hid her in the buttery. Mrs. Levett seeing her there, and not knowing her, conceived her to be the thief, and called to her husband, who entering in the dark, and thrusting before him with his rapier killed Freeman. This was ruled to be misadventure only. *Levett, Cro. Car.* 538 (1639); 1 *Hale P. C.* 42, 474. "Possibly," says Foster, J. (299), "it might have been better ruled manslaughter at common law [than "chance-medley," p. 516], due circumspection not having been used."

Where there is an actual assault, the extent of allowable violence in resistance must depend upon its nature, and the circumstances generally, above, pp. 625, 626. Sometimes a man may reasonably apprehend death or great violence, as, *e.g.*, Ford being in possession of a room at a tavern, several persons persisted in having it, and turning him out, but he refused to submit, when they drew their swords upon Ford and his company, and Ford, drawing his sword, killed one of them, and it was adjudged justifiable homicide (p. 516). Both Kelynge and Foster seem to doubt this decision. But East observes that "though the assailants waited till Mr. Ford had drawn his sword, which does by no means appear, yet if more than one attacked him at the same time (and as he was the only one of his party who seems to have

resisted, it is probable enough that such was the case) . . . the determination seems to be maintainable." 1 *East P. C.* 243; *Ford, Kel.* 51 (between 1627 and 1631). So in *Mawgridge*, pp. 20, 630, great violence was held justifiable in the case of a common assault. "Mawgridge, upon words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword. Mr. Cope returned a bottle at the head of Mawgridge, which it was lawful for him to do in his own defence, and wounded him; whereupon Mawgridge stabbed Cope, which was ruled to be murder. For Mawgridge, in throwing the bottle, shewed an intention to do some great mischief, and his drawing immediately shewed that he intended to follow up his blow." *East, ib.* See 2 *L. Raym.* 1489; *Foster*, 274, 295. "The words previously spoken by Mr. Cope could be no justification for Mawgridge; and it was reasonable for the former to suppose his life in danger when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life; and this at a time when he was off his guard, and without any warning. This latter circumstance forms a main distinction between this case and the case of death ensuing from a combat where both parties engage upon equal terms; for there, if upon a sudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon suspend his arm till he has warned the other, and given him time to put himself upon his guard; and afterwards they engage on equal terms; in such case it is plain that the design of the person making such assault is not so much to destroy his adversary at all events, as to combat with him, and to run the hazard of his own life at the same time. And that would fall within the same common principle which governs the case of a sudden combat upon heat of blood. . . . But if several attack a person at once with deadly weapons, as may be supposed to have happened in Ford's case; though they wait till he be upon his guard; yet it seems (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat." 1 *East P. C.* 276.

An assault with intent to *chastise*, although the person making the assault has no legal right to inflict chastisement, will not justify the person assaulted in killing the assailant. The prisoner who was indicted for the murder of his brother, came home drunk. His father ordered him to go to bed, but he refused, upon which a scuffle ensued between them. The deceased, who was in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him and beat him, the prisoner not being able to avoid his blows, or to make his escape. As they were struggling together, the prisoner gave him a mortal wound with a penknife. This was unanimously held by the judges to be manslaughter, "for there did not appear to be any *inevitable necessity* so as to excuse the killing *in that manner*. The deceased did not appear to have aimed at the prisoner's life, but only . . . to chastise him for his misbehaviour to his father." *Nailor* (1704), 1 *East P. C.* 277. At the conference in this case, "Powell J. put the case;—If A. strike B. *without any weapon*, and B. retreat to a wall, and there stab A., that will be manslaughter; which Holt C.J. said was the same as the principal case; and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking, *without any dangerous weapon*, that the intent of the aggressor rose so high as the death of the party stricken, and without there be a plain manifestation of a felonious intent, no assault, however violent, will *justify* killing the assailant under the plea of necessity." *Ib.* Similarly:—The prisoner and his brother were fighting, on which prosecutor laid hold of the prisoner to prevent him from hurting his brother, and held him down, but did not strike him, and the prisoner stabbed him with a knife above the knee. Parke J. said: "The prosecutor states that he was merely

restraining the prisoner from beating his brother, which was proper on his part. . . . If you are of opinion that the prosecutor did nothing more than was necessary to prevent the prisoner from beating his brother, the crime of the prisoner, if death had ensued, would not have been reduced to manslaughter; but if you think that the prosecutor did more than was necessary to prevent the prisoner from beating his brother, or that he struck any blows, then I think that it would. You will therefore consider whether anything was done by the prosecutor more than was necessary, or whether he gave any blows before he was cut." *Bourne*, 5 *C. & P.* 120 (1831). As it is said, p. 604, the killing must appear to be done from "inevitable necessity," and to avoide the immediate commission of the wrong. "He therefore who, in the case of a mutual conflict, would excuse himself upon the foot of self-defence, must shew that before a mortal stroke given, he had declined any farther combat, and retreated as far as he could with safety; and also that he killed his adversary through mere necessity, and to avoid immediate death. If he faileth in either of these circumstances, he will incur the penalties of manslaughter." *Foster*, 277.

"Neither shall a man in any case justify the killing another by a pretence of necessity unless he were himself wholly without a fault in bringing that necessity upon himself." 1 *Hawk. P. C.* Bk 1, ch. 28, s. 22. Therefore, "where A., with many others, had, on pretence of title, forcibly ejected B. from his house; and B. on the third night returned with several persons with intent to re-enter; and one of B.'s friends attempted to fire the house; whereupon one of A.'s party killed one of B.'s with a gun; held manslaughter in A.; because the entry and holding with force was illegal." 1 *East P. C.* 277–8.

It is to be observed that killing in defence of the person will amount either to justifiable or *excusable homicide* or *chance-medley*, as the latter is termed (p. 516), according to the circumstances. "Self-defence upon chance-medley," implies "that the person, when engaged in a sudden affray, quitted the combat before a mortal wound given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life. This case bordereth very nearly upon manslaughter, and in fact and experience the boundaries are in some instances scarcely perceivable. . . . In both cases it is supposed that passion hath kindled on each side, and blows have passed between the parties; but in the case of manslaughter it is either presumed that the combat on both sides hath continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death." *Foster*, 276–7. "The true criterion" between manslaughter and excusable homicide, or chance-medley in self-defence, "seems to be this: when both parties are actually combating at the time the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and, afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide, excusable by self-defence." 4 *Bl. Com.* 184. In all the cases cited by East, of excusable self-defence, "it must," he says, "be taken that the attack was made upon a sudden occasion, and not premeditated or with malice. For if one attacked another with a dangerous weapon, unprepared, with intent to murder him, that would stand upon a different foot . . . and in that case, if the person whose life was sought killed the other, that would be in self-defence, properly so called, which does not induce any forfeiture. But if the first assault be *upon malice*, and the flight be feigned as a pretence for carrying that malice into execution, it would undoubtedly be murder; for then the flight rather aggravates the crime, as it shews more deliberation." 1 *P. C.* 282.

Where a person is set to watch premises in the night, and shoots at and kills another who intrudes upon them, the nature of the offence will depend upon the reasonable ground which the former had to suspect the latter's intentions. "Any person, set by his master to watch a garden or yard, is not at all justified in shooting at or injuring in any way, persons who may come into those premises even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he has done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he will be guilty of manslaughter," *per* Garrow, B. *Scully*, 1 *C.* & *P.* 319 (1824), where the deceased had undoubtedly come to steal.

Several persons tried to break open the door of a house in which the prisoner lodged; cf. p. 603. The prisoner after remonstrating with them opened the door, and he and they began to fight outside. The prisoner was pushed into the house again by another lodger, but the men outside broke open the door in order to get at the prisoner, and a scuffle again ensued, in which the deceased, who with others had attacked him fiercely, was killed by the prisoner with a pair of iron tongs. There was a back door through which the prisoner might have escaped, had he known of it. Bayley J. said, "If you are of opinion that the prisoner used no more violence than was necessary to defend himself from the attack made upon him, you will acquit him. The law says a man must not make an attack upon others unless he can justify a full conviction in his own mind that, if he does not do so, his own life will be in more danger. If the prisoner had known of the back way, it would have been his duty to go out backwards, in order to avoid the conflict." *Dakin*, 1 *Lewin*, *C. C.* 166 (1828).

The deceased and his servant insisted on placing corn in the prisoner's barn, which she refused to allow; they exerted force, a scuffle ensued, in which the prisoner received a blow on the breast: whereupon she threw a stone at the deceased, upon which he fell down, and died. Holroyd J. said, "The case fails on two accounts: it is not proved that the death was caused by the blow, and if it had been it appears that the deceased received it in an attempt to invade her barn against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose, and she is not answerable for any unfortunate accident that may have happened in so doing," and he directed an acquittal. *Hinchcliffe*, 1 *Lewin C. C.* 161 (1823).

MANUFACTURES, OFFENCES AS TO.

Destroying goods in process of manufacture.] By 24–5 V. 97, 14: "Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking hose or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material or . . ." For continuation, see p. 585.

Stealing goods in the process of manufacture.] By 24–5 V. 96, 62: "Whosoever shall steal to the value of ten shillings any woollen, linen, hempen or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field, or other place, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen years . . ." (see p. 198).

Where on an indictment under a repealed statute, for stealing yarn from a bleaching ground, the yarn at the time it was stolen was in heaps for the purpose of being carried into the house, and was not spread out for bleaching, Thompson B. held that the case was not within the statute. *Hugill*, 2 *Russ. Cri.* 403 (between 1787 and 1800). So where the indictment under the same statute was for stealing calico, placed to be printed and dried in a certain building, it was held, that it was necessary to prove that the building from which the calico was stolen was used either for drying or printing calico. *Dixon, R. & R.* 53 (1803). But that statute mentioned particularly a building, &c., made use of by any calico printer, &c., for printing, whitening, bowking, bleaching, or drying. It has been decided that goods remain in a 'stage, process or progress of manufacture," within 7–8 G. 4, 30, 3 (repealed), though the texture be complete, if they are not yet brought into a condition for sale. *Woodhead*, 1 *Moo. & R.* 549 (1836).

MARRIAGE, OFFENCES IN SOLEMNISING.

See p. 273 and p. 334.

By 6 E. 7, 40, 2, p. 400, it is a misdemeanor punishable by a fine of £100, or imprisonment for one year (maximum), to act in contravention of or not to comply with the Order in Council, regulating the marriage of a foreigner with a British subject in the United Kingdom.

MINES, OFFENCES IN, OR IN RELATION TO.

The following ss. are set out as in *The Statutes Revised, 2nd ed.*

Setting fire to a coal mine.] See 24–5 V. 97, 26, 27, p. 240.

Conveying water into a mine, obstructing the shaft, &c.] By 24–5 V. 97, 28: "Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level or shaft, of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . [see p. 198] and if a male under the age of sixteen years, with or without whipping; provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working."

Damaging steam engines, staiths, waggon-ways, &c., for working mines.] By s. 29: "Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or render useless, any steam engine or other engine, for sinking, draining, ventilating or working, or for in anywise assisting in sinking, draining, ventilating or working any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon way, or trunk for conveying minerals, from any mine, whether such engine, staith, building, erection, bridge, waggon way, or trunk, be completed, or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, or shall unlawfully and maliciously wholly or partially cut through, sever, break or unfasten, or damage with intent to destroy or render useless any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever, in anywise belonging to or appertaining to or connected with, or employed in any mine or the working or business thereof, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . [see p. 198], and if a male under the age of sixteen years, with or without whipping."

As to riotous damage of this sort, see 24–5 V. 97, 11, 12, pp. 746–7.

Larceny from mines.] By 24–5 V. 96, 38: "Whosoever shall steal, or sever with intent to steal, the ore of any metal or any lapis calaminaris,

manganese or mundick, or any wad, black cawke, or blacklead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . ."

Miners removing ore with intent to defraud.] By s. 39: "Whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . ."

Venue.] See, as to offences under 24–5 V. 96, pp. 218, 562.

Malice.] See 24–5 V. 97, 58, p. 241.

Persons in possession of property injured.] See 24–5 V. 97, 59, p. 241.

Form of indictment.] See 24–5 V. 97, 60, p. 241. The mine may be laid as the property of the person in possession and working it, though only an agent. *Jones*, 2 *Moo. C. C.* 293 (1843), under 7–8 G. 4, 30, 6 (repealed), almost identical with s. 28, p. 608.

Injury to mine in asserting right.] 24–5 V. 97, 28, 29, p. 608, do not render a person criminally liable for acts causing such damage, if done in *bonâ fide* exercise of a supposed right, and without a wicked mind. *Matthews*, 14 *Cox C. C.* 5 (1876). Where A. and B. were the owners of adjoining collieries, and A., asserting that a certain airway belonged to him, directed his workmen to stop it up, and they, acting *bonâ fide*, and believing that A. had a right to give such an order, did so, L. Abinger C.B. held they were not guilty of felony under s. 6, above. *James*, 8 *C. & P.* 131 (1837). But if they knew that the stopping up was a malicious act of their master, they would be guilty. *Ib.*

MONEYLENDERS, OFFENCES BY.

See p. 493. By 63–4 V. 51, 4: "If any moneylender, or any manager, agent, or clerk of a moneylender, or if any person being a director, manager, or other officer of any corporation carrying on the business of a moneylender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanor, and shall be liable on indictment to imprisonment with or without hard labour for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both."

MURDER.

Punishment.] By 24–5 V. 100, 1: "Whosoever shall be convicted of murder, shall suffer death as a felon."

Conspiring or soliciting to commit murder.] See 24–5 V. 100, 4, p. 359.

Indictment.] By 24–5 V. 100, 6: "In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed."

Petit treason abolished.] By s. 8: "Every offence which before the commencement of the Act of the ninth year of King George the Fourth, chapter thirty-one [repealed], would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder." The offences were the killing by a servant of his master, by a wife of her husband, by an ecclesiastical person of his superior, "being considered a violation of private allegiance" (*Sweet, Law Dict.*).

Venue in murder abroad.] See 24–5 V. 100, 9, p. 217, and s. 10, p. 216.

Child murder.] S. 60 is set out, p. 331.

Accessory after the fact.] By s. 67: "Every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life . . ." (see p. 198). See pp. 158, 649.

Proof of a murder.] That a murder has been committed by some one, is essentially necessary to be proved; and Hale advises that in no case should a prisoner be convicted, where the dead body has not been found—where the theory of murder depends upon the fact of disappearance. See p. 15. The *fact* is sometimes called *corpus delicti* (*e.g.* by Starkie, below), an inconvenient phrase, leading to confusion with the usual meaning of *corpus*—"body." "Upon charges of homicide," says Starkie, "it is an established rule that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body. . . . The . . . principle requires that upon a charge of homicide, even when the body has been found, and although indications of a violent death be manifest, that it shall still be fully and satisfactorily proved that the death was neither

occasioned by natural causes (see *Spencer Cowper*, 13 *St. Tr.* 1105 in 1699), by accident, nor by the act of the deceased himself. In considering the probability of the latter supposition, it is to be recollected that it is by no means improbable that a person bent on self-destruction would use precautions to protect his memory from the ignominy, and his property from the forfeiture [p. 124], consequent on a verdict of *felo de se*." *Evidence*, 862, *4th ed.* *Spencer Cowper's case*, where the question was whether a body found in the water had come there by suicide or murder, is discussed by *Macaulay*, *History*, ch. 25.

A girl was proceeding from Bristol to Llandogo, and she was seen near Tintern, with a child sixteen days old in her arms, at six o'clock; she arrived at Llandogo between eight and nine without the child. The body of a child was afterwards found in the Wye, near Tintern, which appeared not to be her child. L. Abinger C.B. held that the prisoner must be acquitted, and that she could not by law either be called upon to account for her child, or to say where it was, unless there was evidence to show that it was actually dead. *Hopkins*, 8 *C. & P.* 591 (1838). Cf. *Williams*, p. 331, which shows that a body must be found even on a charge of concealing birth.

Murder of child en ventre sa mère, &c.] A child in the womb is considered *pars viscerum matris*, and not possessing an individual existence, and cannot therefore be the subject of murder; p. 232. Thus, if a woman, quick or great with child, take, or another give her, a potion to procure abortion, or strike her, "whereby the child within her is killed," it is neither murder nor manslaughter. 1 *Hale P. C.* 433. Whether or not a child was born alive, is a proper question for the opinion of medical men. Where their opinion was that a child had breathed, but they could not take upon themselves to say whether it was wholly born alive, as breathing may take place *during the birth*, Littledale J. said, "the being born must mean that the whole body is brought into the world, and it is not sufficient that the child respires in the progress of its birth," and the jury found that the child was not born alive. *Poulton*, 5 *C. & P.* 329 (1832). This authority was recognised by Park J. who added, "but if" the child "has been wholly born, and is alive it is not essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after their birth." *Brain*, 6 *C. & P.* 349 (1834). In another case, J. Parke J. ruled the same way, saying that a child might breathe before it was born, "but its having breathed is not sufficiently life to make the . . . killing murder," and "there must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose." *Pulley*, 5 *C. & P.* 539 (1833), below. So *Wright*, p. 332. So, Coltman J. held that, in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state, and that the fact of its having breathed was not a decisive proof that it was born alive, as it might have breathed and yet died before birth. *Sellis*, 7 *C. & P.* 850 (1837). Where an indictment charged that the prisoner gave birth to a child alive, and afterwards strangled it: Parke B. held that, in order to convict upon that indictment, the jury must be satisfied that the whole body of the child had come forth from the body of the mother when it was strangled, adding, that if the jury "should be of opinion that the child was strangled intentionally, while it was connected with the umbilical cord to the mother, and after it was wholly produced," he should direct them to convict, and would reserve the point, his impression being that it would be murder. *Crutchley*, 7 *C. & P.* 814 (1837). See *Senior*, p. 599; also *Reeves*, 9 *Carr. & P.* 25 (1839). In *Trilloes*, 2 *Moo. C. C.* 260 (1842), it was finally held that murder may be committed on a child still attached to the mother by the navel string.

It is said by Hale, that if the child be born alive, and afterwards die in consequence of blows given to the mother, this is not homicide. 1 *Hale P. C.* 433. And see *Staundforde, Pleas of the Crown*, 21*a*. But Coke, on the contrary, says that if the child be born alive, and die "of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature *in rerum natura* when it is born alive." 3 *Inst.* 50. The latter is generally regarded as the better opinion, and has been followed by text writers. 1 *Hawk. P. C.* Bk. 1, ch. 31, s. 16; 4 *Bl. Com.* 198; 3 *Russ. Cri.* 6; *note* to *Pulley*, above; and *Senior*, p. 599. Cf. *West*, p. 232.

It seems unnecessary now to set out the cases such as *Smith*, 6 *C. & P.* 151 (1833); *Biss*, 8 *C. & P.* 773 (1838); and *Stroud*, 1 *C. & K.* 187 (1842), in which a variance between the description of an infant child in the indictment and the evidence was held fatal. Such a variance would undoubtedly now be amended under 14–15 V. 100, 1, p. 177. "Not named" has been held enough, in *Waters*, pp. 601, 621, though "not baptised" would not have been.

If the child has not been named the best course is to describe it as "a certain male (or female) child then lately born of the body of A. B. and not named." See *Hogg*, p. 194; *Willis*, 1 *Den. C. C. R.* 80 (1845).

Circumstantial Evidence.] See p. 15. Where the case against the prisoner was "made up of circumstances entirely, and contained no one fact which taken alone amounted to a presumption of guilt," Alderson B. told the jury, that before they could find the prisoner guilty of murder, they must be satisfied "not only that those circumstances were consistent with *his* having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person." *Hodge*, 2 *Lew. C. C.* 227 (1838).

In order to convict of murder it is not necessary to prove that the fatal blow was given by prisoner's hand. See p. 151. *Foster*, in the passage cited pp. 151–2, continues, "Therefore if A. happeneth to be present at a murder . . . and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessary." But "in the case of assassinations done in private . . . the circumstances" last supposed "may be made use of against A., as evidence of consent and concurrence on his part, and in that light should be left to the jury, if he be put upon his trial." *Ib.* Where the prisoner is charged with committing the act himself, and it appears to have been committed in his presence by a third person, the indictment is sustained. Thus, where a child had been strangled, and the question was whether it had been done in the prisoner's presence by third persons; J. Parke J. said, "If you are satisfied that this child came by her death by . . . strangulation, it is not necessary that the prisoner should have done it with her own hands; for if it was done by any other person in her presence, she being privy to it, and so near as to be able to assist," she is guilty. *Culkin*, 5 *C. & P.* 121 (1832).

If several go out with a common intent to commit a felony, and death ensues by the act of one of the party, the rest will not necessarily be guilty of murder. "If three persons," says Park J. "go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony, will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out." *Duffey*, 1 *Lewin C. C.* 194 (1830); cf. p. 592. "Three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand. The owner's son,

coming by, collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him. It was ruled by Holt [1697], to be murder in him; but that those on the tree were innocent. They came to commit a small inconsiderable trespass, and the man was killed upon a sudden affray without their knowledge. It would, said he, have been otherwise if they had all come thither *with a general resolution against all opposers.* [So 4 *Hawk. P. C.* Bk. 2, ch. 29, s. 8.] This circumstance, I think, would have shewn that the murder was committed in prosecution of their original purpose; but that not appearing to have been the case, those on the tree were to be considered as mere trespassers; their offence could not be connected with that of him who committed the murder." *Foster* 353. The following is a leading case on the subject. "A great number of persons assembled in a house called Sissinghurst, in Kent . . . and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz. *A.*, was known, the rest were not known; a warrant was obtained from a justice of the peace to apprehend the said *A.* and divers other persons unknown which were all together in Sissinghurst-house. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house and demanded entrance, and acquainted some of the persons within that he was the constable, and came with the justice's warrant, and demanded *A.* with the rest of the offenders that were then in the house, and one of the persons within came and read the warrant, but denied admission to the constable, or to deliver *A.* or any of the malefactors, but going in, commanded the rest of the company to stand to their staves; the constable and his assistants fearing mischief, went away, and being about five rods from the door, *B.*, *C.*, *D.*, *E.*, *F.*, *&c.*, about fourteen in number, issued out and pursued the constable and his assistants; the constable commanded the peace, yet they fell on and killed one . . . and wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said *A.* and one *G.*, that read the warrant, were two; for which the said *A.*, *B.*, *C.*, *D.*, *E.*, *F.*, *G.*, and divers others, were indicted of murder and tried at the King's Bench bar, wherein these points were unanimously agreed: 1. That altho the indictment were that *B.* gave the stroke, and the rest were present aiding and assisting, tho in truth *C.* gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that evidence was sufficient to maintain the indictment, for in law it was the stroke of all the party, according to the resolution in *Mackally's case* [pp. 71, 641.] 2. That, in this case all that were present and assisting to the riot were guilty of the death of the party slain, tho they did not all actually strike him or any of the constable's company. 3. That those within the house, if they abetted or counselled this riot, were in law present, aiding and assisting, and principals, as well as those that issued out and actually committed the assault, for it was but within five rod of the house, and in view thereof, and all done as it were at the same instant; *vide Lord Dacre's case* before [439 in 1541]. 4. That here was sufficient notice that it was the constable, before the man was killed, (1) Because he was the constable of the same village; (2) Because he notified his business at the door before the assault, viz. that he came with the justice's warrant; (3) Because, after his retreat, and before the man slain, the constable commanded the peace, and, notwithstanding it, the rioters fell on and killed the party. 5. It was resolved that the killing of the assistant of the constable was murder, as well as the killing of the constable himself. 6. That those that came in the assistance of the constable, tho not specially called thereunto, are under the same protection as they that are called to his assistance by name. 7. That altho the constable retired with his company upon the not delivering up of *A.*, yet the killing of the assistant in that

retreat was murder. . . . 1. Because it was one continued act in the pursuance of his office, his retiring was as necessary when he could not attain the effect of his warrant, and was in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace . . . in the conclusion the jury found nine of them guilty, and acquitted those within, not because they were absent, but because there was no clear evidence that they consented to the assault, as the jury thought." *Sissinghurst-house case* (1674), 1 *Hale P. C.* 464; see pp. 636 & foll.

John Thom, who was insane, collected a number of persons together, having a common purpose of resisting the police, &c., Thom having declared that he would cut down any constables who came against him. Thom, in the presence of the two prisoners, who afterwards helped him to maltreat the deceased, afterwards shot an assistant of a constable who came to apprehend him, under a warrant. It was held by L. Denman C.J. that the prisoners were guilty of murder as principals in the first degree, and that any apprehension that they had of personal danger to themselves from Thom, was no defence for continuing with him after they knew his purpose (and never is for any illegal act); nor was it any defence, that Thom and his party had no distinct or particular object in view when they assembled together and armed themselves. *Tyler and another*, 8 *C. & P.* 616 (1838). But, in the absence of a common design to be carried out at all hazards, constructive homicide only applies to felonies, not to misdemeanors, *e.g.* poaching at night. Hence while prisoner, who had a gun, was guilty of manslaughter, even if it went off by accident in a scuffle with a keeper who had a right to seize it (and of murder, had he fired it), it was neither in the others, merely because there was homicide in the course of poaching. *Skeet and others*, 4 *F. & F.* 931 (1866), p. 488.

The means of killing.] The killing may be by any of the thousand "forms of death by which human nature may be overcome." 4 *Bl. Com.* 196. But there must be an "external act of violence . . . whereof the common law can take notice"; and therefore, "if a man, either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such passion of grief or fear as that the party either dies suddenly or contracts some disease, whereof he dies" this is no felony. 1 *Hale P. C.* 429. This view is put strongly by Byles J. in *Murton*, p. 617 (who, however, admits "negative" corporal injury, *e.g.* deprivation of necessaries, as enough). Cf. p. 619. But, on the other hand, Dr. Kenny says (*Outlines*, ch. 9), "It used . . . formerly to be thought that killing by a *mental* shock would not be murder; but, in the clearer light of modern medical science, the present tendency of legal opinion is to regard such a cause of death as not too remote for the law to trace."

Intimidation.] Forcing—(it has, perhaps, therefore been said in the earlier editions of this work)—a person to do an act which is likely to produce and does produce death, is murder; and threats may constitute such force. (The authority, however, on which this rests, seems to be Blackstone, who says, "If a man . . . does such an act of which the probable consequence may be, and eventually is, death, such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended," 4 *Comm.* 197). The prisoner—it was alleged—killed his wife by beating; secondly, by throwing her out of the window; and thirdly and fourthly, that he threatened to throw her out of the window and to murder her, and that by such threats and violence she was so terrified that, through fear of his putting his threats

into execution, she threw herself out of the window, and died. There was strong evidence that her death was occasioned by the blows she received before her fall, but three judges "were of opinion, that if her death was occasioned partly by the blows, and partly by the fall, yet, if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner, however, was acquitted, the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats." *Evans* (1812), 3 *Russ. Cri.* 12; see also *Pitts, Carr. & M.* 284 (1842). Prisoner threatened his wife, with every appearance of intending her violence: she began to get out of the window to avoid him, but was held back by a daughter whom prisoner bade let her go, which she did, and the wife fell out; held he was rightly convicted of doing her grievous bodily harm and of assaulting her. *Halliday*, 6 *T. L. R.* 109 (1889), *C. C. R.*, where L. Coleridge C.J. said, "When a man creates in another's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries." Cf. p. 252.

If a man has a beast which is used to do mischief, and he, knowing this, purposely turns it loose, "though barely to frighten people, and make what is called sport," and death ensues, it is "as much murder as if he had incited a bear or a dog to worry them" (see p. 652), and if he "*suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner." 4 *Bl. Com.* 197; 1 *Hale P. C.* 431; cf. pp. 598, 663. A park-keeper, finding a boy spoiling trees, tied him to a horse's tail and began to beat him: the horse was frightened, ran away, and dragged the boy and killed him; held, on special verdict, murder. *Halloway, Cro. Car.* 131; *Palmer* 545; 1 *W. Jones* (198), 4 *Bl. Com.* 198, 199 (1628), p. 617. An indictment for the murder of A. B. by poison, stating that the prisoner administered, &c., a poison, is supported by proof that the prisoner gave the poison to C. D. to administer (as a medicine) to A. B., but C. D. not intending and failing to do so, it was accidentally given to A. B. by a child; the prisoner's intention throughout being to murder, it was as if she had actually done it with her own hand. *Michael*, 2 *Moo. C. C.* 120; 9 *C. & P.* 356 (1840). Cf. 1 *Hale P. C.* 616, p. 649.

Perjury.] Whether or not the giving false evidence against another upon a capital charge, with the result that he is executed, will amount to murder appears to be a doubtful point. There are not wanting old authorities to prove that such an offence amounts to wilful murder. *Mirrour of Justices*, ch. 1, s. 9 (which, however, "as an authority" on criminal law, "is worthless," 2 *Pollock and Maitland, Hist.*, Bk. 2, ch. 8, s. 2, *note*); *Britton*, b. 1, ch. 6 (or 5), f. 14 s. 1; *Bract. de legibus* l. 3, tract. 2, c. 4, f. 121 (who, however, only speaks of homicide "by the tongue," *in a different sense*); see also 1 *Hawk. P. C.* Bk. 1, ch. 31, s. 7. But Coke, citing this passage from *Britt.*, says, "which is not holden for murder at this day." 3 *Inst.* 48. The point arose in *McDaniel and Berry*, 1 *Lea.* 44: 19 *St. Tr.* 810 (June, 1756), where the prisoners were "indicted for murder upon a conspiracy," and convicted, and a special verdict (apparently) was found, but as the point of law was not argued, they were discharged; *Foster* 131, who is against holding the offence to be murder, though he admits that there are strong passages in the ancient writers which countenance such a prosecution. "But," he says, "those writers must always be read with great caution upon the subject of homicide," and "The practice of many ages backwards doth by no means countenance their opinion,"

and he alludes to the prosecutions against Titus Oates [10 *St. Tr.* 1079, 1227 in 1685], as showing that at that day the offence could not have been considered as murder, otherwise Oates would undoubtedly have been so charged. Sir W. Blackstone, however, states that though the attorney-general [Sir Robert Henley] declined, in *McDaniel*, to argue the point of law, yet he has "good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons." 4 *Com.* 196 (*n.*). And East says that he has heard L. Mansfield say that "the opinions of several of the judges at that time, and his own, were strongly in support of the indictment." 1 *P. C.* 333 (*n.*). Blackstone implies what the law was, by observing that "the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their lives) has not yet punished the offence as murder." 4 *Com.* 197.

Unskilful treatment of wounds, &c.] Doubts occasionally arise whether the death has been occasioned by the wound or by the unskilful and improper treatment of that wound; cf. pp. 600, 602. The law on this point is laid down at some length by Hale. "If a man give another a stroke, which, it may be, is not in itself so mortal but that with good care he might be cured, yet if he die of this wound within the year and day, it is a homicide or murder as the case is, and so it hath been always ruled. But if the wound or hurt be not mortal, but with ill applications by the party or those about him of unwholesome salves or medicines, the party dies, if it can clearly appear that this medicine and not the wound was the cause of his death, it seems it is not homicide. . . . But if a man receives a wound which is not in itself mortal, but either for want of helpful applications or neglect thereof, it turns to a gangrene or a fever, and this gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound, for that wound, tho it were not the immediate cause of his death, yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*." 1 *P. C.* 428. "Disorder" or neglect by the victim of his wounds will not excuse the offender. If the former "doth not keep that rule which a person wounded should do; yet if he die it is murder or manslaughter, because, if the wounds had not been, the man had not died." *Rew, J., Kel.* 26 (1663). So Maule J. held that an inflicter of a wound which ultimately caused death, was guilty of murder, though life might have been preserved if the deceased had not refused to submit to an operation. *Holland*, 2 *Moo. & R.* 351 (1841), where deceased had refused to have a finger amputated, *in time*, and lockjaw came on and caused death.

Intoxication, one cause of death.] The prisoner and the deceased had been fighting, and the deceased was killed. A surgeon stated that a blow on the stomach in the state in which the deceased was, "arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober." Hullock B. directed an acquittal, observing that "where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible so to apportion the operations of the several causes, as to be able to say with certainty that the death was immediately occasioned by any one of them in particular"; he cited from his notes, *Brown*, 1824: "Indictment charged with killing by *striking*. The jury found that the death was occasioned by over-exertion in the fight. The judges held that the prisoner was entitled to an acquittal." *Johnson*, 1 *Lewin C. C.* 164 (1827). It may be doubted how far his (1827) ruling was correct; for if by

the act of the prisoner the death was accelerated, he would be guilty of the felony; pp. 600, 602. And although intoxication might render the person more liable to suffer injury from the blows, yet it is difficult to say that the intoxication was the *cause* of his death any more than the infirmity of age or sickness, which could not, it is quite clear, be so esteemed. Where the deceased, at the time of the blow given, was in an infirm state of health, and this circumstance was observed upon on behalf of the prisoner, J. Parke, J. remarked: "It is said that the deceased was in a bad state of health; but that is perfectly immaterial, as, if the prisoner was so unfortunate as to *accelerate* her death, he must answer for it." *Martin*, 5 *C. & P.* 128 (1832). See also *Murton*, 3 *F. & F.* 492 (1862), p. 614, where the question was whether prisoner's treatment of a woman diseased and given to drink, had shortened her life by its shock to her nervous system: he was convicted of manslaughter.

Malice.] "*Malice aforethought* . . . is the grand criterion which now distinguishes murder from other killing; and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart . . . and it may be either *express* or *implied* in law. Express malice is when one, with a sedate deliberate mind and formed design, doth kill another: . . . if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when [*Halloway*, p. 615, is here cited] . . . a master corrected his servant with an iron bar and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. . . . Also, in many cases where no malice is expressed, the law will imply it, as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause." 4 *Bl. Com.* 199–200. See *per* Holt C.J. in *Mawgridge*, pp. 20, 604, 630; and also *per* Stephen J. in *Doherty*, pp. 186, 591; cf. pp. 20, 592–3. See p. 620.

"Where it appears that one person's death has been occasioned by the hand of another, it behoves that other to shew from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to murder." This principle is "perfectly clear." *Per* Tindal C.J., *Greenacre*, p. 591, &c. So 4 *Bl. Com.* 201.

"Former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased," 1 *Phill. Ev.* 514, on the analogy of other offences (see *Other Offences* in *Index*).

Death, undesigned, from unlawful or wanton act.] "If an action, unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful." *Foster* 261, p. 592; cf. p. 246. Thus, where "an injury intended to *A.*, be it by poison, blows, or any other means of death, would have amounted to murder, supposing *him* to have

been killed by it, it will amount to the same offence, if *B.* happeneth to fall by the same means." But "on the other hand, if the blow intended against *A.*, and lighting on *B.*, arose from a sudden transport of passion, which, in case *A.* had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if *B.* should happen to fall by it." *Ib.*; cf. 1 *Hale P. C.* 441–2. See *Hunt* and *Latimer*, pp. 21, 495, &c.

So where two meet to fight a duel, and a stranger comes between them to part them, and is killed by one of them, it is murder in the latter. *Hale, ib.* So *Saunders*, p. 154. Such also was the case of the wife who mixed ratsbane in a potion sent by the apothecary to her husband, which did not kill him, but killed the apothecary, who, to vindicate his reputation, had tasted it himself. *Agnes Gore* (1612), 9 *Co.* 81*a*; 1 *Hawk. P. C.* Bk. 1, ch. 31, s. 45. So *Smith*, p. 495.

It has been said that whenever death is caused, even unintentionally, in the commission of a felony, the crime is murder; see Foster who says (258), "A. shooteth at the poultry of B. and by accident killeth a man, if his intention was to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter" (continued, p. 619). In *Horsey*, 3 *F. & F.* 287 (1862), a man set fire to a stack, and a person sleeping by it was burned to death. Bramwell B. accepted the rule laid down by Foster, though it "may appear unreasonable"; but he suggested to the jury that if they were not satisfied that the deceased was in the barn at the time when the prisoner set fire to the stack, but came in afterwards, they might acquit him, on the ground that the man's death was not the natural and probable consequence of his act. This, however, is virtually to repeal the rule laid down by Foster. It is very doubtful whether Foster's view of the law would be taken to be correct at the present day. It is criticised by Dr. Kenny (*Outlines*, ch. 9), who says, "to treat such cases," as that in Foster, and others which he puts, "seems an excessive severity indeed," and adds, "The modern tendency is thus towards a limitation of the rule to such felonies as are likely to cause death . . . and homicide resulting from any felony which was intrinsically unlikely to cause death would not be murder at all, but only a case of 'involuntary' manslaughter." The acquittal of *Serne*, below, a case similar to *Horsey*, above, "seems to have been due," says Dr. Kenny, "simply to the jury's dislike of the doctrine of a 'constructive' malice," for he was convicted of arson." "Yet, if guilty of arson, he undoubtedly was legally guilty of murder." See *per* Blackburn J. in *Pembliton* (2 *C. C. R.* at 121), pp. 21, 590; and *per* Stephen J. in *Serne*, 16 *Cox C. C.* 311 (1887), who considered that a better rule would be "any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder." As to *intent* against one person and injury, in fact, to another, see p. 495. The prisoners were indicted for murder. The deceased, being in liquor, had gone at night into a glasshouse, and laid himself down upon a chest. While there asleep the prisoners covered him with straw, and threw hot cinders upon him, the consequence of which was, that the straw ignited, and he was burnt to death. There was no evidence of express malice on the part of the prisoners, but they showed great recklessness. Patteson J. told the jury that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter. *Errington*, 2 *Lew. C. C.* 217 (1838). As to intending the consequences of an act, see *Faulkner*, pp. 22, 246, 590, and *Martin*, pp. 22, 495, 590.

It is not necessary, in order to render the killing murder, that the unlawful act intended would, had it been effected, have been felony.

Thus, in the case of the person who gave medicine to a woman (1 *Hale P. C.* 429), and of her [*Tinckler*, p. 29] who puts skewers into a woman's womb, with a view in both cases to procure abortion, whereby the women were killed: "Such acts are clearly murder; though the original intent, had it succeeded, would not have been so but only a great misdemeanor [but see p. 232], for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the person on whom they were practised." 1 *East P. C.* 230. So if in a riot or quarrel, whether "sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavouring to keep the peace and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy as to go on in it to the hazard of the lives of those who no otherwise offend him but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems, in this respect, equally criminal as if his intention had been to commit a felony." 1 *Hawk. P. C.* Bk. 1, ch. 31, s. 54.

If a person rides a horse "known to be used to kick, amongst a multitude of people," although he only means "to divert himself," and death ensues, he will, it is said, be guilty of murder. *Hawk. ib.* s. 61; ch. 29, s. 12; 1 *East P. C.* 231. Cf. p. 615. "So if a man, knowing that people are passing along the street, throw a stone likely to create danger, or shoot over the house or wall, with intent to do hurt to people, and one is thereby slain, it is murder, on account of the previous malice, though not directed against any particular individual; for it is no excuse that the party was bent upon mischief generally. But if the act were done incautiously, without any such intent, which must be collected from the circumstances, it is only manslaughter." *East, ib.*; 1 *Hale P. C.* 475. See pp. 596, 622. In all these cases "the nature of the instrument and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence." *East, ib.* 257. If a person fires at another a rifle, "knowing it to be loaded, the intent is to be presumed, and from the intention to kill the malice aforethought is implied in law"; but if he did not know, he cannot be convicted of murder. *Campbell*, p. 597, where the alternative of manslaughter is explained.

Foster's rule (p. 618), extends only to such acts as are *mala in se*; for if they "be barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man." The mere imposing of penalties will not in a case of this kind "enhance the accident beyond it's intrinsick moment." *Foster* 259. Thus, shooting deer in one's own park, or throwing a stone at a bird, and accidentally killing some one thereby [without any negligence whatever] is no offence, but "throwing a stone at another's horse," and thereby killing some one, is felony (manslaughter), for the act itself was unlawful. 1 *Hale P. C.* 39, 475; 1 *East P. C.* 255, 257.

As to a trespass committed in sport and causing death, see *Fenton*, p. 592.

Wilful neglect of duty.] In *Hughes*, pp. 593, 601, cf. *Lowe*, p. 601, the prisoner was a brakesman at the mouth of a pit-shaft, into which building materials were being sent: it was his duty to place a stage over the mouth of the pit as the loaded trucks came up, to stop them, but he negligently omitted to place it there, and one of the trucks came up and fell into the pit and killed the deceased. A conviction for manslaughter was upheld; if the omission had been wilful, it would have been murder. "It has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty, as of a mother to nourish her infant child, this is a case of murder," *per* L. Campbell. Cf. p. 614.

Ill-treatment of infants and other helpless persons.] Amongst the eight modes of killing enumerated by Hale, are (1) the "exposing a sick or weak person or infant unto the cold to the intent to destroy him, whereof he dieth," (2) "laying an impotent person abroad, so that he may be exposed to and receive mortal harm, as laying an infant in an orchard, and covering it with leaves, whereby a kite strikes it and kills it." 1 *P. C.* 431, 432. These are murders, for "he who wilfully and deliberately does any act which apparently endangers another's life, and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense." 1 *East P. C.* 225. See p. 617. "Such was the case of him who carried his sick father against his will, in a cold frosty season, from one town to another, by reason whereof he died." 1 *Hawk. P. C.* Bk. 1, ch. 31, s. 5; *East, ib.* See p. 329. Cf. *Stockdale,* 2 *Lew. C. C.* 220 (1838).

When apprentices, prisoners, &c., have died from want of sufficient food or necessaries, the question has sometimes been whether the law would imply malice in the master or gaoler, so as to make the offence murder. The prisoner and his wife were indicted for the murder of his parish apprentice. Both had used him in a most barbarous manner, and had not provided him with sufficient food, &c.; but the surgeon who opened the body gave his opinion that the boy died from debility and want of proper nourishment, and not from the wounds, &c., he had received. The judge was of opinion that the case was defective as to the wife, and directed an acquittal; but the husband was found guilty and executed. *Squire* (1799), 3 *Russ. Cri.* 13, p. 818, and below.

Where a married woman was charged with the murder of her illegitimate child, by omitting to supply it with proper food, Alderson B. held that she could not be convicted unless it was shown that her husband supplied her with food to give to the child, and that she wilfully neglected to give it, saying, "There is no distinction between the case of an apprentice and that of a bastard child, and the wife is only the servant of the husband, and according to" *Squire,* above, "can only be made criminally responsible by omitting to deliver the food to the child, with which she had been supplied by her husband." *Saunders,* 7 *C. & P.* 277 (1836), p. 818. But a mother would be liable if the death arose from her not suckling an infant when she was capable of doing so. *Per* Patteson J., *Edwards,* 8 *C. & P.* 611 (1838).

The prisoner left Worcester in a stage-waggon, and was in the waggon about ten at night at an inn on the Malvern Hills. She must have subsequently left the waggon, as she overtook it at Ledbury; she had been delivered of a child between the inn and Ledbury, and had carried it about a mile to the place where it was found dead, which was also at the road-side. The road was much frequented, and two waggon teams and several persons were on it about the time when the child was left. A waggoner, who was passing along the road, heard the child cry, but went on without rendering it any assistance. Having told some other persons, they proceeded to the spot and found the child, which was quite naked, and dead from cold and exhaustion. The prisoner had arranged with a woman to be confined at her house, and to pay her 3*s.* 6*d.* a week for taking care of the child. Coltman J. on the trial for murder, said, "Suppose a person leaves a child at the door of a gentleman, where it is likely to be taken into the house almost immediately, it would be too much to say, that if death ensued it would be murder; the probability there would be so great, almost amounting to a certainty, that the child would be found and taken care of. If, on the other hand, it were left on an unfrequented place, a barren heath, for instance, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, because the child is exposed on a public road where persons not only might pass, but were passing at the time, and you will

therefore consider whether the prisoner had reasonable ground for believing that the child would be found and preserved." Verdict, manslaughter. *Walters, Carr & M.* 164 (1841). Cf. p. 329. See also *Waters*, pp. 601, 612. The prisoner was indicted for the murder, and charged on the coroner's inquisition with the manslaughter of her niece by beating her, and compelling her to work for unreasonable hours and beyond her strength. The deceased was about fifteen, in ill health, and had been placed under the prisoner's care. She employed her in stay-stitching for fourteen or fifteen hours a day, and when she did not do the required quantity severely punished her with cane and rod, accompanying her corrections with very violent and threatening language. The surgeon who examined the body stated, before the coroner, that, in his opinion, she died from consumption, but that her death was hastened by the treatment she was said to have received. The prisoner, when she beat the deceased, always said she was sure that she was acting the hypocrite, and shamming illness, and that she had a very strong constitution. The prisoner having pleaded guilty to the manslaughter, the prosecution offered no evidence on the murder, thinking "there was not proof of malice sufficient to constitute" that offence, in which Vaughan B. concurred. *Cheeseman*, 7 *C. & P.* 455 (1836).

A special verdict found that Huggins, the warden of the Fleet, appointed Gibbons his deputy, and Gibbons had a servant, Barnes, whose duty it was to take care of the prisoners, and particularly of one Arne. Barnes put him into a newly-built room, over a common sewer, the walls of which were damp and unwholesome, and kept him there forty-four days without fire, and other necessaries. Barnes knew the state of the room, and for fifteen days at least before the death of Arne, so did Huggins, having been once present, seen Arne there, and left. Arne sickened and died. During the time Gibbons was deputy, Huggins sometimes acted as warden. The K. B. were clearly of opinion that Barnes was guilty of murder; but they thought Huggins not guilty. It could not be inferred from his bare seeing of the deceased once during his confinement that he knew his situation was due to improper treatment, or that Huggins consented to the continuance of it. They said it was material that the duress by which the deceased came by his death could not be known "by a bare looking in upon him" (p. 151). Huggins could not, from that, know the circumstances; and it was likewise material that no application had been made to him, which, perhaps, might have altered the case. Besides, the verdict found that Barnes was the servant of Gibbons, and Gibbons had the actual management of the prison, and the judges seemed to think that the accidental presence of the principal would not amount to a revocation of the deputy's authority. *Huggins (and Barnes)*, 2 *Str.* 882; 2 *L. Raym.* 1574 (1730); *Foster C. C.* 322; 1 *East P. C.* 331. If a gaoler knowing that a prisoner with small-pox lodged in a certain room in the prison, confined another prisoner against his will in the same room, and the latter prisoner caught it, and died of it, it would be murder in the gaoler. *Castell* v. *Bambridge*, 2 *Str.* 854 (1730); *Foster* 322; 1 *East P. C.* 331 (appeal of murder).

"But where the death ensued rather from incautious neglect, however culpable, than from any actual malice or wilful disposition to injure, or obstinate perseverance in doing an act necessarily attended with danger, and regardless of the consequences, the severity of the law may admit of some relaxation; but the case must be strictly freed from these latter incidents. As in the case of *Self* [1776], who upon his apprentice returning to him from Bridewell, whither he had been sent for bad behaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; the apprentice not having been suffered to be in a bed on account of the vermin, but being made to lie on the

boards for some time without any covering, and without common medical care." The boy dying, the master was indicted for murder, and medical men were of opinion that his death "was most probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home; and they inclined to think that if he had been properly treated when he came home, he might have recovered." There was no evidence of personal violence or want of sufficient sustenance. The recorder left it to the jury to consider whether the death was occasioned by ill-treatment of the prisoner, and if so "whether that ill-treatment amounted to evidence of malice," it which case it would be murder. At the same time they were told that if they thought otherwise, yet as it appeared that the prisoner's conduct towards the apprentice "was highly blameable and improper, they might, under all these circumstances, find him guilty of manslaughter, which they accordingly did," and the judges afterwards approved of the conviction. 1 *East P. C.* 226, who comments on the report in 1 *Lea.* 137. Cf. p. 602.

Where a stranger interfered in the affairs of a very old woman, and stated that he should take her into his house and look after her, and did so, and took the management of her property into his hands and dealt fraudulently with it, and (according to the medical evidence) she died of starvation and of want of proper attention and necessaries and of confinement, upon an indictment for murder, Patteson J. said, "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death . . . then he will be guilty of murder. If, however, you think only that he was so careless that death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter . . . it will be for you to say whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty, which she, from age and infirmity, was incapable of doing . . . and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned, then he becomes criminally responsible." Verdict, manslaughter. *Marriott*, 8 *C. & P.* 425 (1838).

As to what amounts to a legal duty, see *Shepherd*, pp. 330, 601.

Death caused by carelessness in ordinary employment.] See p. 595, where this kind of *manslaughter* is treated; cf. p. 619. In extreme cases the crime may be murder. The most usual illustration of the text writers is the instance of death caused by workmen throwing stones, &c., from a house in the ordinary course of their business, p. 594. "If they deliberately saw the danger, or betrayed any consciousness of it, from whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act." 1 *East P. C.* 262; cf. 1 *Hale P. C.* 472; *Foster*, 262; "this may be either misadventure, manslaughter or murder, according to . . . if it were in a country village . . . and he calls out to all people to have a care . . . [or] if it were in London or other populous town . . . though he gives loud warning . . . [or] if he knows of their passing and gives no warning at all"; 4 *Bl. Com.* 192.

This distinction is also made in cases of negligent driving, p. 596. "A. drives his cart carelessly, and it runs over a child in the street, if A. have seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run across the way, and the cart runs over the child before it was possible for the carter to make a stop, it is *per infortunium*," and so ruled "by us . . . in 1672." If a man or boy, riding in the street, whip his horse to put him into speed and run over a child and kill him, this is homicide, and not *per infortunium*, and if he had rid so in a press of people with intent to do hurt, and the horse had kild

another, it had been murder in the rider." 1 *Hale P. C.* 476. Cf. *Foster* 263, who says the driver is only entirely excused if "no want of due care could be imputed" to him.

Correction by parents and others.] See *Correction* in *Index* and *Foster* 262, cited p. 602. See for instances, p. 617. Where a father whipped a child two years and a half old beneath her clothes with a strap one inch wide and eighteen long, and the child died, it was ruled to be manslaughter. *Griffin*, p. 254. The passage cited from Foster, p. 602, continues, "If with a cudgel or other thing not likely to kill, though improper for the purpose of correction, manslaughter. If with a dangerous weapon likely to kill or maim, due regard being always had to the age and strength of the party, murder." Thus where a master finding that his apprentice had disobeyed him, and on his remonstrance was rude, struck him on the head with a bar of iron, which he had in his hand, and killed him, it was held, "in strictness of law," murder; for a bar of iron is not a fit instrument of correction, yet the judge recommended a pardon. *Grey, Kel.* 64 (1666). "Though the correction exceed the bounds of moderation, the court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must, in all probability, occasion death, though the party were hurried to great excess. As was the case of a father, whose son had frequently been guilty of stealing, complaints of which had come to the father who had often corrected him. At length the son, being charged with another theft, and resolutely denying it, though proved against him, the father in a passion beat his son with a rope, by way of chastisement for the offence, so much that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the father consulted his colleague in office, and the principal counsel on the circuit, who all concurred in opinion that it was only manslaughter, and so it was ruled." *Anon.* (1775), 1 *East P. C.* 261.

Dangerous assaults.] "No affront, by words or gestures only, is a sufficient provocation so as to excuse or extenuate such acts of violence as manifestly endanger the life of another." 4 *Bl. Com.* 200. See p. 624.

Provocation in general.] Cf. p. 591. A certain degree of provocation may reduce the crime from murder to manslaughter. "The indulgence shewn to the first transport of passion in these cases is plainly a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasteth, rendereth the man deaf to the voice of reason. The provocation therefore which extenuateth in the case of homicide must be something which the man is conscious of, which he feeleth and resenteth at *the instant the fact which he would extenuate is committed*; not what time or accident may afterwards bring to light." *Foster* 315. The passage from East, p. 591, continues, "In no instance can the party killing alleviate his case by referring to a previous provocation, if it appear by any means that he acted upon express malice." Where the provocation is "sought for and induced by" the prisoner "to afford him a pretence for wreaking his malice," it cannot avail as a defence. Thus "where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him; on which B. strikes, and A. kills him, this is murder." 1 *East P. C.* 239, continued p. 632. A. and B. having a difference, "A. bids B. take a pin out of the sleeve of A., intending thereby to take an occasion to strike or wound B., which B. doth accordingly, and then A. strikes B., whereof he died. This was ruled murder, 1, because it was no provocation, when he did it by the consent of A.; 2, because it

appeared to be a malicious and deliberate artifice thereby to take occasion to kill B." 1 *Hale P. C.* 457. Cf. p. 636.

Provocation by words or gestures only.] "Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder. Nor are indecent provoking actions or gestures, expressive of contempt or reproach, without an assault upon the person. This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill or do some great bodily harm; but if he had given the other a box on the ear, or had struck him with a stick or other weapon *not likely to kill, and had unluckily, and against his intention*, killed, it had been but manslaughter." *Foster* 290, citing *Hale* 456, below. Cf. p. 648; 4 *Bl. Com.* 200, p. 623. Where the deceased coming past the shop of the prisoner, "distorted his mouth and smiled at him," upon which prisoner killed him, "it is murder, for it was no such provocation as would abate the presumption of malice in the party killing." *Brain* (1600), 1 *Hale P. C.* 455. "If A. be passing the street, and B. meeting him (there being convenient distance between A. and the wall) takes the wall of A., and thereupon A. kills him, this is murder; but if B. had justled A., this justling had been a provocation [assuming "considerable violence and insult in the jostling." 3 *Russ. Cri.* 39 *n.*], and would have made it manslaughter, and so it would be, if A. riding on the road, B. had whipt the horse of A. out of the track, and then A. had alighted and killed B., it had been manslaughter. *Lanure* (1642)." *Ib.* "If there be chiding between husband and wife, and the husband strikes his wife with a pestle, that she dies presently, it is murder, and the chiding will not be a provocation to extenuate it to manslaughter." *Ib.* "A. sitting drinking in an alehouse, B., a woman, called him a *son of a whore*. A. takes up a broomstaff and, at a distance, throws it at her, which hitting her upon the head, kild her, whether this was murder or manslaughter was the question in" 1671, "it was propounded to all the judges at Serjeant's Inn. . . . 1, Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the offence into manslaughter? 2, Admitting it would not in case there had been a striking with such an instrument, as necessarily would have caused death, as stabbing with a sword, or pistolling, yet whether this striking, that was so improbable to cause death, will not alter the case; the judges were not unanimous in it," and a pardon was recommended. *Ib.* (beginning of passage, p. 633). In *L. Morley's case*, p. 59, the judges are said (by *Hale*, *ib.*) to have held, "that words of menace of bodily harm would come within the reason of such a provocation as would make the offense to be but manslaughter." But in the report in *Kel.* 55, the reverse appears: "No words, be they what they will," are enough, and the same may be gathered from the speech of Heneage Finch S.G. in the report in *St. Tr.* Hence "it seems that they [the words] ought at least to be accompanied by some act denoting an immediate intention of following them up by an actual assault." 1 *East P. C.* 233. Although this is the general rule of law, yet there may under special circumstances be such a provocation by words as to be "at least as great as blows," and in such a case a violent blow resulting in death may reduce the crime to manslaughter. *Per* Blackburn J., *Rothwell*, 12 *Cox C. C.* 145 (1871), where prisoner on hearing from his wife that she had been and would be unfaithful, struck her on the head with tongs; he was indicted for murder, but manslaughter was found. Cf. p. 648.

Where the provocation was blows accompanied by words, Pollock C.B. said: "If there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures, as would be calculated to produce a degree of

exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only": verdict, murder. *Sherwood*, 1 *C. & K.* 556 (1844). *Smith*, 4 *F. & F.* 1066 (1866), was a similar case of extreme provocation, where the wife spat at or on the prisoner. This alone, the judge thought, would not have negatived murder, but "an assault, in itself very slight, may become extremely serious by reason of the circumstances": verdict, manslaughter.

Provocation by assault.] "It must not, however, be understood that every trivial provocation [pp. 635, 643–8] which in point of law amounts to an assault, or even a blow, will, of course, reduce the crime . . . to manslaughter. . . . For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty: it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation. Barbarity, says Lord Holt, in *Keat's case, Comb.* 408 [1697], will often make malice." 1 *East P. C.* 234; cf. pp. 603–4, 645, 647. There being an affray in the streets, Stedman ran towards the combatants. The deceased, a friend of one of them, seeing him, exclaimed, "You will not murder the man, will you?" The prisoner replying, "What is that to you, you bitch?" the deceased gave him a box on the ear, upon which the prisoner struck her on the breast with the pummel of his sword. She fled, and the prisoner, pursuing her, stabbed her in the back. Holt C.J. was first of opinion that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear. But it afterwards appearing that the deceased had struck the prisoner in the face with an iron patten, which drew a great deal of blood, it was held clearly only manslaughter. *Stedman*, *Foster C. C.* 292 (1704); 1 *East P. C.* 234. "The smart of the man's wound," adds the former, "and the effusion of blood might possibly keep his indignation boiling to the moment of the fact." In an affray between soldiers and boatmen one of the soldiers was very much beaten. The prisoner, a comrade, who had before driven the mob away, came to the rescue and used threats but no violence, until, on their pressing him, he struck at them with the flat side of his sword, and as they fled pursued them. The other soldier in the meantime had got away, and prisoner returned and asked whether they had murdered him; but being again several times assaulted by the mob, he brandished his sword, and bid them keep off. In the tumult the deceased, who was dressed as a boatman and was passing by, was killed by a blow from the prisoner's sword. The judges held it manslaughter; "it was not murder as the jury had found because there was a previous provocation, and the blood was heated in the contest; nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that manner." *Brown*, 1 *East P. C.* 245; 1 *Lea.* 148 (1776). Both reports explain that if death from the original blow would only have been manslaughter, its falling on another by mistake or accident will not make it murder. Cf. *Towers*, p. 593, and see p. 594.

Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent for the attorney's bill. Words arose at the lodgings about *civility money* which L. refused; he went upstairs to fetch money to pay the debt. He returned with a brace of loaded pistols, which, on the importunity of his servant, he laid down on the table, saying he did not intend to hurt the officers, but he would not be ill-used. The other officer arriving, some angry words passed, and L. struck one

of the officers in the face with a walking-cane and drew a little blood, whereupon both of them fell upon him, "one stabbed him *in nine places, he all the while on the ground begging for mercy, and unable to resist them*; and one of them fired one of the pistols at him *while on the ground*, and gave him his death's wound. This is reported to have been holden manslaughter, by *reason of the first assault with* the cane." So Foster J. who (at 293) thinks that *Strange's* report shows *murder*, but that in *St. Tr.* (p. 28) explains the decision. He enumerates the material circumstances, each one of which "weigheth *something* in the scale of justice" (294). "1. Mr. Lutterel had a sword by his side which, after the affray was over, was *found drawn and broken*. How that happened did not appear in evidence. . . . 2. When L. laid the pistols on the table, he declared that he brought them down *because he would not be forced out of his lodgings*. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol-shot (for both the pistols were discharged in the affray), and slightly on the wrist by some sharp-pointed weapon; and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching L.'s begging for mercy was not that he was on the ground *begging for mercy*, but that on the ground he held up his hands *as if he was begging for mercy*. The Chief Justice directed the jury that if they believed L. endeavoured to rescue himself, which he seems to think was the case, and very probably was the case, it would be justifiable homicide in the officers. However, as Mr. L. gave the first blow, *accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings*, which it would have been their duty to have done if the debt had not been paid or bail given, he declared it could be no more *than manslaughter*." *Reason*, p. 30, &c.

Two soldiers, having a new recruit in a room under their care, who wished to desert, one of them stationed himself at a door in an inn with his sword drawn to prevent ingress or egress, and a person wishing, apparently, to rescue the recruit, was resisted by the soldier at the door, whereupon a struggle ensuing with the recruit and his friends, the other soldier struck one of them in the back with his bayonet. Being indicted for stabbing with intent to murder, and convicted, the judges held the conviction right, the soldiers having no authority to enlist; and they said that it would have been murder if death had ensued. *Longden, Russ. & Ry.* 228 (1812). As to arrest without authority, see p. 637, and *Curvan*, 1 *Moo. C. C.* 132 (1826), p. 645.

See *Hopkins*, p. 254. Where the prisoner levelled a gun at D., the deceased (with whose wife he had improper relations) to frighten him (as he said), deceased having often threatened both of them very determinedly, and it was a question whether the gun went off accidentally (partly owing to deceased's action) or not, Cockburn C.J. left the following questions to the jury:—"1. Was the discharge of the gun intentional or accidental? (*a*) If intentional, was it from ill-feeling to D., or desire to get rid of him on account of his wife? in which case it would be murder. (*b*) If it was not so done, was it done by the prisoner in self-defence, and to protect himself from death or serious bodily injury intended towards him by the deceased; or (*c*) from the reasonable apprehension of it induced by the words and conduct of the deceased, though the latter may not, in fact, have intended death or serious injury? (*d*) If not so, was it done after an assault made by the deceased on the prisoner, though short of an assault calculated to kill or cause serious bodily injury? or (*e*) Was it done under such a degree of alarm and bewilderment of mind, caused by the conduct of the deceased, as to deprive the prisoner for the time of his reason and power of self-control? or (*f*) Was the effect of the language and conduct of the deceased such as to provoke the

angry passions of the prisoner so as to deprive him of his reason and power of self-control? 2. If the discharge of the gun was accidental—in which case the prisoner cannot be convicted of murder, but may be of manslaughter—(*a*) Was the gun levelled by the prisoner at the deceased in self-defence against an attack of the deceased, endangering life or limb, or reasonably apprehended by the prisoner as likely to do so, in either of which cases the prisoner would be entitled to acquittal? or (*b*) Was the gun levelled by the prisoner at the deceased unnecessarily under the circumstances, but without the intention of discharging it? in which case it would be manslaughter." The jury found: That the gun was levelled at the deceased unnecessarily under the circumstances, but without any intention of discharging it, and that it went off accidentally: held, manslaughter. *Weston*, pp. 185, 598.

Instrument used.] Especial attention is to be paid—as has already been often said—to the kind of weapon with which death was inflicted. Was it one likely or not to produce that result? Cf. p. 648. Perhaps it is rather on the mode in which the weapon is used than on its kind that the issue depends. In one instance, Foster J. (at 294), takes a nice distinction with regard to the size of a cudgel—on *Royley, Cro. Jac.* 296; 12 *Rep.* 87 (1612); 1 *Hale P. C.* 453, where prisoner's "son fights with another boy and is beaten; he runs home to his father all bloody, the father takes a staff, runs three-quarters of a mile, and beats the other boy, who dieth of this beating. This is said to have been ruled manslaughter, *because done in sudden heat and passion.* Surely," he says, "the provocation was not very grievous: the boy had fought with one who happened to be an overmatch for him and was worsted; a disaster slight enough and very frequent among boys. If, upon this provocation, the father, after running three-quarters of a mile, had set his strength against the child, had dispatched him with a hedgestake, or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder; since any of these circumstances would have been a plain indication of the *malitia*, the mischievous vindictive motive before explained. . . . Croke setteth the case in a much clearer light. . . . His words are:—'Royley struck the child with a small cudgel (*Godbolt* 182 calleth it a rod), of which stroke he afterwards died.' I think, it may be fairly collected from Croke's manner of speaking, . . . that the accident happened by a *single stroke* with a cudgel *not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import the *malitia*, the malignity of heart attending the fact already explained and therefore manslaughter. I observe that L. Raymond [1498] layeth great stress on this circumstance: *that the stroke was with a cudgel not likely to kill.*" Cf. p. 629. A special verdict found that the prisoner threw a four-legged child's stool at a child, for some childish fault, and struck her on the right temple, of which she soon afterwards died: and that the stool was of sufficient size and weight to give a mortal blow, but that prisoner when she threw it did not intend to kill her; that she afterwards threw the body into the river, and told her husband that the child was lost. Whether this was murder or manslaughter was referred to all the judges, but no opinion was ever delivered, as after prisoner had been twelve months in prison she was pardoned. *Hazel*, 1 *East P. C.* 236; 1 *Leach* 368 (1785). Where prisoner's wife had given clogs to the deceased, a boy, to clean, but he had not cleaned them, and prisoner struck him with one of them, and he died; this was held to be only manslaughter, because the prisoner could not, from the size of the thing, have had any intention to take away the boy's life, and he had a right to correct his servant reasonably. *Turner, Comb.* 407; *Ld. Raym.* 144, 1498 (1666). See p. 602. Exactly the same direction was given where prisoner, a butcher,

seeing some of his sheep straying, ran towards the boy whose duty it was to tend them, and taking up a stake that was on the ground threw it at him, it hit the boy and fractured his skull, and he soon afterwards died. Verdict, manslaughter. *Wigg*, 1 *Leach* 378 *n.* (1784). "A. finding a trespasser on his land, in the first transport of his passion beateth him, and unluckily happeneth to kill; this hath been holden to be manslaughter. [1 *Hale P. C.* 473, is cited, but not quite accurately.] But it must be understood that he beat him not with a mischievous intention, but merely to chastise . . . and to deter him from committing the like; for if he had knocked his brains out with a bill or hedgestake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it had been murder." *Foster* 291. See pp. 647–8.

The prisoner, a boy of twelve, was convicted of manslaughter. An apprentice by order endeavoured to prevent his taking chips from his master's shop after he had been forbidden to take them; prisoner seized a long knife, threw it at him and killed him. Hullock B. thought that it amounted to murder. *Langstaffe*, 1 *Lewin C. C.* 162 (1827); p. 805.

Provocation, extreme.] Where a man finds another in the act of adultery with his wife, and kills him in the first transport of his passion, this is manslaughter. *Manning, Sir T. Raym.* 212 (1672): "The court directed the executioner to burn him gently [in the hand], because there could not be greater provocation than this." But if the husband kill the adulterer "deliberately, and upon revenge, after the fact and sufficient cooling time, the provocation will not avail in alleviation of the guilt." 1 *East P. C.* 251, 234; but to kill the wife, on suspicion of infidelity, however strong, is murder. *Kelly*, 2 *C. & K.* 814 (1848). Cf. p. 635.

So if a father *see* a person in the act of committing an unnatural offence with his son, and instantly kill him (probably) it is only manslaughter, and "that of the lowest degree" (*East* 234); but if he only *hear* of it, and go in search of the offender—and that with a deadly weapon—and kill him, it will be murder. *Fisher*, 8 *C. & P.* 182 (1837), where Park J. also ruled that whether the blood has had time to cool or not is a question for the judge, and not for the jury; but it is for them to find how long had elapsed between the provocation and the act. It is, however, submitted that the whole question is for the jury. Cf. p. 583. Here two days had elapsed but the jury found manslaughter.

It has been held by Rolfe B. that a blow given to the prisoner's wife would afford the same provocation as a blow given to the prisoner himself, so as to reduce the killing to manslaughter. *Rodgers*, 1842 (earlier editions of this work). Cockburn C.J. seems to have approved of murder being reduced to manslaughter where the prisoner had killed his son-in-law, who was fighting with his wife, prisoner's daughter, although not in a manner to endanger life. *Harrington*, 10 *Cox C. C.* 370 (1866).

Provocation, recent.] See last paragraph and p. 635. Provocation must be recent; for in every case of homicide, "how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder." *Foster* 296. "With respect to what interval of time shall be allowed for passion to subside, it is much easier to lay down rules for determining what cases are without the limits than how far exactly those limits extend. It must be remembered, that in these cases the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if from any circumstances whatever it appear that the party reflected, deliberated, or cooled, any time before

the mortal stroke given; or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder; as being attributable to malice and revenge rather than to human frailty. . . . [2 *Ld. Raym.* 1496, cited]. Thus, if between the provocation received and the stroke given, he fall into other discourse, or diversions, and continue so engaged a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his intention was once called off from the subject of the provocation [the excuse is gone]. Again, if it appear that he meditated upon his revenge, or used any trick or circumvention to effect it; for that shews *deliberation* which is inconsistent with the excuse of *sudden passion*, and is the strongest evidence of malice. It may further be observed in respect to time, that in proportion to the lapse thereof between the provocation and the stroke, less allowance ought to be made for any excess of retaliation, either in the instrument or the manner of it . . . The mere length of time intervening between the injury and the retaliation aids very much the presumption of malice in law, for that is in some cases evidence in itself of deliberation." 1 *East P. C.* 251–2. Cf. p. 627. A leading case on this subject is that of Major Oneby. A special verdict was found, which stated that prisoner, was in company and playing at hazard with the deceased and three other persons at a tavern, when one of them, asked if any one would "set" him three half-crowns, whereupon the deceased, in a jocular manner, laid down three half-pence, and the prisoner "set" three half-crowns and lost them; immediately after which the prisoner angrily said to the deceased, *it was an impertinent thing to set half-pence, and he was an impertinent puppy for so doing*, to which deceased answered, *whoever called him so was a rascal.* Upon this prisoner took up a bottle, and with great force threw it at deceased's head, but did not hit him. Deceased immediately tossed a candlestick or bottle at prisoner, which missed him; upon which they both rose to fetch their swords, which hung in the room, and deceased drew his sword, but the prisoner was prevented from drawing his by the company. Deceased then threw away his sword, and the company interposing, they sat down again for an hour. Then deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over," and at the same time offered his hand. But prisoner replied, "No, damn you, I will have your blood!" All except prisoner, then went out of the room to go home, but he called to deceased, "Young man, come back, I have something to say to you," on which deceased came back. The door was immediately closed, and the rest of the company excluded, but they heard a clashing of swords, and deceased was found to have received a mortal wound. It was also found that at the breaking up of the company prisoner had his great-coat thrown over his shoulders, and that he received three slight wounds in the fight, and deceased being asked on his death-bed whether he received his wound in a manner among swordsmen called fair, answered, "I think I did." It was further found, that from the throwing of the bottle *there was no reconciliation between prisoner and deceased.* Upon these facts the judges were unanimously of opinion that the prisoner was guilty of murder, he having acted upon malice and deliberation, and not from sudden passion. *Oneby*, 2 *Str.* 766; 2 *Ld. Raym.* 1485; 17 *St. Tr.* 30 (1727). "It must, I think," says East, 1 *P. C.* 254, "be taken upon the facts found in the verdict, and the argument of the Chief Justice, that after the door had been shut the parties were upon an equal footing, in point of preparation before the fight began. . . . The main point then upon which the judgment turned, and so declared to be, was the evidence of *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under these circumstances the court were of

opinion that the prisoner had had *reasonable time for cooling*; after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression that *he would have his blood*. And again, the prisoner remaining in the room after the rest of the company had retired, and calling back the deceased by the contemptuous appellation of *young man*, on pretence of having something to say to him, altogether shewed such strong proof of deliberation and coolness, as precluded the presumption of passion being continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances, for it must have been implied, according to *Mawgridge's case* [pp. 20, 604], that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for prepartion on the part of" deceased, "made a deadly assault upon him." Cf. p. 591, and see Index (*Duelling*), and p. 633. Deceased was requested by his mother to turn prisoner, a butcher, out of her house, which, after a short struggle, he effected, and in doing so gave him a kick. On prisoner leaving the house, he said to the deceased, "he would make him remember it," and instantly went to his own lodging hard by; there he went to a pantry, and then returned hastily to the street. In the pantry he kept several butcher's knives. Meanwhile, deceased had followed him for the purpose of giving him his hat, which he had left behind him, and they met. They stopped for a short time, and were heard talking together, but without any words of anger, deceased desiring him not to come down to his mother's house that night, and prisoner insisting that he would. Very soon after, deceased gave prisoner his hat, when the latter exclaimed, that he would have his rights, and instantly stabbed the deceased with some sharp instrument in two places, saying he had served him right, and instantly ran back to his lodgings. No knife was found upon him, and the several knives appeared the next morning in their usual places in the pantry, whither on his return he had gone. Tindal C.J. told the jury that the principal question for them was, "whether the mortal wound was given by the prisoner, while smarting under a provocation so recent and so strong, that" he "might not be considered at the moment the master of his own understanding: in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder. That, in determining this question, the most favourable circumstance for the prisoner was the shortness of time which elapsed between the original quarrel and the stabbing by" him; "but on the other side, the jury must recollect that the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place. It would be for them to say, whether the prisoner had shewn thought, contrivance, and design, in the mode of possessing himself of this weapon, and again replacing it immediately after the blow was struck: for the exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion." Verdict, murder. *Hayward*, p. 31.

"If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things; first, that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation." *Per* Parke B., *Thomas*, pp. 63, 632, who also held, that, if from the circumstances it appeared that prisoner, before any provocation given, intended to

use a deadly weapon towards any one who might assault him, this would show that a fatal blow given afterwards to a person who struck him ought not to be attributed to the provocation, and the crime would therefore be murder. See p. 632.

On a trial for murder, one Chorlton, stated, "On entering prisoner's house I saw prisoner and his son on the floor, the son was uppermost, and they were wrestling together. I asked the (son) deceased to get up; he did so, and went to the door. Prisoner then took up a coal-pick. . . . Prisoner threw the coal-pick at his son, which struck him on the back. Deceased said it hurt him, and prisoner said he would have his revenge. The coal-pick flew into the street, and deceased fetched it, and tossed it into the house, but not at prisoner. Deceased stood at the door . . . when prisoner took a knife off the table, and jobbed deceased with it on the left side. Deceased said, 'Father, you have killed me!' and retreated a few paces into the street. . . . I told prisoner he had stabbed his son. He said, '. . . I will have my revenge.' Deceased came into the house again, and prisoner stabbed deceased again in the left side. Deceased died at seven o'clock the same morning." There was evidence of fearful threats by prisoner, when drunk. Coleridge J. said, "I will suppose that all was purely unpremeditated till Chorlton came, and then the case will stand thus—the father and son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if, when he got up, and threw the pick at the deceased, he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question (the son having given no further provocation), whether in truth that which was in the first instance sufficient provocation, was so recent to the actual deadly blow, that it excused the act that was done; and whether the father was acting under the recent sting, or had had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and he acted on its sting, and the blood remained hot, but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows, because though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions." Verdict, manslaughter. *Kirkham*, 8 *C. & P.* 115 (1837).

After a tavern brawl and an apparent reconciliation, deceased deliberately followed prisoner and attacked his party and him—all of whom were in drink—perhaps with a bayonet he had picked up. With this deceased was ultimately killed. Bosanquet J. said, "Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? for if he did, it will amount to murder; but if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? if he did, then it will be manslaughter. But there is another question, did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he will be justified." Verdict, guilty of manslaughter, with a strong recommendation to mercy on account of the great provocation he had received. *Smith*, 8 *C. & P.* 160 (1837).

Drunkenness.] The cases are not altogether consistent, for if it once be

admitted that intoxication may be an excuse where there must be a (criminal) intention formed, it must equally be admitted where any sufficient disturbance of mind excuses, and the question then becomes, what is sufficient? This is, in fact, an issue of insanity, on which, see p. 814. It has been held by Park and Littledale JJ. that *Grindley* (1819), 1 *Russ. Cri.* 143 *n.*—which see, generally, on this point—(where Holroyd J. ruled that "though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated" was "a circumstance proper to be taken into consideration"), is not law, and Holroyd J. retracted his opinion—otherwise "there would be no safety for human life." *Carroll*, 7 *C. & P.* 145 (1835). It has been laid down that where it is essential to prove the intention with which the act is done, the jury may find that prisoner was so drunk as not to be capable of forming *any* intention whatever, and may acquit him, *per* Patteson J.—*Cruse*, p. 496, &c., and by Coleridge J., *Monkhouse*, 4 *Cox C. C.* 55 (1849)—which seems to be what Holroyd J. had said. Where prisoner stabbed a man with a fork, and it appeared that he was "in liquor," Alderson B. said, "If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous weapon is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party." *Meakin*, 7 *C. & P.* 297 (1836). In *Thomas*, p. 630, a similar case, Parke B. said, "Drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse." Cf. p. 598.

Provocation: Express malice.] Cf. p. 630. If there is *express malice* at the time of the act committed, the provocation will not reduce the offence to manslaughter. In such a case—East, cited p. 623, goes on to say—not even previous blows will reduce the offence, as in the following case: Richard Mason was indicted and convicted for the murder of William, his brother. Prisoner, with deceased and others, were drinking in a friendly manner in a public-house, till "growing warm in liquor," but not intoxicated, the two began in idle sport to push each other about. They then wrestled one fall, and soon afterwards played at cudgels. All this time no tokens of anger appeared on either side, till prisoner, in the cudgel play, gave deceased a smart blow on the temple. Deceased thereupon grew angry, and throwing away his cudgel, closed with prisoner, and they fought "a short space in good earnest"; but the company interposing, they were soon parted. Prisoner then quitted the room in anger, and was heard to say, "Damnation seize me, if I do not fetch something and stick him;" and, being reproved, answered, "I'll be damned to all eternity if I do not fetch something and run him through the body." Deceased and the rest continued in the room; and in about half an hour prisoner returned, having in the meantime changed a slight for a thicker coat. The door being open, prisoner stood leaning against the doorpost, his left hand in his bosom, and a cudgel in his right; looking

in, but not speaking. Deceased invited him in, but he answered, "I will not come in." "Why will you not?" said the other. He replied, "Perhaps you will fall on me, and beat me." Deceased assured him he would not, and added, "Besides, you think yourself as good a man as me at cudgels; perhaps you will play at cudgels with me." The other answered, "I am not afraid to do so, if you will keep off your fists." Upon these words deceased went towards prisoner, who then dropped the cudgel. Deceased took it up, and with it gave prisoner two blows. The latter immediately put his right hand into his bosom, and drew out the blade of a "tuck-sword," crying, "Damn you, stand off, or I'll stab you!" and immediately, without giving deceased time to stand off, made a pass at him with the sword, but missed him. Whereupon prisoner, shortening the sword in his hand, leaped forward towards deceased, who had given back a little, and stabbed him so that he instantly died. The judges unanimously agreed, "that there are in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence cannot be less than wilful murder." *Mason, Foster* 132 (1756); 1 *East P. C.* 239.

Mutual combat.] See Index (*Duelling*), and p. 634.

In this class of cases "the degree or species of provocation enters not so deeply into the merits of them as in the foregoing: and those are where upon words of reproach, or indeed any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being taken or sought on either side; if death ensues, this amounts to manslaughter. And here it matters not what the cause be, whether real or imagined, or who draws or strikes first; provided the occasion be sudden, and not urged as a cloak for pre-existing malice." 1 *East P. C.* 241. "Many who were of opinion that bare words of slighting, disdain, or contumely would not of themselves make such a provocation as to lessen the crime into manslaughter, yet were of this opinion, that if A. gives indecent language to B., and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and then B. kills A., that this is but manslaughter; for the second stroke made a new provocation, and so it was but a sudden falling out; and tho B. gave the first stroke, and after a blow received from A., B. gives him a mortal stroke, this is but manslaughter according to the proverb, *the second blow makes the affray*; and this was the opinion of myself and some others." 1 *Hale P. C.* 456 (see conclusion of this passage, p. 624). *Foster* 295, adopting this, continues, "and they fought upon equal terms, *and in such combats upon sudden quarrels it mattereth not who gave the first blow.* But if B. had drawn his sword, and made a pass at A., *his sword then undrawn*, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed, this would have been murder: for B., by making his pass, *his adversary's sword undrawn*, showed that he sought his blood, and A.'s endeavour to defend himself, *which he had a right to do*, will not excuse B.; but if B. had first drawn, and forborne till his adversary had drawn too, it had been no more than manslaughter." So 1 *East P. C.* 242. Both emphasise "no undue advantage being sought or taken on either side."

"The prisoner and Levy quarrelled, and went out to fight. After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places, and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner, who had a clasped knife before the affray. Bayley J. told the jury that if the prisoner used the knife privately from the beginning, or if, before they began to fight, he placed the knife so that he might use it during the affray and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray.

it was only manslaughter. The jury found the prisoner guilty of murder.' *Anderson* (1816), 3 *Russ. Cri.* 63. In a quarrel, both being drunk, prosecutor struck prisoner, whom he had overtaken, a blow. They fought for a few minutes, when prisoner ran back a short distance, but prosecutor overtook him. Prisoner, who had taken out his knife, gave prosecutor a bad cut. On an indictment for cutting with intent to murder, Parke J. left it to the jury whether prisoner ran back "with a malicious intention of getting out his knife to inflict an injury on the prosecutor, and so gain an advantage in the conflict; for, if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow," he was "of opinion that, if death had ensued, the crime of the prisoner would have been murder; or whether the prisoner *bonâ fide* ran away from the prosecutor with intent to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself; as in this latter case, if the prosecutor had been killed," it would have been manslaughter only. Verdict, not guilty. *Kessal*, 1 *C. & P.* 437 (1824). Snow, a shoemaker, was convicted of the murder of Palmer. One evening prisoner, "who was much in liquor," passing where deceased was at work, had a quarrel with him, and after high words they were going to fight, but were prevented by the latter's mother, who hit prisoner in the face, and threw water over him. Prisoner went into his house near by, but came out in a few minutes, and sat himself down upon a bench before his gate, with a shoemaker's knife in his hand, paring a shoe. Deceased passing home called out to him, "Are not you an aggravating rascal?" Prisoner replied, "What will you be when you are got from your master's feet?" on which deceased took the prisoner by the collar, and, dragging him off the bench, they both rolled into the road. While they were struggling, prisoner underneath deceased, the latter cried out, "You rogue, what do you do with that knife in your hand?" but could not get it nor could he free himself; at last he received a mortal wound. "They thought that there was not sufficient evidence that the prisoner lay in wait for the deceased with a malicious design to provoke him, and under that colour to revenge his former quarrel by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by neither provoked him by word or gesture. The deceased began first by ill language, and afterwards by collaring and dragging him from his seat and rolling him in the road. The knife was used openly, before the deceased came by, and not concealed from the bystanders, though the deceased in his passion did not perceive it till they were both down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, they thought it only amounted to manslaughter, and he was recommended for a pardon." *Snow*, 1 *East P. C.* 244, 245; 1 *Lea.* 151 (1776), p. 182.

The combat itself may be of such a nature as to make it murder if death ensue. Prisoner was convicted of manslaughter; he and deceased were "fighting up and down," a brutal and savage practice in the north of England [as late as 1835]. Bayley J. said, "*Fighting up and down* is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of this description it is murder, and not manslaughter," and thought prisoner might have been charged with murder. *Thorpe*, 1 *Lewin C. C.* 171 (1829).

He also said, "Where persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues—it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having

been given, a party draws, in the heat of blood, a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an *unfair advantage*, though mutual blows pass, it is not manslaughter, but murder." *Whiteley*, 1 *Lewin C. C.* 173 (1829).

The following case illustrates several points above mentioned (pp. 625, 628, 633). Prisoner and deceased who were old friends, had been drinking together till about midnight, when they had some words, and a scuffle ensued, in which deceased struck prisoner in the face with his fist, and gave him a black eye; prisoner called for the police, and on a policeman coming, went away. He, however, returned again, between five and ten minutes afterwards, and stabbed deceased with a common knife, which he was in the habit of carrying about with him. L. Tenterden said, "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also, whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place . . . for aught that appears, he might have gone a little way from the deceased, and then returned, still smarting under the blow he had received. . . . If there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy. . . . If you think that there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter," which was the verdict. *Lynch*, 5 *C. & P.* 324 (1832).

But it is not in every case of an "old grudge" that the jury will be justified in finding malice. Thus, "where two persons who have formerly fought on malice are afterwards, to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the fact." 1 *Hawk. P. C.* Bk. 1, ch. 31, s. 30; *i.e.* "that the reconciliation was but pretended or counterfeit." 1 *Hale P. C.* 452.

As to the first blow, see *Lewis*, pp. 252, 253, and Index (*Provocation*).

Duelling.] "Deliberate duelling, if death ensues, is in the eye of the law murder; for duels are generally fought in deep revenge; and though a person should be drawn into a duel, not upon a motive so criminal, but merely upon the punctilio of what the *swordsmen falsely call honour*, that will not excuse; for he that deliberately seeketh the blood of another, upon a private quarrel, acteth in defiance of all laws, human and divine, whatever his motive may be. But if, as I said before [p. 633] upon a sudden quarrel the parties fight upon the spot, or if they presently fetch their weapons, and go into the field and fight, and one of them falleth, it will be but manslaughter, because it may be presumed the blood never cooled [p. 628]. It will be otherwise if they appoint to fight the next day, or even upon the same day, at such an interval as that the passion might have subsided; or if from any circumstances attending the case it may be reasonably concluded that their judgment had actually controuled the first transports of passion before they engaged. The same rule will hold, if after a quarrel they fall into other discourse or diversions, and continue so engaged a reasonable time for cooling." *Foster* 297. Cf. p. 629. "It seems agreed," says Hawkins, Bk. 1, ch. 31, s. 21, "that wherever two persons in cool blood meet, and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alledging that he was first struck by the deceased; or that he had

often declined to meet him, and was prevailed upon by his importunity; or that it was his intent only to vindicate his reputation; or that he meant not to kill, but only to disarm his adversary; for since he deliberately engaged in an act highly unlawful, in defiance of the law, he must at his peril abide the consequences." It is said by Hale, that if A. and B. meet "deliberately to fight, and A. strikes B., and pursues B. so closely that B. in safeguard of his own life kills A., this is murder in B., because their meeting was a compact and an act of deliberation, and therefore all that follows thereupon is presumed to be done in pursuance thereof, and thus is *Dalton* [c. 145, p. 330, *ed.* 1742] to be understood." 1 *P. C.* 452, 479. But yet, *quære*, he adds (452), "whether if B. had really and truly declined the fight, ran away as far as he could (suppose it half a mile), offerd to yield, and yet A., refusing to decline it, had attempted his death, and B. after all this kills A. in his own defense, whether it excuseth him from murder; but if the running away were only a pretense to save his own life, but was really designed to draw out A. to kill him, it were murder." Cf. pp. 623–4. The point is no longer of practical importance; it is argued by *East* 1 *P. C.* 282–5; and by *Black.* 4 *Comm.* 185. So it is said by Hawkins, "if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder in respect of his first intent." 1 *P. C.* Bk. 1, ch. 31, s. 26.

Where death ensues from a duel, not only is the principal, the actual killer, guilty of murder, but also his second, and it has even been doubted whether the other second is not also guilty, "because it is a compact." Hale cites *Fitzherbert's Abridgement*, Pt. 1, f. 217, *Corone* 262 (22 E. 3); but he thinks "the law was strained too far in that case," and that though "a great misdemeanor," it is not murder in the second of the one killed. 1 *Hale P. C.* 443. But that doctrine was flatly denied by Williams J. and, apparently, Rolfe B. in *Cuddy*, 1 *C. & K.* 210 (1843), who asserted that all who aid and abet such a duel are guilty of murder; the verdict was not guilty. See p. 595.

One Mirfin was killed in a duel by Elliott. Neither of the prisoners acted as a second on the occasion, but they and others went to the ground with Mr. Elliott, and were present when the duel took place. Vaughan B. said, "Mere presence alone will not be sufficient to make a party an aider and abettor, but it is essential that he should, by his countenance in conduct . . . being present, aid and assist the principals . . . the seconds also are equally guilty," *sc.* with the principal. ". . . neither was called upon to act as a second. If, however, either of them sustained the principal by his advice or presence; or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do anything, yet if he was present and was assisting, and encouraging at the moment when the pistol was fired, he will be guilty of the offence." The prisoners were found guilty. *Young and another*, 8 *C. & P.* 644 (1838).

Death during arrest.] If, as is frequently the case, the apprehension and detainer of one person by another be lawful, then two consequences follow which are important with reference to the crime of murder. First, if the person apprehended resist with violence, and in so doing kill the person apprehending him, it is murder or manslaughter; secondly, if the person apprehending in repressing the violence of the person apprehended necessarily kill him, it is excusable.

As to the right to apprehend, see pp. 222.

There are two main rules: 1, Resistance to arrest may amount to murder or manslaughter; 2, Homicide by the arrester may be excusable.

Police officer.] "Ministers of justice" are protected not only "at the

instant the officer is upon the spot and at the scene of action," but "he is under the same protection of the law, *eundo, morando, et redeundo:* and, therefore, if he cometh to do his office, and meeting with great opposition retireth, and in the retreat he is killed, this will amount to murder." *Foster* 308; 1 *Hale P. C.* 463, p. 614. "Upon the same principle, if he meeteth with opposition by the way, and is killed before he cometh to the place, *such opposition being intended to prevent his doing his duty, which is a fact to be collected from circumstances appearing in evidence*, this likewise will amount to murder." *Foster* 309.

A "constable hath as good authority in his place as the Chief Justice of England in his," *per* Coke (1 *Rolle's Rep.* 238). That authority is discussed at length in *Tooley's case*, pp. 638–9.

The authority of a constable, &c., ceases with the limits of his district, and if he attempts to execute process out of the jurisdiction of the court whence it issues, and is killed, it is only manslaughter, as in the case of void process. 1 *Hale P. C.* 458; cf. 457, p. 638; 1 *East P. C.* 314. So where a bailiff attempted to execute an informal writ, he was held a trespasser, and defendant, who was indicted for cutting with intent to murder, was acquitted. *Mead*, 2 *Stark. N. P. C.* 205 (1817), below.

"But if the process be directed to a particular constable by name, or even by his name of office, and he execute it within the jurisdiction of the court or magistrate issuing the same, although it be out of the constable's vill, that will be sufficient." 1 *East P. C.* 314; 3 *Hawk. P. C.* Bk. 2, ch. 13, ss. 27, 30.

A warrant directed "To the constable of G.," under 11–12 V. 43, 23, is directed to the *parish* constable of G., and a conviction for violence on its execution by a county policeman was quashed. *Sanders, L. R.* 1 *C. C. R.* 75; 36 *L. J. M. C.* 87; 10 *Cox C. C.* 445 (1867); *C. C. R.*, p. 638.

See below on this point and for the regulation of warrants generally.

Where a constable having a warrant to arrest prisoner gave it to his son, who attempted to execute it, the constable then being in sight, but too far off to assist, Parke B. held that the arrest was illegal, and that violence at most would have amounted to manslaughter (there being no premeditation). *Patience*, 7 *C. & P.* 775 (1837).

As to proof that any one is a constable, &c., see pp. 6, 17.

As to production of the warrant, see *Codd* v. *Cabe*, and *Carey*, pp. 223, 642.

It is sufficient, on an indictment for murder, to produce the warrant or writ upon which a constable, &c., has acted, without proving the judgment or decree upon which it is founded. *Foster* 311, 312; 1 *East P. C.* 310. But the writ to the sheriff must be proved as well as the warrant to the bailiff. *Mead*, above; *Stark. Ev.* 437, *4th ed.* As to authority derived from the articles of war, see pp. 138, 647. In several instances prisoners have been acquitted on a charge of murder for want of such evidence. 2 *Stark. Ev.* 519, *2nd ed.*, for it may be a "material question . . . how far the prisoner was to be obedient to his" officer, *per* Buller J., *Withers*, p. 138.

Legality of process.] The process must be legal, p. 626. But by this it is only to be understood that "the process, be it by writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice, from a court or magistrate having jurisdiction in the case. There may have been error or irregularity in the proceeding previous to the issuing of the process; but if the sheriff or other minister of justice be killed in the execution of it; this will be murder: for the officer to whom it is directed must, at his peril, pay obedience to it." *Rogers, Foster C. C.* 312 (1735), where an injunction for delivering possession was set at defiance, and in enforcing it three of the sheriff's posse were killed. So even if the warrant is obtained from a magistrate (having jurisdiction) by gross imposition, and false information, yet

killing the bearer may be murder. *Curtis* (1756), *Foster* 135, 312, pp. 611, 644, 645. "And altho the warrant . . . be not in strictness lawful, as if it express not the cause particularly enough, yet if the matter be within his jurisdiction as justice of the peace, the killing of such officer in the execution of his warrant is murder; for in such case he cannot dispute the validity of the warrant, if it be under seal of the justice." 1 *Hale P. C.* 460. "In all kinds of process, both civil and criminal, the falsity of the charge contained in such process,—that is, the real injustice of the demand in one case, or the party's innocence in the other, will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice." 1 *East P. C.* 310; 1 *Hale P. C.* 457, cf. 458; pp. 637, 641.

The statutes now regulating warrants are: 11–12 V. c. 42, c. 43; 12–13 V. 69, 11–15 (backing); 14–15 V. 55, 18 (backing); 14–15 V. 93, 27–31, 41, 43 (backing); 20–1 V. 72, 11; 27–8 V. 53, 9 (backing); 30–1 V. 19 (backing); 31–2 V. 107 (backing); 40–1 V. 56, 77 (backing); 44–5 V. 24; 61–2 V. 37, 26, 41.

Warrants in treason, felony, and breach of the peace may be executed on Sunday, but no other process, by 29 C. 2, 7, 6, but justices may issue search-warrants or those to arrest for any indictable offence on Sunday, by 11–12 V. 42, 4.

"But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person . . . or if the name of such person or of the officer be inserted without authority, and after the issuing of the process, or the officer exceed the limits of his authority, and be killed," this is only manslaughter "*in the person whose liberty is invaded.*" *Foster* 312; 1 *East P. C.* 310. Cf. *Reynolds*, p. 776. Prisoner, who had been arrested and rescued, declared that if Welch, the officer, attempted to arrest him again, he would shoot him. A writ of rescue was made out and carried to the office of the under-sheriff, to have the warrants made out. A warrant was there made out against the prisoner on a blank piece of paper, as was the custom, and delivered to Welch, who inserted therein the names of two other persons to assist him. In executing this warrant, Welch, in getting into the house to assist those two, already there, was shot by the prisoner. The judges certified that the offence in point of law amounted only to manslaughter, as the warrant was illegal. *Stockley*, 1 *East P. C.* 310 (1772), pp. 66, 645. So where the name of another sheriff's officer was inserted in a sheriff's warrant, after it had been signed and sealed, and directed to A. by name and all the other sheriff's officers, the arrest by the substituted officer was held illegal; 3 *Russ. Cri.* 102, and so *Stevenson*, 19 *St. Tr.* 846 (1759), where the warrant was filled up after it had been sealed. But otherwise, apparently, if the name be inserted before the sealed warrant leaves the office. *Harris*, 3 *Russ. Cri.* 102 (1801). Where a magistrate kept by him blank warrants ready signed, and, on being applied to, filled up one of them, and delivered it to an officer, who in attempting to make the arrest was killed, it was held that this was murder. *Per* L. Kenyon, *Winwick, Inhabs. of*, 8 *T. R.* 454 (1800). Where a county court clerk made out an attachment in his own suit, all the judges held this was legal, as it was a purely ministerial act. *Baker*, p. 644. Cf. *Sanders*, p. 657. A warrant of commitment, issued by county justices of Worcestershire, and served on the prisoner in the city of Worcester (whither he had not been pursued from the county; cf. p. 224), without being backed by a justice for the borough, was held to be defective, and a conviction for assault was quashed. *Cumpton*, 5 *Q. B. D.* 341; 49 *L. J. M. C.* 41 (1880), *C. C. R.*

A warrant must show an information on oath on which it issues. *Caudle* v. *Seymour*, 1 *Q. B.* 889 (1841).

Illegal arrest—Third person interfering.] Cf. p. 636. "The question in a legal form is reducible to this, How far the mere view of a person under

arrest or about to be arrested, supposing it to be illegal, is *of itself* such a provocation to a bystander as will extenuate his guilt in killing the officer, in order to set the party free . . . or prevent the arrest . . .?" 1 *East P. C.* 325. One Bray, constable of St. Margaret's, Westminster, came into St. Paul, Covent Garden, "where he was no constable, and consequently had no authority," and without warrant took up a woman on suspicion of being a disorderly person, but who, it was found, had not misbehaved herself. . . . The prisoners, strangers to her, meeting her in his custody, drew their swords, and assaulted Bray to rescue her; but on his showing his staff, and declaring he was about the queen's business, they put up their swords, and he carried her to the round-house in Covent Garden. Soon afterwards the prisoners again drew their swords, and assaulted Bray, in order to get her discharged. Whereupon Bray called Dent to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners, when one of them, before any stroke received, gave Dent a mortal wound. All the judges, except one, agreed that Bray acted without any authority; but that one thought showing his staff was sufficient, and that, with respect to the prisoners, he was to be considered as constable *de facto*. But the main point on which they differed was, whether the illegal imprisonment of a stranger was, under these circumstances, a sufficient provocation to bystanders; or in the language of L. Holt (borrowed from *Kel.* 60), "a provocation to all the subjects of England." Five judges held the case to be murder, and thought that it would have been a sufficient provocation to a relation or a friend, but not to a stranger. The other seven judges, who held it to be manslaughter, thought that there was no ground for making such a distinction, and that it was a provocation to all, whether strangers or others, so as to reduce the offence to manslaughter, "it being a sudden action," &c. . . . only to rescue one who was unlawfully restrained of her liberty." *Tooley*, 2 *L. Raym.* 1296 (1709); *East, ib.*; *Holt* 485 ("The Case of the Reforming Constables"); 11 *Mod.* 242. The judgment of the majority is severely criticised by *Foster* (312–5), who points out that the prisoners, when they first saw the constable, drew their swords upon him, though he was unarmed, but put them up, appearing, on cool reflection, to be pacified. At the second meeting the deceased received his death-wound, before any blow given or offered by him or his party. There was no pretence of a rescue; for, before the second encounter, the woman had been lodged in the round-house, which the soldiers could not hope to force; so that the second assault upon the constable seemed rather to be grounded upon resentment or revenge for what had passed, than upon any hope to rescue the woman. He thinks that the doctrine advanced in this case "is utterly inconsistent with the known rules of law touching a sudden provocation in the case of homicide," and carries favour to private persons "*officiously* interposing" beyond what is reasonable. *East*, above. Upon *Tooley* being cited, Alderson J. observed, apparently with the concurrence of all the judges, that it had been overruled. *Warner*, 1 *Moo. C. C.* 380 (1833); cf. p. 636.

The majority in *Tooley* grounded their opinion upon (*a*) *Hugget* and (*b*) *Ferrers*. (*a*) Berry pressed a man for the Dutch War without authority: the man quietly submitted, and went along with him. The prisoner, with three others, seeing them, instantly pursued them, and required to see the warrant; on which Berry showed them a paper, which prisoner and his companions said was no warrant, and immediately drawing their swords to rescue the impressed man, thrust at Berry. A fight ensued, in which Hugget killed Berry. *Hugget*, *Kel.* 59, 137 (1666), p. 646. Hale (1 *P. C.* 465) reports the case somewhat differently (contrasting it with *Jackson*, p. 645, where the attempt to arrest was perfectly legal). Four judges held that it was murder, eight that it was manslaughter: *ib.*; *Foster* 314, who is inclined to rest this case upon the

ground of "a sudden quarrel and affray, and a combat between" prisoner "and an assistant of the press-master upon some rudeness" of his (so *Hale*); and he observes that Hale, who, at the conference, was one who held it to be manslaughter only, says "nothing touching the provocation which an act of oppression towards individuals might be supposed to give to the bystanders." The report in *Kel.* clearly turns upon "the illegality of the impress, and the provocation such an act of oppression may be presumed to give to every man, be he stranger or friend, out of mere compassion, to *endeavour a rescue*." (*b*) Sir Henry Ferrers being arrested for debt upon a warrant which was illegal, as it called him "knight," whereas he was a baronet, his servant, in attempting to rescue him, as was alleged, killed the officer; he was indicted for aiding and abetting the murder, but the K. B. held that at the most it was manslaughter, as it was "an ill warrant," and he was acquitted on the facts. The servant was held not to be guilty of murder; he may have been found guilty of manslaughter (2 *L. Raym.* 1302). *Ferrers, Cro. Car.* 371; *W. Jones* 346 (1635). Apparently this was not a case of rescue at all. *Foster* 138, 313.

The prisoner was tried for the murder of an assistant to a constable, who had come to arrest one Farmello, with whom prisoner cohabited, as a disorderly person to be pressed, &c., under an Act, which he was certainly not within. He made no resistance, but prisoner immediately, on the assistant requiring Farmello to go along with them, without a word, stabbed him. Hotham B. said it was a very different case from what it would have been if the blow had been given by Farmello himself. "If he, when the constables entered the room with an insufficient warrant, had immediately, in his own defence, rather than suffer himself to be impressed, done the deed . . . the homicide would have been lessened to the crime of manslaughter." The offence also might have been different if prisoner had been his wife; but she was to be considered an absolute stranger to him, and guilty of murder. He then adverted to *Hugget* and *Tooley*, above, and observed that the circumstances there were extremely different from those of the present case. Gould and Ashurst JJ. concurred in this opinion; but it was thought fit, in view of Foster's opinion above, that the jury should find a special verdict. The case was subsequently argued before ten of the judges, but no judgment was given, the prisoner having made her escape from prison, during the riots in 1780. It is said that the judges held the case to be manslaughter only. *Adey*, 1 *Leach* 206 (1779); 1 *East P. C.* 329, *n.*; 3 *Russ. Cri.* 117, *n.*

In connection with *Allen and others* (1867: Manchester Special Commission), convicted of the murder of a police officer, whom they shot in attempting to rescue Fenian prisoners, the law upon the subject was summed up by Blackburn and Mellor J.J. after consulting the other judges:—"When a constable, or other person properly authorised, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently, if he is killed in the execution of his duty, it is in general murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But where the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and consequently the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation. . . . The cases . . . cited [mostly those above] are authorities . . . where the affray is sudden and not premeditated. . . . In the present case the form of warrants adopted . . . probably might on application to the court for a writ of *habeas*, have entitled the prisoners to be discharged from custody . . . however, it was clearly proved that there was on the part of the convicts a deliberate, pre-arranged

conspiracy to attack the police with firearms and shoot them, if necessary, for the purpose of rescuing the two prisoners . . . it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it would justify the slaughter of an officer . . . or reduce such slaughter to . . . manslaughter." *Stephen's Dig. of. Cr. Law*, 421, *5th ed.*; "it would have made no difference if they had known of the irregularity of the warrant," *ib.* p. 189.

Although a distinction may exist "between the cases of servants and friends, and that of a mere stranger, yet . . . the limits between both are nowhere accurately defined. And, after all, the nearer or more remote connexion of the parties with each other seems more a matter of observation to the jury, as to the probable force of the provocation, and the motive which induced the interference of a third person, than as furnishing any precise rule of law, grounded on such a distinction." 1 *East P. C.* 292.

No warrant.] See *per* Blackburn J. above. In *Sherriff*, pp. 184, 186, 429, it being doubtful whether arrest without even a search-warrant, under 24-5 V. 96, 103, p. 222, was legal, on indictment for murder of a policeman during the arrest, Darling J. intended to reserve the point, but the verdict was manslaughter.

Police, &c., must be known as such.] "With regard to such ministers of justice who, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots or affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties concerned should have some notice with what intent they interpose; otherwise the persons engaged may, in the heat and bustle of an affray, imagine that they came to take a part in it. But, in these cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer in any other manner declare with what intent he interposeth. Or if the officer be within his proper district, and known or but generally acknowledged to bear the office he assumeth, the law will presume that the party killing had due notice of his intent, especially if it be in the daytime. In the night some farther notification is necessary, and commanding the peace, or using words of the like import notifying his business will be sufficient." *Foster*, 310. But cf. *Forbes*, p. 256.

A constable, "sworn in the leet where all resiants [residents] are to attend," is presumed to be known to all the inhabitants of his district; 1 *Hale P. C.* 460, 461; and such a constable or bailiff in making the arrest, is not bound to show his warrant (a note suggests that this refers to his warrant of appointment), "and a private bailiff need not show his warrant upon the arrest till the party arrested demand it." *Ib.* 458. "A justice . . . may for a matter within his jurisdiction issue his warrant to a private person, as servant; but then such person must shew his warrant or signify the contents of it." *Ib.* 459. But if "it be a private bailiff, either the party must know, or there must be some . . . notification thereof," *Mackalley* [pp. 71, 613]. *Ib.* 461. And in the night-time, some notification would be necessary in the case of a leet constable. But whether in the day or night, it is sufficient if he declares himself to be the constable, or commands the peace in the king's name. *Ib.* 461.

In *Curtis*, pp. 638, 644, "The nine judges were of opinion that no precise form of words was required in a case of this kind. It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority . . . it will be no excuse on his [the resister's] part to say that he did not know or believe that the officer came armed with a proper authority. . . . The judges who differed thought that the officers

ought to have declared in an explicit manner what sort of warrant they had. They said that an escape doth not *ex vi termini*, nor in the notion of law, imply any degree of force or breach of the peace; and consequently the prisoner had not due notice that they came under the authority of a warrant grounded on a breach of the peace; and for want of this due notice the officers are not to be considered as acting in discharge of their duty, but as mere trespassers." *Foster*, 137.

When police, &c., may kill in arresting.] "If a person having actually committed a felony will not suffer himself to be arrested, but stand on his own defence, or flies, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them." 1 *Hawk. P. C.* Bk. 1, ch. 28, s. 11. Cf. p. 516. "Where a felony is committed, and the felon fleeth from justice, or a dangerous wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if, in the pursuit, the party fleeing is killed, *where he cannot be otherwise overtaken*," it is "justifiable homicide." *Foster*, 271; 1 *Hale P. C.* 481.

"If an innocent person be indicted of a felony, where, in truth, no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may be lawfully killed by him, if he cannot otherwise be taken; for there is a charge against him upon record, to which at his peril he is bound to answer." 1 *Hawk. P. C.* Bk. 1, ch. 28, s. 12. Cf. p. 637. In this respect an officer *without a warrant* is in a different position to that of a private man. 1 *East P. C.* 300.

Bare suspicion of guilt, though a felony has actually been committed, will not warrant killing in arrest, nor even breaking open the outward door of a house by a peace officer without a warrant. *Foster*, 136–7, 318, 320–1; see p. 643. However, according to Hale, an officer would be justified in killing the suspected person if he fly. 2 *Hale P. C.* 84, 85. Cf. *Dadson*, p. 496; and for private persons (gamekeepers) arresting, cf. *Ball*, p. 486.

In cases of *misdemeanors*, the law does not admit the same severe rule as in that of felonies. Arrests for misdemeanors and in civil proceedings are upon the same footing. *Foster*, 271. If a man charged with a misdemeanor, or the defendant in a civil suit, flies, and the officer pursues, and kills him, it is murder. 1 *Hale P. C.* 481. Or rather, "it will be murder or manslaughter, as circumstances may vary the case; for if the officer, in the heat of the pursuit, and merely in order to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon *not likely to kill*, and death should unhappily ensue, I cannot think that this will amount to more than manslaughter, if in some cases even to that offence. . . . But had he made use of a deadly weapon, it would have amounted to murder." *Foster, ib.*; see *Codd* v. *Cabe*, pp. 223, 637.

"If those who are engaged in a riot, or a forcible entry, or detainer, stand in their defence, and continue the force in opposition to the command of a justice of peace, &c., or resist such justice endeavouring to arrest them, the killing of them may be justified; and so perhaps may the killing of dangerous rioters by any private persons, who cannot otherwise suppress them or defend themselves from them." 1 *Hawk. P. C.* Bk. 1 ch. 28, s. 14. Cf. p. 648.

Police, &c., not bound to retreat.] "Regularly" to excuse killing in self-defence, the killer must "fly as far as he may to avoid the violence of the assault before he turn upon his assailant"; but an officer if assaulted in the execution of his office, "is not bound to give back to the wall; but if he kills the assailant, it is . . . adjudged *se defendendo*." But unnecessary violence may amount

to murder. 1 *Hale P. C.* 481. Cf. p. 255. So in civil process. 1 *Hawk. P. C.* Bk. 1, ch. 28, ss. 17, 18. "But though it be not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor unless upon a reasonable necessity . . . therefore, where a collector, having distrained for duty, laid hold of a maid-servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court held her opposition to the officer to be a sufficient provocation to extenuate the homicide; yet they were clearly of opinion that he was guilty of manslaughter in so far exceeding the necessity of the case. And where no resistance at all is made, and yet the officer kills, it will be murder. So if the officer kill the party after the resistance be over, and the necessity has ceased, it is manslaughter at least; and if the blood had time to cool, it would, I conceive be murder." 1 *East P. C.* 297; *Gosse, Ventr.* 216 (1673). Cf. p. 648.

Breaking in to arrest.] There must always be "notification, demand, and refusal" first. *Foster*, see p. 641; 3 *Hawk. P. C.* Bk. 2, ch. 14, s. 1.

Where one known to have actually committed a felony, or given a dangerous wound is pursued, any one may break in, even without a warrant; it seems that mere suspicion of felony when there is no indictment will not justify this. *Foster*, 321; *Hawk. ib.*; but there was an opinion that mere suspicion justified this course without a warrant after refusal to open, 1 *Hale P. C.* 583; 2 *Ib.* 92.

An authorised person is justified in breaking in upon a *capias*, grounded on an indictment for any crime whatever, or upon one to compel one to find sureties for the peace (apparently) by whomever issued. 3 *Hawk. P. C.* Bk. 2, ch. 14, s. 3. So upon a *capias utlagatum*, or *pro fine*, "or other process for the king"; 1 *Hale P. C.* 459; or upon an *habere facias possessionem*; *ib.* 458; or upon the warrant of a justice for levying a forfeiture in execution of a judgment or conviction; *Hawk. ib.* s. 5; or upon a writ of attachment for contempt of court (of a punitive nature). *Harvey* v. *Harvey*, 26 *Ch. D.* 664 (1884); but not in a merely civil process. *Ib.*

"If there be an affray in the house where the doors are shut, whereby there is likely to be manslaughter or bloodshed committed, the constable of the vill having notice thereof and demanding entrance, if they within refuse to do it, but continue the affray . . . may break open the doors to keep the peace, and prevent the danger." 2 *Hale P. C.* 95. So where he immediately pursues the affrayers, 3 *Hawk. P. C.* Bk. 2, ch. 14, s. 8; 2 *ib.* B. 1, c. 63, s. 16. And "if there be disorderly drinking or noise in an house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder; and this is constantly used in London and Middlesex." *Hale, ib.*; 1 *East P. C.* 322. See p. 234. But it has been doubted whether a constable can safely break open doors in such a case without a magistrate's warrant; "at least, it should seem, there must be some circumstances of extraordinary violence in the affray to justify him in so doing." 1 *Russ. Cri.* 590 *n.*

"In civil suits the officer cannot justify the breaking open an outward door or window to execute the process; if he do, he is a trespasser, and consequently cannot be deemed acting in discharge of his duty. In such case, therefore, if the occupier resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose for himself and his family." 1 *East P. C.* 321. Where this happened, "it was ruled: 1. That it is not murder, because he cannot break the house." 2. But it was manslaughter, because he knew him to be a bailiff. But

3. Had he not known him to be a bailiff, or one that came upon that business, it had been no felony because done in defense of his house." *Cook*, 1 *Hale P. C.* 458; *Cro. Car.* 537; *W. Jones*, 429 (1640), pp. 645, 648. "This last instance . . . must be understood to include at least a reasonable ground of suspicion that the party broke the house with a felonious intent; and that the party did not know . . . nor had no reason to believe that it was merely as a trespasser with a different intent." 1 *East P. C.* 321–2.

The privilege is confined to the *outer doors* and windows only—for if the officer enter by an open outer door, he "may break open the inward doors, tho the process be without a *non omittas* [a clause empowering the sheriff to enter where otherwise he would have no authority], and therefore the killing of him in such case is murder." 1 *Hale P. C.* 458; 1 *East P. C.* 323. If the person whom the officer is about to arrest, or the goods which he is about to seize, be within the house at the time, he may, once being in, break open any inner doors to search for him or them, without demanding admission. *Hutchinson* v. *Birch, &c.* (sheriffs of London), 4 *Taunt.* 619 (1812). But it seems that if the person be not within the house at the time, the officer acting under civil process must demand admittance before he will be justified in breaking an inner door. *Ratcliffe* v. *Burton*, 3 *B. & P.* 223 (1802). But if the house be that of a *stranger*, the justification of the officer will depend upon his finding the goods there in fact,—provided the door is open. *Cooke* v. *Birt* (sheriff of Surrey), 5 *Taunt.* 765 (1814); or on his finding the person, *Johnson* v. *Leigh* (a sheriff), 6 *Taunt.* 246 (1815). An officer attempting to attach the goods of the prisoner in his dwelling-house, put his hand over the hatch of the outer door which was divided into two parts, the lower hatch being closed and the higher open. A struggle ensued, but the officer got into the shop, when the prisoner shot at and killed him, and this was held murder; no question was raised as to breaking an outer door, but only as to the legality of the process. *Baker*, 1 *Lea.* 112 (1775); 1 *East P. C.* 323, p. 638. See further *Crabtree* v. *Robinson*, p. 299, and cf. *Long* v. *Clarke*, 1894, 1 *Q. B.* 119 (*C. A.*), and other cases under *Semayne's case*, 5 *Coke*, 91 (1604) in 1 *Smith's L. C.*

"If a stranger, whose ordinary residence is elsewhere, upon a pursuit taketh refuge in the house of another, this is not *his* castle, he cannot claim the benefit of sanctuary in it." *Foster*, 320, 321; 1 *East P. C.* 323, who adds that this must be subject to the officer breaking in doing so at his peril,—"unless, as it seems, where the parties act under a magistrate's warrant." The last words cited from East may now be taken to refer to the various search-warrants for persons or things, a list of which will be found in *Atkinson's Magistrate's Annual Practice* (1900), pp. 119–121: to which add search-warrants under 46–7 V. 52, 25, 119 (2), p. 268 (Bankruptcy Act).

"This privilege [of the householder] is also confined to arrests *in the first instance;* for if a man who is legally arrested (and laying hold of the prisoner, and pronouncing words of arrest, is an actual arrest) escape from the officer, and take shelter, though in his own house, the officer may, upon fresh pursuit, break open the door, in order to retake him, having first given due notice of his business, and demanded admission, and been refused." *Foster*, 320; 1 *East P. C.* 324. "If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant from a magistrate." *East, ib.*, cf. 1 *Hale P. C.* 459.

Homicide through arrest—Circumstances of provocation.] Even where resistance is lawful, unnecessary violence must not be used. See pp. 625, 632. In *Curtis*, pp. 638, 641, prisoner being in the house of one Cowling, who had made his escape from arrest on civil process, swore, when the serjeants-at-mace arrived with assistants to take Cowling, that the first person who entered to

retake him should be a dead man, and, immediately upon the officers breaking open the door, struck an assistant with an axe and killed him. This was held murder (by nine to two, who thought it was manslaughter), and a few of the judges were of opinion, that even if the officers could not have justified breaking open the door (as to which, see p. 643), yet that it would still have been so, for at the worst they had committed a bare trespass in the house of Cowling, without any attempt on the property or person of the *prisoner*; and admitting that a trespass in the house, with an intent to make an unjustifiable arrest of the owner, could be considered as some provocation to a bystander, yet "the knocking a man's brains out, or cleaving him down with an ax, on so slight a provocation, savoureth rather of brutal rage, or, to speak more properly, of diabolical mischief, than of human frailty. And it ought always to be remembered, that in all cases of homicide upon sudden provocation, the law indulgeth to human frailty, *and to that alone*." Cf. p. 625. So in *Stockley*, pp. 66, 638, the fact that the prisoner deliberately resolved upon shooting Welch, in case he offered to arrest him again, was (East suggests, in view of *Curtis*, above), sufficient of itself to warrant a conviction for murder.

When "a bailiff, having a warrant to arrest a man, pressed early into his chamber with violence, but not mentioning his business, nor the man knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword that hanged in his chamber, and stabbed the bailiff, whereof he presently died"; this was held, "with some diversity of opinion," not to be murder, "for the prisoner did not know but that the party came in to rob or kill him, when he thus violently broke into his chamber without declaring his business." *Anon.* (1657), 1 *Hale P. C.* 470. Cf. p. 603. See *Cook's case*, pp. 644, 648, where the bailiff had no right to break the house, on the particular process, and prisoner threatened to shoot him, before he did so.

In *Thomson*, 1 *Moo. C. C.* 80 (1825), where the officer was about to make an arrest on an insufficient charge, a majority of the judges, who thought that had death ensued from his attack it would not have been murder, relied on the fact that prisoner was in such a situation that he could not get away, and held a conviction for intent to murder, for which he had been sentenced to death, wrong. To the same effect is *Curvan*, p. 626. Cf. *Stockley*, pp. 66, 638, and *Curtis*, pp. 638, 641, 645.

Rescue by third person.] Cf. p. 638. If the arrested person yield himself and make no resistance, "but others endeavour to rescue him, and he doth no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, this is murder in them, but not in the party arrested"; otherwise, if he do any act to countenance the violence of the rescuers, *e.g.* first attempt his own rescue. *Stanley*, *Kel.* 86; 1 *Sid.* 159 (1664); 3 *Russ. Cri.* 118. *Jackson* and four other robbers being pursued by the hue and cry, Jackson turned round upon his pursuers, the rest being in the same field, and refusing to yield, killed one of them. By five judges this was held murder, and inasmuch as all the robbers were of a company, and made a common resistance, and one animated the others, all those who were of the company in the same field, though at a distance from Jackson, were all principals, viz. present, aiding, and abetting. Arrest upon hue and cry is good, though there be no warrant, if a felony has been actually committed (at any rate, by the pursued). They also resolved that one of the malefactors, being apprehended a little before the party was hurt, and, therefore, in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated Jackson to kill the party. They were all sentenced to death for the robbery, and four of them for the murder (1675). 1 *Hale P. C.* 464. Cf. p. 639. Where A. beat B., a constable in the execution of his

duty, and they were parted, and then C., a friend of A., fell upon the constable, and killed him in the struggle, but A. was not engaged in the affair after he was parted from B., it was held that this was murder only in C., and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to "abuse" the constable. *Anon.*, 1 *East P. C.* 296 (time of W. 3).

It is for the jury in such cases to determine for what purpose the third person intervened. If he interfered for the purpose of rescuing the arrested person, it would be murder, but if "not knowing the bailiff, but intending to preserve the peace and prevent mischief," it may, perhaps, not amount to murder. 1 *East P. C.* 318, on *Stanley's case*, above. 3 *Russ. Cri.* 119.

A constable was killed in repressing a riot. Several prisoners all used violence in different ways, some by beating him with sticks, some by throwing stones, &c. Alderson B. told the jury to consider whether all the prisoners had the common intent of attacking the constables; "if so, each of them is responsible for all the acts of all the others done for that purpose; and if all the acts done by each *if done by one man*, would together shew such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such a purpose, you ought to find the prisoners guilty only of manslaughter," which they did. *Macklin*, 2 *Lewin C. C.* 225 (1838).

Impressment of seamen.] The foregoing principles were illustrated by cases on the impressment of seamen, a practice now obsolete, though not abolished by law. See *Phillips*, *Cowp.* 830 (1778); *Broadfoot* (1743), *Foster C. C.* 154; *Dixon* (1756), 1 *East P. C.* 313; *Borthwick*, 1 *Dougl.* 207 (1779), and see *East*, *ib.* 308. Cf. *Hugget*, p. 639.

Killing by soldiers or sailors by order of superiors.] Cf. *Hutchinson*, p. 598. Prisoner was sentinel on board H.M.S. *Achille*, when she was paying off. The orders to him from the preceding sentinel were to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach, and he received a musket, three blank cartridges, and three balls. Some boats pressing forwards, he called upon them repeatedly to stop; but one of them persisted, and came close under the ship. He then fired at a man who was in the boat, and killed him. It was put to the jury whether he did not fire under the mistaken impression that it was his duty, and they found that he did. On a case reserved, the judges resolved unanimously that it was nevertheless murder. They thought it, however, a proper case for pardon; and further, they were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. *Thomas*, 3 *Russ. Cri.* 94 (1816); see 4 *M. & S.* 441. On this case, Professor Dicey observes that it illustrates curiously the position of a soldier. "The judgment of the court rests upon and illustrates the incontrovertible principle of the common law that the fact of a person being a soldier and of his acting strictly under orders, does not of itself exempt him from criminal liability for acts which would be crimes if done by a civilian." *The Law of the Constitution*, Pt. 2, ch. 9 (p. 297, *note* 4, *6th ed.*).

"When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence." *Ib.* The same writer deals (*ib.* p. 298) with the possible conflict between the duties of a soldier [or sailor] as a military [or naval] person and as a citizen thus:—"During a riot an officer orders his soldiers to fire upon rioters. The command to fire is justified by the fact that no less energetic course of action would be sufficient to put down

the disturbance. The soldiers are, under these circumstances, clearly bound from a legal, as well as from a military point of view, to obey the command of their officer. It is a lawful order, and the men who carry it out are performing their duty both as soldiers and citizens.

An officer orders his soldiers in a time of political excitement then and there to arrest and shoot without trial a popular leader against whom no crime has been proved, but who is suspected of treasonable designs. In such a case there is (it is conceived) no doubt that the soldiers who obey, no less than the officer who gives the command, are guilty of murder and liable to be hanged for it when convicted in due course of law. In such an extreme instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.

An officer orders his men to fire on a crowd who he thinks could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The order, therefore, to fire is not in itself a lawful order, that is, the colonel, or rather officer, who gives it is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view the duty of the soldiers? The matter is one which has never been absolutely decided," but Professor Dicey adopts the answer given by Stephen J. (1 *Hist. Crim. Law*, pp. 204–6; add *Dig. Crim. Law Art.* 219) as embodying the authorities. The effect of that passage is "that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds," but not otherwise. Professor Dicey also cites (*ib.* App. *note* 6) "an almost judicial statement of the law as to the duty of soldiers when called upon to disperse a mob" in the Report of the Committee (L. Bowen L.J., Haldane Q.C., and Sir A. K. Rollit, a solicitor) on the Featherstone Riots, 1893 (*Parl. Paper*, Co.—7234), in which the following passage occurs (p. 10): "The question whether, on any occasion, the moment has come for firing upon a mob of rioters depends . . . on the necessities of the case. Such firing to be lawful must, in the case of a riot like the present, be necessary to stop or prevent . . . serious and violent crime . . . ; and it must be conducted without recklessness or negligence. When the need is clear the soldier's duty is to fire with all reasonable caution so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An order from the magistrate who is present is required by military regulations. . . . But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists. With the above doctrines of English law the Riot Act [p. 746] does not interfere."

As to the Articles of War, see pp. 138, 637. Naval assistance in riots is regulated by the Admiralty Instructions, art. 441. See *Stephens*, &c., on *Naval Law*, p. 377 (1901). Cf. *Marks* v. *Frogley*, p. 653.

Killing in defence of person or property.] See pp. 602–3, 625, and *Self-defence* in Index. Sometimes the question is whether the offence amounted to murder or not. See p. 625.

As to mere trespass on property, see p. 628, and 1 *East P. C.* 288. Deadly weapons must not be used to prevent trespass. Captain Moir discharged a gun at a person who persisted in trespassing on his land, and the man died. He went home for pistols on seeing the trespasser, and angry words passed. Being indicted for murder, he was found guilty and executed. *Moir* (1828), cited in *Price*, 7 *C. & P.* 178. Cf. p. 628. As to the instrument used, see p. 627.

"If A., in defence of his house, kill B., a trespasser, who endeavour to make an entry upon it, it is at least common manslaughter, unless indeed there were danger of his life. But if B. had entered into the house, and A. had gently laid his hands upon him to turn him out, and then B. had turned upon him and assaulted him, and A. had killed him (not being otherwise able to avoid the assault, or retain his lawful possession) it would have been in self-defence. So it had been if B. had entered upon him, and assaulted him first, though his entry were not with intent to murder him, but only as a trespasser, to gain the possession. In such case, A. being in his own house, need not fly as far as he can, as in other cases of self-defence; for he has the protection of his house to excuse him from flying; as that would be to give up the possession of his house to his adversary by his flight. But in these cases the homicide is excusable rather than justifiable." 1 *East P. C.* 287, citing 1 *Hale P. C.* 445; and *Cook*, pp. 644, 645; cf. *Hale*, p. 643.

A publican was killed in a struggle between him and two men who unlawfully resisted his turning them out of his house. He refused to serve them owing to the lateness of the hour. Later one returned, got in and collared the publican who still refused. The latter struggled to put him out at the door, at which the other outside struck him with a sharp instrument which killed him. Buller J. held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them; "for the landlord did no more . . . than he lawfully might; which was no provocation for the cruel revenge taken, more especially as there was reasonable evidence of the prisoners having come a second time, with a deliberate intention to use personal violence, in case their demand for beer was not complied with." *Willoughby*, 1 *East P. C.* 288 (1791). Cf. *Archer*, p. 593.

Several of the foregoing points are illustrated by *Meade*. Prisoner had made himself obnoxious to the boatmen at Scarborough, by giving information to the excise of certain smuggling transactions. They, in revenge, met him and ducked him, and he had to be rescued by the police. Then they threatened that they would come at night and pull his house down, and in the middle of the night a great number of persons did come about his house, singing songs of menace, and using violent language, clearly with no friendly or peaceable intention; and prisoner, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of them was killed. Holroyd J. said, "A *civil trespass* will not excuse the firing a pistol at a trespasser in sudden resentment or anger [p. 628.] If a person takes *forcible possession* [p. 642] of another man's close, so as to be guilty of *a breach of the peace*, it is more than a trespass [p. 603.] So if a man with force invades and enters into the *dwelling* of another. But a man is not authorised to fire a pistol on every intrusion or invasion of his house [pp. 625, 628]. He ought, if he has a reasonable opportunity, to endeavour to remove himself without having recourse to the last extremity [p. 643.] But the making an attack upon a dwelling, especially *at night*, the law regards as equivalent to an *assault* on a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault; but no *words* or *singing* are equivalent to an assault [pp. 624–5], nor will they authorise an assault in return. If . . . there was nothing but the *song*, and no appearance of further violence—if . . . there was no reasonable ground for apprehending further danger [pp. 602–3], but . . . the pistol was fired for the purpose of *killing* [pp. 624, 627], then it is murder." Verdict, manslaughter. *Meade*, 1 *Lewin C. C.* 184 (1823).

Self-preservation.] With self-defence is connected self-preservation.

Prisoners, Dudley and Stevens, another seaman (not indicted), and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat, in which they drifted on the ocean, probably more than 1000 miles from land. On the twentieth day, when they had all been many days without food or drink, and the boy especially was *in extremis*, Dudley, with the assent of Stephens (but not of the third man), killed the boy, and all lived on his flesh for four days. It was highly probable that had they not resorted to such an expedient they would all have died of starvation very soon; there was no other appreciable chance of saving life. It was held upon these facts, found in a special verdict, by five judges of the Q. B. D., that prisoners were guilty of murder, and they were sentenced to death, which sentence was commuted to six months' hard labour. *Dudley*, pp. 165, 189. See p. 819.

Abetting Suicide.] If A. persuade B. to kill himself, and B. do so, A. is guilty of murder; if *e.g.* B. takes poison in the absence of A., the persuader, yet A. is a principal in the murder. 1 *Hale P. C.* 431; citing *Vaux's case* (1591); 4 *Rep.* 44 *a*. Prisoner was indicted for the murder of a woman by drowning her. He stated that they had resolved to drown themselves together in the Thames. Ultimately he found himself in the water, but whether by actually throwing himself in from a boat in which they both were, or by accident, did not appear. He struggled and got back into the boat again, and then found that the woman was gone. He endeavoured to save her, but could not, and she was drowned. In his statement before the magistrates, which was read at the trial, he said he intended to drown himself, but dissuaded the woman from doing so. The judge told the jury that if they believed the prisoner only intended to drown himself, they should acquit the prisoner; but if they both went to the water for the purpose of drowning themselves, each encouraging the other to felony, the survivor was guilty of murder: also that though the indictment charged *throwing* her into the water, yet, if he was present at the time that she threw herself in, and consented to her doing it, the act was the act of both, and he would be guilty. The jury found that they both went to the water for the purpose of drowning themselves, and prisoner was convicted. The judges were clear that if deceased threw herself into the water by the encouragement of the prisoner, and through his example, as they had agreed, he was principal in the second degree, and guilty of murder; but as it was doubtful whether, in fact, deceased did not fall in by accident, it was not murder in either, and prisoner was recommended for a pardon. *Dyson, Russ. & Ry.* 523 (1823). This was followed in *Alison*, a very similar case, where there was no suggestion of accident. (Another case, said (1 *Russ. Cri.* 146, *note l.*) to be *Anon., Fr. Moore* 754, in 1604, was cited). Prisoner was convicted. *Alison*, 8 *C. & P.* 418 (1838); and so *Jessop*, 16 *Cox C. C.* 204 (1877), where sentence of death was pronounced, but commuted.

See *Fretwell*, pp. 153, 232, where it was held that whether the woman was or was not *felo de se*, the man was not even an accessory before the fact.

Accessories.] To the general rule that principals in the second degree (p. 151) "must be present at the perpetration" there are some exceptions "founded in necessity and political justice . . . that justice which is due to the publick," *Foster*, 349, citing *Kel.* 52–3, and 1 *Hale P. C.* 616. "A. with intention to destroy B. layeth poison properly disguised in his way. B. taketh it and dieth. A., though absent when the poison was taken, is a principal; and if this had been done at the instigation of C., he if absent would have been no more than an accessary in the murder, unless they had

both mingled" it and laid it in B.'s way, in which case both would have been principals. But if the intermediary innocently administer the poison as a medicine on A.'s instructions, A., though absent, is a principal "upon the same foot of necessity." *Ib.* Cf. p. 615. See, generally, p. 151 (*Greenacre, etc.*), and *Jackson*, p. 645; as to punishment, p. 610; as to suicide, p. 649; and as to the relation between husband and wife, *Manning*, 2 *C. & K.* 903; 1 *Den. C. C.* 467; *C. C. R.*; 7 *St. Tr. N. S.* 1029 (1849), p. 817.

MURDER—ATTEMPTS TO COMMIT.

Intent to murder.] By 24–5 V. 100, 11: "Whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life" (see p. 198). See p. 494.

Destroying, &c., building with intent to murder.] See p. 394.

Damaging, &c., a ship with intent to murder.] By s. 13: "Whosoever shall set fire to any ship or vessel or any part thereof, or any part of the tackle, apparel or furniture thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony . . ." Conclusion as in s. 11, above.

Attempt to murder.] By s. 14: "Whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison or other destructive thing or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person or shall attempt to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony . . ." Conclusion as in s. 11, above. See below.

Otherwise than in preceding ss.] By s. 15: "Whosoever shall by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony . . ." Conclusion as in s. 11. See p. 257.

What are loaded arms.] See s. 19, p. 249.

Proof.] There must be a positive intention to murder; it is not enough that if death had taken place it would have been murder. *Cruse*, pp. 496, 632, 817, which was under 1 V. 85, 2 (repealed). But the same judge who laid this down, doubted it in *Jones*, 9 *C. & P.* 258 (1840), and held that the intent might be inferred, if it would have been murder, had death ensued.

As to shooting at A. (supposed to be B.) with intent to murder B., see *Holt*, p. 495.

An attempt to commit suicide is not an attempt to commit murder within this statute, and is triable at quarter sessions. *Burgess*, *L. & C.* 258; 52 *L. J. M. C.* 55 (1862).

Proof of the attempt.] Prisoner was indicted under s. 14, above, for attempting to discharge a loaded pistol at S. with intent to murder him. He, having a grudge against S., went to his house and drew a loaded pistol

from his pocket, but before he had time to do anything further, the pistol was snatched out of his hand by a third person. Stephen J. at the trial, held there was no evidence to go to the jury of any offence under s. 14, considering himself bound by *St. George* (overruled, see p. 251, &c.), where "it was held that the words 'by drawing a trigger, or in any other manner,' meant in any other manner like drawing a trigger, as, *e.g.*, by striking a percussion-cap with a hammer, and that an attempt to discharge a pistol by attempting to pull a trigger was not an offence within" these words (see p. 251). The only question reserved being whether there was an offence within s. 15, the Court for C. C. R. held that there was not, for s. 15 pointed to "means" other than those mentioned in the earlier ss. But they clearly thought the case was within s. 14. *Brown*, 10 *Q. B. D.* 381; 52 *L. J. M. C.* 49; 15 *Cox C. C.* 199 (1883); *C. C. R.* See *Duckworth*, p. 251. In a case very similar to *Brown*, above, where prisoner avowed his intention to kill, the Court for C. C. R. held that it was within s. 18, above (as well as s. 14), though no trigger was drawn, the struggle to get the revolver having been successful. *Linneker*, 1906, 2 *K. B.* 99; 21 *Cox C. C.* 196.

As to inciting to murder, see *Most*, p. 359.

MUTINY (AND MILITARY AND NAVAL OFFENCES).

See p. 520.

This is one of the many offences which only persons subject to military and naval law can commit. That law is contained, as to the army, in the Army Act, 1881 (44–5 V. 58), as amended from time to time, and as to the navy, in the Naval Discipline Act, 1866 (29–30 V. 109), as amended by that of 1884 (47–8 V. 39). By s. 41, proviso (*a*) of the first of these, a person subject to military law is not to be tried by court-martial for treason, murder, manslaughter, treason-felony, or rape committed in the United Kingdom; and by proviso (*b*), the ordinary courts in the dominions of the crown may try a military person for any offence for which they would try any one else. See also s. 162 (2) to the same effect: (1) of which s. provides that the ordinary courts, in punishing, for an offence already punished by a court-martial, may take that punishment into consideration. See *Marks* v. *Frogley*, 19 *Cox C. C.* 92 (1898): *C. A.* As to the liability of naval persons to the ordinary courts, see s. 101 of the Naval Discipline Act, 1866.

As to a special offence by military officers, see p. 668.

See *Admiralty, Jurisdiction of*, and *War, Articles of*, in Index.

As to evidence at courts-martial, see 61–2 V. 36, 6 (2), p. 831.

NAVAL, MILITARY, AND OTHER STORES—OFFENCES CONNECTED WITH.

The law is now consolidated by the Public Stores Act, 1875, 38–9 V. c. 25, by s. 2 of which "the term 'stores' includes all goods and chattels, and any single store or article."

By s. 3: "This Act shall apply to all stores under the care, superintendence, or control of a secretary of state, or the admiralty, or any public department or office, or of any person in the service of her Majesty, and such stores are in this Act referred to as her Majesty's stores. The secretary of state, admiralty, public department, office or person having the care, superintendence, or control of such stores, are hereinafter in this Act included in the expression, 'public department.'"

By s. 4: "The marks described in the first schedule to this Act may be applied in or on stores therein described in order to denote her Majesty's property in stores so marked; and it shall be lawful for any public department, and the contractors, officers, and workmen of such department, to apply those marks, or any of them, in or on any such stores; and if any person without lawful authority (proof of which authority shall lie on the party accused) applies any of those marks in or on any such stores, he shall be guilty of a misdemeanor, and shall on conviction thereof be liable to be imprisoned for any term not exceeding two years, with or without hard labour."

By s. 5: "If any person with intent to conceal her Majesty's property in any stores takes out, destroys or obliterates, wholly or in part, any such mark as aforesaid, or any mark whatsoever denoting the property of her Majesty in any stores, he shall be guilty of felony, and shall on conviction thereof be liable, in the discretion of the court before which he is convicted, to be kept in penal servitude for any term not exceeding seven years . . ." (see p. 198).

By s. 6: "A constable of the metropolitan police force may, within the limits for which he is constable, and any constable, if deputed by a public department may, within the limits for which he is constable, stop, search and detain any vessel, boat, or vehicle in or on which there is reason to suspect that any of her Majesty's stores, stolen or unlawfully obtained, may be found, or any person reasonably suspected of having or conveying in any manner any of her Majesty's stores stolen or unlawfully obtained.

A constable shall be deemed to be deputed by a public department within the meaning of this section if he is deputed by any writing signed by the person who is the head of such department, or who is authorised to sign documents on behalf of such department." Cf. p. 294.

By s. 10: "For the purposes of this Act stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field, or place, open or enclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit, or for the use or benefit of another."

S. 12 incorporates ss. 98–100, 103, 107–113 (113 is repealed, 56–7 V. 61 sched.), 115–121, of 24–5 V. 96, for which, see *Table of Statutes*.

By s. 13: "The provisions of this Act relative to the taking out, destroying,

or obliterating of marks, or to the having in possession or keeping her Majesty's stores, shall not apply to stores issued as regimental necessaries, or otherwise for any soldier, militiaman, or volunteer; but nothing herein shall relieve any person from any obligation or liability to which he may be subject under any other Act in respect of any such stores."

By s. 16: "Nothing in this Act shall prevent any person from being indicted under this Act or otherwise for any indictable offence made punishable on summary conviction by this Act, or prevent any person from being liable under any other Act, or otherwise to any other or higher penalty or punishment than is provided for any offence by this Act, so that no person be punished twice for the same offence."

S. 20 of 30–1 V. 128, enables the Secretary of State for War to prosecute and defend actions, civil and criminal, relating to her Majesty's stores.

Guilty possession.] As to what was held to amount to a guilty possession under repealed Acts, see *Anon.* (between 1745 and 1763), *Foster, Crown Cases. App.* 439; *Banks*, 1 *Esp.* 144 (1794); *Willmett*, 3 *Cox C. C.* 281 (1848), and *Cohen*, 8 *Cox C. C.* 41 (1858).

Goods are to be in the custody and possession of a person, though they may never have been in his actual possession, or on his premises, if they have been under his control, and disposed of by him. *Sunley*, 1 *Bell C. C.* 145 (1859). See now s. 10, above, and p. 18.

Defendant was an ironmonger, and delivered for transport a cask of copper bolts, some of which were marked with a broad arrow. Upon their being seized he admitted sending them, but said he did not think "it was marked"; he gave no account from whom he had bought it. The whole consisted of stores not allowed to be sold in the dockyard. The jury found (i.) that prisoner was in possession of bolts marked with the broad arrow, but (ii.) that they had not sufficient evidence before them to show that prisoner knew it, and (iii.) that prisoner had reasonable means of knowing it. The Court for C. C. R. held that prisoner was entitled to be acquitted. *Sleep, L. & C.* 44; 30 *L. J. M. C.* 170 (1861), p. 190. And see also *O'Brien*, 15 *L. T. N. S.* 419 (1867).

As to embezzlement of stores belonging to Chelsea Hospital, see 7 G. 4, 16, 34; of those of Greenwich Hospital, see 28–9 V. 89, 45, to which 38–9 V. 25, above, is applied (by s. 17 of the latter), instead of the Naval and Victualling Stores Act, 1864 (27–8 V. 91), repealed.

NUISANCE.

"PUBLIC or common nusances are such inconvenient or troublesome offences as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable, as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow subjects." 4 *Bl. Com.* 167. Cf. p. 289. It may be both indictable and actionable. *Rose* v. *Graves*, 5 *M. & Gr.* 613 (1843); *Fritz* v. *Hobson*, p. 505.

Public nature of the nuisance.] "The very existence of the nuisance depends upon the number" of persons annoyed, and is a fact to be judged of by a jury. *White*, 1 *Burr.* 337 (1757), below, and p. 658. Thus where a tinman was indicted by attornies for the noise made by him in carrying on his trade, and it appeared that it only affected the inhabitants of three numbers in Clifford's Inn, and that it might be in great measure prevented by shutting the windows, L. Ellenborough ruled that the indictment could not be maintained, as the annoyance, if anything, was a private nuisance. *Lloyd*, 4 *Esp.* 200 (1802). But a nuisance (*e.g.* a tannery for dipping stinking hides) near the highway and several houses, whereby the air thereabouts is corrupted, is a public nuisance. *Pappineau*, 2 *Str.* 686 (1726), pp. 658, 665.

Making great noises in the night, with a speaking-trumpet, has been held to be an indictable offence, if done to the disturbance of the neighbourhood. *Smith*, 2 *Str.* 704 (1726); fined 5*l.* So there is a precedent of indictment for keeping dogs, which make noises in the night. 3 *Chitty's Cr. Law*, 647.

So, too, the keeping of hogs in London is not only a nuisance by statute 2 W. & M. sess. 2, c. 8, s. 20, but also at common law. *Ib.*, and *Wigg*, 2 *Ld. Raym.* 1163 (1706), p. 658, where it was laid down as a rule never to quash indictments for nuisances. As to pigs, see *Att.-Gen.* v. *Squire*, 5 *Loc. Gov. R.* 99 (1906).

It is now settled that the fact, that the thing complained of furnishes, upon the whole, a greater convenience to the public than it takes away is no answer to an indictment for a nuisance; see *Ward*, p. 504, but cf. p. 657.

What the legislature declares to be a public nuisance is indictable as such. *Crawshaw*, 9 *W. R.* 38 (1860), *C. C. R.* (lottery), p. 662; *Gregory*, 5 *B. & Ad.* 555 (1833).

Public nuisance a matter of degree.] It is a matter of some difficulty to define the degree of annoyance that constitutes a public nuisance. Upon an indictment for a nuisance, in making great quantities of offensive liquors, oil of vitriol, &c., near the king's highway, it appeared that "the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick and gave them head-achs." It was held, that it was "not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable." *White*, above. So it was said that the carrying on of an offensive trade is indictable, where it is destructive of the general health of the neighbourhood, or renders the houses

untenantable or uncomfortable. *Davey*, 5 *Esp.* 217 (1805); smoke from coke ovens—acquittal. But it was ruled, by Abbott C.J. on an indictment for carrying on the trade of a varnish maker, that it was not necessary that a public nuisance should be injurious to health; that if there were smells offensive to the senses, it was enough, as the neighbourhood had a right to pure and fresh air. *Neil*, 2 *C. & P.* 485 (1826).

The nuisance need not be actual; it is enough if there is a reasonable probability. *Lister*, p. 658.

Situation.] Where the defendant set up the business of a melter of grease, &c., in a neighbourhood where other manufactories, "which emitted disagreeable and noxious smells," had been carried on for years, L. Kenyon thought that he was not liable to be indicted for a nuisance, unless the annoyance was *much* increased by the new manufactory: what has long been borne is consented to by the inhabitants, though, perhaps, they might have objected successfully, in time. *Neville*, 1 *Peake* 125 (1792). So where a person *continued* a noxious trade which his father carried on in the same place for nearly fifty years. *Ib.* But this case, which was criticised by L. Campbell C.J. in *Fairie*, p. 664, seems hardly reconcilable with the doctrine, that no length of time can legalise a public nuisance, although it may supply an answer to an action by a private individual. 1 *Russ. Cri.* 734; see below. "It should seem that, in judging whether a thing is a public nuisance or not, the public good it does, may, in some cases, where the public health is not concerned, be taken into consideration, to see if it outweighs the public annoyance." *Ib.* Cf. p. 504.

Indictment for carrying on the business of a horse-boiler; the trade had been carried on for many years before the defendants came to the premises; but its extent was much greater under them. For the defendants, it was shown that the neighbourhood was full of noxious trades, and evidence was given of the trade being carried on in an improved manner; *Neville*, above, was relied upon. L. Tenterden observing that there was no doubt that this trade was in its nature a nuisance, adopted the doctrine in that case. He left it to the jury to say whether in consequence of the alleged improvements there was or not increase of annoyance. *Watts, Moo. & Mal. N. P. C.* 281 (1829). Where a paper manufacturer had been used to send the washings of rags into the plaintiff's riparian water, but found out a new way of making paper and discharged the refuse of a certain fibrous plant into the water, it was held that he could do so provided he did not increase the pollution of the river. *Baxendale* v. *McMurray, L. R.*, 2 *Ch. App.* 790; see also *Ball* v. *Ray, L. R.* 8 *Ch. App.* 467 (1873). See p. 659.

If a noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within its reach, or if a public road be made so near it, that the carrying on of the trade become a nuisance to the persons using the road, the trader is entitled to continue his trade, because it was legal *before;* but a statutory licence to keep a slaughterhouse does not entitle its continuance "one hour after it becomes a nuisance to the neighbourhood." *Per* Abbott C.J. *Cross*, 2 *C. & P.* 483 (1826). These principles were considered in *Rushmer* v. *Polsue and Alfieri*, 1907, *A. C.* 121 (*H. L.*).

Time.] "No length of time will legitimate a nuisance" (but cf. above); and "it is immaterial how long the practice may have prevailed," *per* L. Ellenborough C.J. *Cross*, p. 503, and *Reed*, p. 660. "However twenty years' acquiescence may bind parties whose private rights only are affected yet the public have an interest in the suppression of public nusances, though of longer standing," *per* L. Ellenborough C.J. *Weld* v.

Hornby, 7 *East* 195 (1806). Thus though the stell fishery (*i.e.* of salmon with nets) across the river at Carlisle had been established for "a vast number of years," yet Buller J. held that it continued unlawful, and gave judgment that it should be abated: cited in *Cross*, above. So it is a public nuisance to place a wood-stack (for fuel) in the street of a town before a house, though it is the ancient usage of the town, and leaves sufficient room for passengers, for "the prescription to make a nuisance is not good." *Fowler* v. *Sanders*, *Cro. Jac.* 446 (1618). In one case, however, L. Ellenborough ruled, that length of time and acquiescence might excuse what might otherwise be a common nuisance. Upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place (*Rag Fair*) had been used as a market for the sale of clothes for above twenty years. L. Ellenborough said, that after twenty years' acquiescence, and it appearing to all the world that there was a market or fair kept at the place, he could not hold a man to be criminal who came there under a belief that it was such a fair or market legally instituted. *Smith*, 4 *Esp.* 111 (1802).

Highways.] See p. 497.

Particular trades.] Certain trades, producing noxious and offensive smells, have been held to be nuisances when carried on in a populous neighbourhood, as making candles in a town by boiling stinking stuff, which annoys the whole neighbourhood. *Tohayle* (before 1639), cited *Cro. Car.* 510; but candle-making in a town was held not a nuisance in 1606, as candles were absolutely necessary, 2 *Roll. Ab.* 139—a view criticised by 2 *Hawk. P. C.* Bk. 1, ch. 75, s. 10, because there is no necessity to make them *in a town*, just as "a brewhouse erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nusance; and so in the like case may a glasshouse or swineyard." Cf. *Wigg*, p. 656; and for a manufactory of vitriol, &c., *White*, p. 656; and for a tannery, *Pappineau*, p. 656. See *St. Helen's Co.* v. *Tipping*, 35 *L. J. Q. B.*, 66 (1865), *H. L.*

In *Lister*, *Dears. & B. C. C.* 209; 26 *L. J. M. C.* 196; 7 *Cox C. C.* 342 (1857), p. 657; the defendants were indicted for a public nuisance in keeping and storing large quantities of wood naphtha and spirits of wine in a warehouse in the City; the quantities so stored were from 4000 to 5000 gallons of naphtha, and from 40,000 to 50,000 gallons of spirits. The operation of mixing the two together was carried on upon the premises. Naphtha is very inflammable, more so than spirits, or even than gunpowder itself, passing into vapour at a heat of 140° Fahr.; and, if inflamed, water would not extinguish it, except in enormous proportions relatively to the quantity of inflamed naphtha. There was no dispute that a fire on these premises could not be quenched, and that the consequences to the neighbourhood would be very disastrous; but it was proved that it was the practice never to allow any light of any kind whatsoever to be taken into the warehouse, and that unless it was ignited, this storing of naphtha and spirits would produce no danger. The case was twice argued, and ultimately fifteen judges agreed that, as from the nature and quantity of the substance, a real danger to the lives and property of the public was created, the defendants had committed an indictable offence; and that the jury were entitled to consider the possibility of ignition from without the warehouse, and on all the facts together were warranted in finding defendants guilty.

In this case several decisions were referred to, in which it had been held that manufacturing or keeping large quantities of gunpowder in towns, or closely inhabited places, was an indictable offence at common law. See *Williams* (1700), *Burn's "Justice," Gunpowder; Taylor*, 2 *Str.* 1167 (1742);

Crowder v. *Tinkler*, 19 *Ves.* 617 (1816), indictment directed and speedy trial; and these cases are confirmed by the above decision. For the statutes as to Explosives, see 38–9 V. 17, and 46–7 V. 3, see pp. 395–6.

Corrupting the waters of public rivers.] Cf. p. 657. In *Medley*, 6 *C. & P.* 292 (1834), p. 664, the chairman, deputy-chairman, superintendent, and engineer of a gas company were found guilty upon indictment for conveying the refuse of gas into the Thames, whereby the fish were destroyed, and the water was rendered unfit for drink, &c. L. Denman C.J. told the jury, that the question for them was, whether the special acts of the company amounted to a public nuisance; the fact that fishermen had been thrown out of employment was nothing to the matter.

Railway nuisances.] See *Pease*, p. 505. But where defendant, the proprietor of a colliery, without the authority of an Act, made a railway from his colliery to a seaport town, upon the turnpike way, which it narrowed in some places, so that there was not room for two carriages to pass, although he gave the public (paying a toll) the use of the railway, yet it was held that the facility thereby afforded—especially to coal traffic—was not such a convenience as justified the obstruction. *Morris*, p. 504.

Indictments for nuisances by steam-engines are regulated by 1–2 G. 4, 41. By s. 1, the court, in case of a conviction for a nuisance arising from the improper construction or negligent use of furnaces employed in the working of steam-engines is authorised to award reasonable costs to the prosecutor. By s. 2, if it shall appear to the court that the grievance may be remedied by altering the construction of the furnace, it shall be lawful, without the consent of the prosecutor, to make such order as shall be thought expedient for preventing the nuisance in future, before passing final sentence. By s. 3 the Act is not to extend to furnaces erected for the purposes of working mines.

Public disorder or indecency—Inconvenience of neighbourhood.] "It hath been said that all *common stages* for rope-dancers, and also all *common gaming-houses*, are nusances in the eye of law . . . not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons," to the inconvenience of the neighbourhood. 2 *Hawk. P. C.* Bk. 1, ch. 75, s. 6. As to a shooting-ground, see *Moore*, 3 *B. & Ad.* 184 (1832), p. 664.

As to exposure of a dead body, see *Clark*, p. 365, and as to cremation, see *ib.* under *Dead Bodies*.

An indecent exposure in a place of public resort, if actually seen only by one person, no other person being in a position to see it, is not a common nuisance. *Webb*, p. 203. So *Farrell*, 9 *Cox C. C.* 446, *C. C. R. Ir.* (1862). But this view of the law has since been doubted in the case of *Elliott*, *L. & C.* 103 (1861), where a jury had convicted but no judgment was given. An indictment for indecent exposure in an omnibus, several passengers being therein, contained two counts; one laying the offence as "in an omnibus," and the other "in the public highway." It was held that an omnibus was sufficiently a public place to sustain the indictment; *Holmes*, 1 *Dears. & P. C. C. R.* 207; 22 *L. J. M. C.* 122 (1853); and *semble* that a railway carriage would under similar circumstances be also a public place. *Langrish* v. *Archer*, p. 490. So where a man indecently exposed his person upon the roof of a house, where his act could not be seen by persons on the highway, but was seen by seven persons from the back windows of another house, it was held that the place was public. *Thallman*, *L. & C.* 326; 33 *L. J. M. C.* 58 (1863). An urinal, open to the public, approached from a public footpath,

is a public place. *Harris*, *L. R.*, 1 *C. C. R.* 282; 40 *L. J. M. C.* 67; 11 *Cox C. C.* 659 (1871), *C. C. R.*, which throws a good deal of doubt on *Orchard*, 3 *Cox C. C.* 248 (1848).

In *Wellard*, 14 *Q. B. D.* 63; 54 *L. J. M. C.* 14; 15 *Cox C. C.* 559 (1884), *C. C. R.*, there was indecent exposure in a place where, in fact, the public went, although they had no legal right to go there. It was held that the jury were justified in finding that the place was public. "It is obvious that what is a public place may vary from time to time," *per* L. Coleridge C.J. It seems also from the same case that the offence may be indictable if committed before several people, *even* if the place be not public. For 48–9 V. 69, 11, see p. 778.

"It appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor." *Campbell's* note to *Crunden*, below; "all open lewdness grossly scandalous." 1 *Hawk. P. C.* Bk. 1, ch. 5, s. 4; cf. 4 *Black. Comm.* 59, 65. Thus undressing on the beach and bathing in the open sea, so as to be distinctly seen from the neighbouring houses, is an indictable offence, although the houses had been recently erected, and, until their erection, it had been usual for whole regiments of soldiers to bathe there, "for," said M'Donald C.B. "whatever place becomes the habitation of civilised men, there the laws of decency must be enforced." *Crunden*, 2 *Campb.* 89 (1809), confirmed by K. B.; *Sidley*, p. 567. Bathing so near a public footway frequented by females that exposure must occur is a nuisance, and it is no defence that there has been an usage to bathe at that place time out of mind. *Reed*, 12 *Cox C. C.* 1 (1871), *per* Cockburn C.J. Cf. *Cross* (1826), p. 657.

Exhibiting an offensive and disgusting picture, although there be nothing immoral in it, and although the motive of the exhibitor may be innocent and even laudable, is a nuisance. *Grey*, 4 *F. & F.* 73 (1864), p. 567. So keeping a booth on a race-course for the purpose of showing an indecent exhibition on payment is indictable at common law for indecency in a public place. *Saunders*, 1 *Q. B. D.* 15; 45 *L. J. M. C.* 11; 13 *Cox C. C.* 116 (1875), *C. C. R.*

As to obscene prints, see 14–15 V. 100, 29, pp. 360, 825, and 20–1 V. 83, p. 567; and as to obscene books, see *Hicklin*, 37 *L. J. M. C.* 89; 11 *Cox C. C.* 19 (1868), *Q. B.*, where it was held defendant was within 20–1 V. 83, though his object (viz. to attack a church) was, from his point of view, good, if, in fact, his matter (intended to expose that church) injured public morals.

As to using the post for these things, see *De Marny*, p. 710.

Disorderly Inns.] "The keeper of an inn may be indicted and fined, as guilty of a public nusance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or . . . refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price." 2 *Hawk. P. C.* Bk. 1, ch. 78, ss. 1, 2; *Ivens*, 7 *C. & P.* 213 (1835), where an innkeeper was convicted on indictment and fined twenty shillings; the tender is now obsolete unless demanded; *Hawthorn* v. *Hammond*, 1 *C. & K.* 404 (1844).

But a refreshment bar, though attached to the inn (hotel), is not an inn within the common law rule, and therefore no indictment will lie for refusing to supply refreshments there. *Rymer*, 2 *Q. B. D.* 136; 46 *L. J. M. C.* 108 (1877), *C. C. R.*

Disorderly houses, generally.] Keeping a gambling-house or a disorderly house is within 22–3 V. 17, p. 160. See also 30–1 V. 35, p. 826.

The quarter sessions for a borough have jurisdiction to try an indictment

for keeping a disorderly house, and the provisions of 25 G. 2, 36, 5, do not confine it to assizes or the county quarter sessions. *Charles*, 10 *W. R.* 62; 31 *L. J. M. C.* 69 (1861), *C. C. R.*

Gaming-houses.] In *Dixon*, 10 *Mod.* 336 (1716), it was held that the keeping of a gaming-house was an offence at common law, as a nuisance. So 2 *Hawk. P. C.* Bk. 1, ch. 75, s. 6, p. 659. A *feme covert* may be convicted jointly with her husband (as in *Dixon*, above) of this offence; for she may probably have a greater share in the management than he. 2 *Hawk. P. C.* Bk. 1, ch. 92, s. 30; see p. 818. Cf. p. 662. See *Rogier*, p. 490, at 493 (1738). In *Mason*, 2 *T. R.* 581; 1 *Leach* at 493 (1788), p. 199, Grose J. seemed to be of opinion that the keeping of a common gaming-house might be described generally in the indictment. See *Taylor*, pp. 169, 490, and see p. 662. "It seems that the keeping of a cockpit is not only an indictable offence at common law, but is considered as a gaming-house within the 33 H. 8, 9." 2 *Hawk. P. C.* Bk. 1, ch. 92, s. 29.

8–9 V. 109, 2, enacts "That, in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information, that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law and forbidden to be kept by the said Act of King Henry the Eighth, and by all other Acts containing any provision against unlawful games on gaming-houses." The Act also contains provisions for searching gaming-houses. For 16–17 V. 119, and 37–8 V. 15, see p. 491.

Any person found in a betting-house and arrested on a warrant under 16–17 V. 119, may be bound over under 33 H. 8, 9, 9, no more to play, &c., at any gaming-house, though he was merely found there. *Murphy* v. *Arrow*, 1897, 2 *Q. B.* 527; 66 *L. J. Q. B.* 865.

By 17–18 V. 38, penalties are imposed upon persons obstructing the entry of constables into suspected houses; and by s. 2: "Where any constable or officer authorised as aforesaid to enter any house, room, or place, is wilfully prevented from or obstructed or delayed in entering the same or any part thereof, or where any external or internal door of or means of access to any such house, room, or place so authorised to be entered shall be found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same or any part thereof of any constable or officer authorised as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence until the contrary be made to appear that such house, room, or place is used as a common gaming-house within the meaning of this Act, and of the former Acts relating to gaming, and that the persons found therein were unlawfully playing therein." Cf. p. 224.

The proceedings against persons keeping gaming-houses, bawdy-houses, or disorderly houses, are facilitated by 25 G. 2, 36, by s. 8 of which, "any person who shall . . . appear, act, or behave . . . as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished

as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof." By s. 10, no indictment shall be removed by *certiorari.* This s. does not prevent the crown from removing the indictment, there being nothing in the Act to bind the crown. *Davies*, 5 *T. R.* 626 (1794), but it prevents it in all other cases, whether the prosecution be under ss. 5, 6, or by a private prosecutor. *Sanders*, 9 *Q. B.* 235; 15 *L. J. M. C.* 158 (1846).

After an indictment for a public nuisance has been preferred by a private prosecutor, the court will allow any other person to go on with it, even against the consent of the prosecutor. *Wood*, 3 *B. & Ad.* 657 (1832).

By 10–11 W. 3, 17 (otherwise 23), 1, and 42 G. 3, 119, 1, all lotteries are declared to be a public nuisance. See *Hardwick* v. *Lane*, 20 *Cox C. C.* 576 (1903) and *Crawshaw*, p. 656; cf. p. 490. By 9–10 V. 48, art unions, for the distribution of works of art, are legalised.

By 42–3 V. 18, unlicensed horse races within the metropolitan area are [public] nuisances.

See generally 22–3 V. 17, pp. 160, 825, and 30–1 V. 35, p. 826.

Bawdy-houses.] See pp. 78, 660. The keeping of a bawdy-house is a common nuisance, both on the ground of its corrupting "the manners of both sexes" and of its "endangering the public peace, by drawing together dissolute" persons. 2 *Hawk. P. C.* Bk. 1, ch. 74; *ib.*, ch. 75, s. 6. A *feme covert* is punishable jointly with her husband for this offence as if she were sole. *Ib.*, ch. 75, s. 6, see p. 818; *Williams*, 1 *Salk.* 384 (1712); cf. p. 661. And a lodger, who keeps only a single room for the use of bawdry, is indictable for keeping a bawdy-house; see *Pierson*, 2 *Ld. Raym.* 1197; 1 *Salk.* 382 (1706); but the bare solicitation of chastity is not indictable. *Ib.*, and 2 *Hawk. P. C.* Bk. 1, ch. 74, s. 1. "Though the charge [in the indictment "without charging any particular fact"] is general, yet at the trial you may give in evidence particular facts, and the particular time of doing them," *per* L. Hardwicke C. *Clarke* v. *Periam*, 2 *Atk.* 339 (1742); it being, in fact, a cumulative offence. Cf. p. 270. "The same rule as to keeping a common gaming-house." *Ib.* It is not necessary to prove who frequents the house, which in many cases might be impossible, but if unknown persons are proved to have conducted themselves there in a disorderly manner, it is enough. *l'Anson* v. *Stuart*, p. 569, at 754. It is not necessary that the indecency or disorderly conduct should be perceptible from the exterior of the house. *Rice*, *L. R.* 1 *C. C. R.* 21; 35 *L. J. M. C.* 93 (1866). For 25 G. 2, 36, see p. 663. Summary proceedings against brothel-keepers, &c., are extended by 48–9 V. 69, 13; note that this Act is in the schedule, p. 831. A woman of bad character occupying a house alone is not within the section. *Singleton* v. *Ellison*, 1895, 1 *Q. B.* 607; 64 *L. J. M. C.* 123.

See generally 22–3 V. 17, pp. 160, 825; and 30–1 V. 35, p. 826.

Landlord of bawdy-house.] If a house be let to a weekly tenant, who uses it as a bawdy-house with the knowledge of the landlord, who nevertheless does not get any additional rent thereby, the latter cannot be convicted of keeping a bawdy-house. *Barrett*, 32 *L. J. M. C.* 36; *L. & C.* 263 (1862); cf. p. 664; *Stannard*, *L. & C.* 349 (1862). See now 48–9 V. 69, 13, above.

Play-houses, &c.] "Play-houses having been originally instituted with the laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident," drawing together numbers of coaches or people, &c., to the inconvenience of the neighbourhood. 2 *Hawk. P. C.* Bk. 1, ch. 75, s. 7.

Players, plays, and play-houses are now regulated by 6–7 V. 68, by s. 2 of which all theatres, which are not authorised by letters patent from the

crown, or by licence from the lord chamberlain, or the justices of the peace, are unlawful.

By 25 G. 2, 36, 2, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London or Westminster, or within twenty miles thereof—but so far as this relates to the administrative county of Middlesex it is repealed by 57–8 V. 15, 2 (12)—without a licence from the magistrates, shall be deemed a disorderly house, and the keeper is subjected to a penalty of 100*l.*, and is punishable for keeping a disorderly house. A room thus used is within the statute, although it is not exclusively so used, and no money be taken for admission; but the mere accidental or occasional use of the room, for such a purpose will not be within the Act. *Per* L. Lyndhurst C.B., *Gregory* v. *Tuffs*, 6 *C. & P.* 271 (1833). It is for the jury to say whether such use be normal. See also *Gregory* v. *Tavernor*, *ib.* 280, p. 121; *Marks* v. *Benjamin*, 5 *M. & W.* 565 (1839); *Tucker*, 2 *Q. B. D.* 417; 46 *L. J. M. C.* 197; 13 *Cox C. C.* 600 (1877), *C. C. R.*—skating-rink with music; and cases collected in *Chitty's Statutes* under *Public Entertainment.*

Dangerous animals.] "Keeping ferocious animals without proper control is a public nuisance and indictable accordingly," and so, perhaps, in the case of a dangerous unmuzzled mastiff. There is a difference between wild animals and tame animals that sometimes break out. *Burn's Justice*, *Nuisance*, p. 1032, 30*th ed.*; 2 *L. Raym.* 1583. Cf. p. 615.

Contagious or infectious disease.] It is an indictable offence to expose a person having a contagious, &c., disease as the small-pox, in public. *Vantandillo*, 4 *M. & S.* 73 (1815); *Burnett*, *ib.* 272 (1815).

As to notification to the medical officer of health of infectious diseases, and the preventing of such nuisances, generally, see 52–3 V. 72, and 53–4 V. 34—both almost wholly repealed as to London by s. 142 of 54–5 V. 76, the Public Health (London) Act—and 59–60 V. 19. In all these Acts the jurisdiction is summary, but there is an exception in 54–5 V. 76, 13. And there may be a right to be tried by a jury, as in *Dennis*, below. See also p. 366.

Unhealthy food.] See *Dixon's case*, pp. 16, 322, and cf. p. 324. It may be that *victuallers*, &c., are punishable for a common nuisance for selling bad food, even if they do not know the fact, *per* Parke B., *Burnby* v. *Bollitt*, 17 *L. J. Exch.* 190 (1847). A butcher publicly exposing for sale or selling diseased meat, known to be so, is indictable at common law; *Stevenson*, 3 *F. & F.* 106 (1862); and a carrier who knowingly sends such meat to market, *Jarvis*, *ib.* 108 (1862)—but not unless he knew that it was for human food; *Crawley*, *ib.* 109 (1862).

As to the inspection and seizure of unwholesome food, see 38–9 V. 55, 116–119; 54–5 V. 76, 47; *Dennis*, 1894, 2 *Q. B.* 458; 18 *Cox C. C.* 21, *C. C. R.*, which, apparently, shows that the vendor is protected if he gives notice that some of the food may be unfit for consumption. By 38–9 V. 63, 3, the adulteration of food in certain cases after a previous conviction, is made a misdemeanor, punishable by six months' hard labour. See *Firth* v. *Macphail*, 20 *Cox C. C.* 821 (1905); *Wieland* v. *Butler-Hayan*, *ib.* 630 (1904); *Grivell* v. *Malpas*, 21 *ib.* 220 (1906).

Eaves-dropping, being a common scold.] Eaves-droppers, or such as listen under walls or windows, or the eaves of houses, "to hear an after discourse, and thereupon to frame slanderous and mischievous tales," are common nuisances, and indictable at sessions, and may be punished by fine and

finding sureties for their good behaviour. 4 *Bl. Com.* 168; *Burn's Justice*, under *Eaves-Droppers*.

So, "a common scold is a public nusance to her neighbourhood," and may be indicted; upon conviction she may be put into the "cucking-stool" (or "ducking-stool," as 2 *Hawk. P. C.* Bk. 1, ch. 75, s. 14, calls it), 4 *Bl. Com.* 168. The particulars need not be set forth in the indictment; 4 *Hawk. P. C.* Bk. 2, ch. 25, s. 59; nor is it necessary to prove the particular expressions used; "it is sufficient to prove generally that she is always scolding." *Per* Buller J. *I'Anson* v. *Stuart*, pp. 569, 662, &c.

Liability of defendant for his servants, &c., and others.] A man may be guilty of a nuisance by the act of his agent or servant. Thus the directors of a gas company are liable for an act done by their superintendent and engineer, under a general authority to manage their works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the method, which the directors had no reason to suppose discontinued. *Medley*, p. 659. Cf. pp. 503, 504, 609.

So *Stephens*, p. 504. But where defendant was summoned for not consuming the smoke of his furnaces and it was proved that defendant himself had by no means been guilty of negligence, but the nuisance was due to the carelessness of a stoker, the court held that he was not criminally responsible for his servant's negligence, and explained *Stephens* above, on the ground that it was a civil case, as the judges there, in effect, said. *Chisholm* v. *Doulton*, 22 *Q. B. D.* 736; 58 *L. J. M. C.* 133 (1889). See *Coppen* v. *Moore*, p. 456.

Defendant had converted his premises at Bayswater, near the public highway, into a shooting-ground; the visitors shot with rifles at a target, and also at pigeons; as the pigeons frequently escaped, persons collected outside the ground and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. It was held by the K. B., that the evidence supported the allegation that the defendant caused such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a *probable* consequence of his keeping a shooting-ground in such a place. *Moore*, p. 659.

If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. So he is, if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant. If one buy the reversion during a tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it; but if such reversioner re-let, or having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance. *Per* Littledale J. "The nuisance here has been a natural consequence of the erection," *per* L. Denman C.J. It is the duty of a landlord to bind his tenants to cleanse or to let him in to do so, in default, *per* Taunton J. *Pedly*, 1 *Ad. & E.* 822 (1834). Cf. p. 662.

The erection of a small-pox hospital was found by a jury to be a nuisance; and the H. L. held it was no answer to say that the defendant acted *bonâ fide* under the powers of an Act of parliament that did not directly and imperatively order the things complained of to be done. *Hill* v. *Met. Asylum Managers*, 6 *Ap. Cas.* 193; 50 *L. J. H. L.* 353 (1881).

Evidence.] On an indictment for a nuisance in carrying on an offensive trade, a conviction of defendant before justices for an offence at the same place, and in the course of the same trade, but before the time comprised in the indictment, is not admissible in evidence, as the former offence is not

necessarily a nuisance. And there was a difference of opinion whether it would have been admissible, even if the offence had been a nuisance. *Fairie*, 8 *E. & B.* 486 (1857). See *Maybury*, p. 501.

Punishment and abatement of the nuisance.] The punishment is fine and (or) imprisonment; and the judgment of the court may be, that the defendant shall remove it at his own costs. 2 *Hawk. P. C.* b. 1, ch. 75, ss. 14–15. But where the continuing of the nuisance is not averred in the indictment, the judgment of abatement would not be proper; for it would be absurd to give judgment to abate a thing which does not appear to exist. *Stead*, 8 *T. R.* 142 (1799); and so *Justices of West Riding*, 7 *T. R.* 467 (1798). And where the court are satisfied that the nuisance is effectually removed before judgment is prayed upon the indictment, they will refuse to give judgment to abate it. *Incledon*, 13 *East* 127 (1810). The judgment, in fact, is adapted to the circumstances. When judgment of abatement is given, it is only to remove or pull down so much of the thing as actually causes the nuisance; as, if a house be built too high, the judgment is to pull down only so much of it as is too high. And the like where the defendant is convicted of a nuisance in carrying on an offensive trade, or where the nuisance is temporary, in which case the judgment is not to pull down the building where the trade is carried on, but only to prevent the defendant from using it again for the purpose of the offensive trade. *Pappineau*, pp. 656, 658; see 9 *Co.* 54; *Co. Entries*, 92 *b.*

Where defendant had entered into a recognisance to appear at the assizes and plead to an indictment for nuisance, and at the time of the assizes he was on the continent in ill-health; the nuisance having been abated, and the prosecutor being willing to consent to an acquittal, Patteson J. after conferring with Erskine J. under these circumstances, allowed a verdict of not guilty to be taken. *Macmichael*, 8 *C. & P.* 755 (1839). Cf. p. 165.

OATHS—UNLAWFUL.

As to authority to administer oaths, see p. 137.

Statutes.] The offence of taking or administering unlawful oaths is provided against by 37 G. 3, 123, and 52 G. 3, 104.

By s. 1 of the former: "Any person or persons who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same, to engage in any mutinous or seditious purpose; or to disturb the publick peace; or to be of any association, society, or confederacy, formed for any such purpose; or to obey the order or commands of any committee or body of men not lawfully constituted; or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done, or to be done; or not to reveal or discover any illegal oath or engagement, which may have been administered or tendered to, or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement; shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported [p. 198] for any term of years not exceeding seven years; and every person who shall take any such oath or engagement not being compelled thereto," is subject to the same punishment. See *Marks*, 3 *East* 157 (1802).

By 52 G. 3, 104, 1 (amended S. L. R. (No. 1) 1888): "Every person who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at the administering of, any oath or engagement, purporting or intending to bind the person taking the same to commit any treason, or murder, or any felony punishable by law with death, shall, on conviction thereof by due course of law, be adjudged guilty of felony . . . and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction . . . be adjudged guilty of felony, and shall be transported [p. 198] as a felon for the term of his natural life, or for such term of years as the court . . . shall adjudge.

7 W. 4 & 1 V. 91, partly set out p. 520, includes 52 G. 3, 104, 1.

The statutes are not confined to oaths administered with a seditious or mutinous intent. *Marks*, above; *Ball*, 6 *C. & P.* 563 (1834)—trade union cases; *Brodribb*, *ib.* 578 (1816), p. 667—poachers sworn to secrecy. And it is sufficient to aver that the oath was administered, not to give evidence against a member of an association to do a "certain illegal act," without setting out the act. *Brodribb.*

The oath.] By 37 G. 3, 123, 5, "any engagement or obligation whatsoever, in the nature of an oath," and by 52 G. 3, 104, 6, "any engagement or obligation whatsoever in the nature of an oath, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning" of those statutes, "in whatever form or manner the same shall be administered or taken, and whether the same shall be actually administered by any person or persons to any other person or persons, or

taken by any person or persons, without any administration thereof by any other person or persons."

It is not necessary in the indictment to set forth the words of the oath or engagement, the purport of it or of some material part is sufficient. 37 G. 3, 123, 4; 52 G. 3, 104, 5; *Moors*, pp. 10, 23, where the object imputed was "to disturb the public peace," it was held not necessary to aver *how* the society intended to do so. Parol evidence may be given of the oath, though the person administering it appeared to read it from a paper, to produce which no notice has been given. And where the oath was not on the face of it seditious, evidence of the declarations of the administerer of it, at the time, is admissible to show that the brotherhood referred to in it was a seditious society. *Ib.*

If the book on which the oath was administered was not the Testament, it is immaterial, if the swearer was intended to believe himself under a binding engagement. *Brodribb*, p. 666; *Lovelass*, 1 *Moo. & Rob.* 349; 6 *C. & P.* 596 (1834), a trade union case. Under 37 G. 3, 123, Williams B. said that the oath contemplated by the Act was not required to be of "a formal nature," but it was sufficient if it was intended to operate as an oath, and was so understood by the person taking it; the Act provided against any evasions by s. 5, above (*Moo. & Rob.*).

Aiding and assisting.] By 37 G. 3, 123, 3: "Persons aiding and assisting at, or present at and consenting to, the administering or taking of any such oath or engagement as aforesaid, and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and shall be tried as such, although the persons or person who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted."

Defence—Disclosure.] In order to escape the penalties of 37 G. 3, 123, it is not sufficient for the prisoner merely to prove that he took the oath, &c., by compulsion, for, by s. 2, "compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall within four days after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she shall know touching the same, and the person or persons by whom and in whose presence, and when and where such oath or engagement was administered or taken, by information on oath before one of his Majesty's justices of the peace, or one of his Majesty's principal secretaries of state, or his Majesty's privy council, or in case the person taking such oath or engagement shall be in actual service in his Majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer." 52 G. 3, 104, 2, contains a similar provision, fourteen days being substituted.

It is also provided by both the above statutes (ss. 7, 8, respectively), that any one who has once been tried under them, shall not be liable to be tried again for the same fact, &c., "as high treason, or misprision of high treason"; but, if not so tried, they are not to be exempt from the ordinary law.

Unlawful combinations.] Unlawful oaths have always been closely connected with unlawful combinations. Cf. p. 379.

By 39 G. 3, 79, 2, all societies, the members whereof are required to take unlawful oaths or engagements within the intent of 37 G. 3, 123, above, or any oath not required or authorised by law (or which do various other things), are declared unlawful combinations.

By s. 8, members may be summarily convicted, or on indictment; in the

latter case they are liable to transportation for seven years, or to be imprisoned for two years. See p. 198.

By 57 G. 3, 19, 25, all societies, the members whereof shall be required to take any oath or any engagement which shall be unlawful within 37 G. 3, 123, above, or 52 G. 3, 104, above, or to take any oath not required or authorised by law, &c., and the members thereof, are to be deemed guilty of unlawful combination within 39 G. 3, 79, above.

In *Dixon*, 6 *C.* & *P.* 601 (1834), a trade union case, Bosanquet J. held that every person engaging in an association, the members of which, in consequence of being so, take any oath not required by law, is guilty within 57 G. 3, 19, 25, above.

Administering, &c., voluntary oaths, &c.] Cf. pp. 676, 678. By 5–6 W. 4, 62, 13: "It shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognisance by some statute in force at the time being; provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation, before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively." See *Nott*, p. 191: perhaps the offence is not indictable.

OFFICE-HOLDERS—OFFENCES BY.

Under this head will be considered the evidence requisite in prosecutions against officers;—1, for malfeasance; 2, for nonfeasance; 3, for extortion; and 4, for refusing to execute an office.

Time limitation.] By 56–7 V. 61, 1, &c., no prosecution shall lie for any act done "in pursuance or execution or intended execution of any Act of parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, duty or authority" unless "it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof."

The day on which the offence is committed is excluded from the reckoning. *Radcliffe* v. *Bartholomew*, 1892, 1 *Q. B.* 161; 61 *L. J. M. C.* 63. By 52–3 V. 63, 3, month means calendar month.

Malfeasance.] Cf. p. 322. "Any publick officer is indictable for misbehaviour in his office." *Anon.*, 6 *Mod.* 96 (1704). And where the act done is clearly illegal, it is not necessary, in order to support an indictment, to show that it was done with corrupt motives, whatever may be the case as to an application for an information. Thus, where a meeting-day had been appointed, and a licence had been refused by the Surrey magistrates, City magistrates having concurrent jurisdiction in Southwark, appointed another day for a meeting, and granted the licence, it was held that this was an illegal act, and punishable by indictment, "without the addition of corrupt motives." *Sainsbury*, 4 *T. R.* 451 (1791); so *Holland*, 1 *T. R.* 692 (1787). Still more is such an offence punishable when it proceeds from oppressive or corrupt motives. *Williams*, 3 *Burr.* 1317 (1762), where magistrates refused licences because the applicants had not voted for their candidates. A gaoler is punishable for barbarously misusing the prisoners. 2 *Hawk. P. C.* Bk. 1, ch. 66, s. 2. So overseers of the poor for misusing paupers, by lodging them in unwholesome rooms, &c. *Wetherill*, *Cald.* 432 (1784). Or by exacting labour from such as are unfit to work. *Winship*, *Cald.* at 76 (1780). Where an overseer received from the father of a bastard a sum of money as a composition with the parish, and neglected to give credit for this sum in account, he was punishable, though the contract is illegal. *Martin*, p. 322. See also *Bembridge*, p. 322, and *Wyat*, 1 *Salk.* 380 (1704), p. 670, the case of a constable. See also *Hall*, pp. 175, 322, where one reason was that the Act itself created a remedy for the breach, and a tribunal to try it.

In an indictment against a public officer for a breach of duty, it is sufficient to state generally that he is such officer without showing his appointment; neither is it necessary to aver that the defendant had notice of the acts from which his duty arises; he is presumed from his situation to know them. Where he is charged with disobedience of orders, it need not be alleged that such orders still continue in force, as that will be assumed; nor need it, that the neglect of duty was corrupt, if a statute makes *wilful* neglect a misdemeanor. *Holland*, 5 *T. R.* 607 (1794) pp. 16, 17.

Negligence and oppression by officers of justice in their offices are variously punished, frequently by forfeiture of the office. 4 *Bl. Com.* 141. See p. 697.

As to the sale of offices, see *Charretie*, 13 *Q. B.* 447 (1849); East India director's nomination to a cadetship); and *Hopkins* v. *Prescott*, 4 *C. B.* 578 (1847), and *Vaughan*, p. 281.

As to corruption of, and by officers, &c., of public bodies, see p. 281.

Nonfeasance.] Upon a prosecution for not performing the duties of an office, the prosecutor must prove—1, that the defendant holds the office; 2, that it was his duty, and within his power to perform the particular act; and 3, that he neglected so to do.

Where an officer is bound, either by common law or by statute, by virtue of his office to perform an act, the neglect to perform that act is an indictable offence. Thus a coroner, 2 *Chitt. C. L.* 255; a constable, 1 *Russ. Cri.* 419; *Wyat*, p. 669; a sheriff, *Antrobus*, p. 295; and an overseer of the poor, *Tawney* (1705), 1 *Bott, Poor Laws*, 6*th ed.* (1827) 358, are indictable for not performing their several duties—the latter for not relieving the poor, or doing so when there is no need for it. The majority of the judges were of opinion, that an overseer cannot be indicted for not relieving a pauper, unless there has been an order of justices for such relief, or unless in a case of immediate and urgent necessity. *Meredith*, *Russ. & Ry.* 46 (1803). But where the overseer had under his care a poor woman belonging to his township, but neglected to provide for her necessary meat, &c., whereby she was reduced to a state of extreme weakness, and afterwards, through want, &c., died, he was convicted, and sentenced to a year's imprisonment. *Booth*, *ib.* 47, *n.* (1796). And where an overseer was indicted for neglecting, when required, to supply medical assistance to a pauper labouring under dangerous illness, it was held that the offence was sufficiently charged and proved, though the pauper was not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief. *Warren*, *ib.* 48, *n.* (1820).

By 11 G. 1, 4 (repealed), the officers of corporations, absenting themselves on the "charter" day (*i.e.* that fixed by charter) for the election of their successors, &c., were to be imprisoned; but they were, however, not indictable, unless their presence was *necessary* to constitute a legal corporate assembly for that purpose. *Corry*, 5 *East* 372 (1804). This statute is repealed by S. L. R. Act, 1887.

Extortion.] "Extortion in a large sense signifies any oppression under colour of right; but . . . in a strict sense it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due." 2 *Hawk, P. C.* Bk. 1, ch. 68, s. 1. So the refusal by a public officer to perform the duties of his office, until his fees have been paid, where none are legally due, is extortion; *e.g.* by a coroner (1347?). 3 *Inst.* 149; an under-sheriff, *Hescot*, 1 *Salk.* 330 (1694); *Empson* v. *Bathurst*, *Hutt.* 53 (1620). A ferryman must not take more than is due by custom. *Roberts*, 4 *Mod. R.* 101 (1692). So it is extortion for a miller to take more toll than is due by custom; and where the farmer of Newgate market erected such a number of stalls that the market people had not space to sell their wares, it was held that forcing them to take and pay for the use of the stalls would be extortion. *Burdett*, p. 72.

It must be proved that the defendant fills the office in question. See pp. 6, 17. The usual fees of the office must also be proved. Several persons may be indicted jointly, if all are concerned; for in this offence there are no accessories, but all are principals. *Atkinson*, 2 *Ld. Raym.* 1248; 1 *Salk.* 382 (1705); *Loggen*, 1 *Str.* 75 (1718).

The indictment ought to state the sums and figures of the extortion which the defendant received, but the exact sum need not be proved. It is extortion for an official to collect money under threat, without proper authority, though it may be due, and he may pay it over in due course to his superior. See *Burdett*, p. 72, and *Roberts*, above, and cf. *Gillham*, 6 *T. R.* 267 (1795); *Higgins*, 4 *C. & P.* 247 (1830).

Extortion is punishable at common law, by fine and imprisonment, and by removal from office. 2 *Hawk. P. C.* Bk. 1, ch. 68, s. 5. Penalties are also given against sheriffs and king's officers by 3 E. 1 (1275), commonly called the first statute of Westminster, c. 26.

Where a private prosecutor caused a man to be committed without bail and then colluded with the gaoler to have him put in irons, until he paid a sum to the gaoler to be relieved of them, this was held oppression and extortion, and the prosecutor was indicted. *Tracey*, 3 *Salk.* 192 (1704).

Extortion by public officers in the East Indies.] By 33 G. 3, 52, 62, "the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the" East India "Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his Majesty, or the said united company in the East Indies, shall be deemed to be extortion and a misdemeanor at law, and . . . punished as such . . . the offender shall also forfeit to the king . . . the whole gift or present so received, or the full value thereof," but by s. 63, the court may order such present to be restored to the person who gave it, or may order it or any part of it or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer. Cf. p. 199.

In *Douglas* v. *R.*, 13 *Q. B.* 74; 17 *L. J. M. C.* 176 (1846), under this s., Parke B. in delivering the judgment of the Exchequer Chamber, confirming that of the Queen's Bench, said, "The object of the legislature was to prevent a person receiving any gift, or present, or sum of money, in the East Indies (he being an officer of the government, or of the East India Company), absolutely, whatever the reason for that gift might be . . . and it was thought by the legislature, looking at the balance of convenience and inconvenience, that great advantages were obtained by putting an end to gifts altogether, though it might be at the expense of some occasional mischief to innocent persons."

Refusing to execute an office.] Such a refusal by a person duly chosen is indictable, *e.g.* a constable; *Lone*, 2 *Str.* 920 (1732); *Genge*, *Comp.* 13 (1774), p. 673; or an overseer; *Jones*, 2 *Str.* 1146; 7 *Mod.* 410 (1741); 1 *Russ. Cri.* 429.

The prosecution must prove the due election or appointment of the defendant, his liability to serve, notice to him of his appointment, and his refusal. Thus, it must be proved that a corporation electing a constable had power by *prescription* to do so, for they possess no such power of common right. *Bernard*, 2 *Salk.* 502; 1 *Ld. Raym.* 94 (1696). The notice of his appointment must then be proved, *Harpur*, 5 *Mod.* 96; *Comb.* 328 (1695), and his refusal, or neglect to take the oath to execute the office, from which a refusal may be presumed.

Exemptions and disqualifications—Overseers, &c.] For the defence it may be shown that the defendant is not an *inhabitant* of the parish or ward for which he is chosen, *e.g.* constable, though he may occupy a tenement there, be rated for it, and trade there, for the constable's is a *personal* service,

Adlard, 4 *B. & C.* 772; cf. *Donne* v. *Martyr*, 8 *B. & C.* 62 (1828: collector). The following list of persons exempt from serving as *churchwarden* or *overseer* is given in *Steer's Parish Law*, pp. 104, 361, 6*th ed.* (1899), and probably applies to any other common law office there may be in the ecclesiastical parish (N.B.—Some of the enactments here cited have been replaced by later ones.):—"Peers of the realm, members of parliament, sheriffs, *Stephenson* v. *Langston*, 1 *Hagg. Con. R.* 380 [1804]; acting justices of the peace, *Gayer*, 1 *Burr.* 245; 1 *L. Raym.* 492 [1757]; and clergymen—these persons are exempt by the common law—*Gibs.* [*Cod. Jur. Ecc. Ang.*, 1761], 215; Roman Catholic priests, 31 G. 3, 32; dissenting ministers, 1 W. & M. 18 [11]; 52 G. 3, 155, 9; barristers and solicitors, *Com. Dig. Attorney*; law courts officers, 1 *Roll. Rep.* 368 [3 *Hawk. P. C.* Bk. 2, ch. 10, s. 39]; practising physicians, 5 H. 8, 6; 32 H. 8, 40; members of the college of surgeons in London in actual practice, 18 G. 2, 15; practising apothecaries, 6–7 W. & M. 4; 30–1 V. 59; medical practitioners registered under 21–2 V. 90, 35; and persons living out of the parish, although they occupy lands within it, *Gibs.* 215; 18 G. 2, 15; but if they occupy a house of trade there, although they take their meals and sleep in another parish, they are liable, *Stephenson* v. *Langston* [above]. A person who is not resident, nor the occupier of any house or land within the parish, is not legally qualified to serve as churchwarden; and where such a person has been nominated, the court will issue a *mandamus* to the rector to nominate a churchwarden for the parish. *In re Barlow*, 30 *L. J. Q. B.* 271 [1861]. An inhabitant to be qualified for the office of churchwarden, must in some sense be a resident in the parish; the mere payment of rates is not sufficient. *Harding* [53 *J. P.* 75]; 6 *T. L. R.* 54 [1889]. Each of three partners in trade has been held liable to serve as a householder within 43 Eliz. 2, although no one of them resided on the premises. *Poynder*, 1 *B. & C.* 178; 2 *D. & R.* 258 [1823]. By the word 'householder' is meant a person who occupies as tenant. A servant who occupies a house of his master in part payment of his services, and as subservient thereto and necessary for the performance thereof and not merely as a matter of convenience, is not a householder. *Spurrell*, *L. R.*, 1 *Q. B.* 72; 35 *L. J. M. C.* 74 [1865]. A mere lodger is not liable to serve. *Ford* v. *Chauncy*, 1 *Hagg. Con.* 382 [1715]. All officers in the army, navy, and marines, although upon half-pay. *Gayer* [above]. All persons in the regular militia are exempt, 45–6 V. 49, 40; and local militia, 52 G. 3, 138, 197; and men enrolled in, and officers and non-commissioned officers appointed to the army and navy reserve forces, 45–6 V. 48, 7; 16–17 V. 73, 8; and naval volunteers, 22–3 V. 40, 7 [royal naval volunteer reserve, 3 E. 7, 6, 1]; post-office officials and registrars of births, deaths, and marriages, 7 W. 4 and 1 V. 33 and 32; and income tax, 5–6 V. 35, 35; inland revenue, 16–7 V. 59, 17; and customs commissioners and officers, 39–40 V. 36, 9. Dentists registered under 41–2 V. 33, need not serve unless they desire to do so, s. 30. Inspectors of factories and workshops are exempt, 41–2 V. 16, 67. A quaker will not be compelled to serve, *Adey* v. *Theobald*, 1 *Curt.* 447 [1836]. It would appear that women are eligible for the office of churchwarden, *Olive* v. *Ingram*, 2 *Stra.* 1114; 7 *Mod.* 263 [1739]. It does not appear that any of these persons who are exempt (except aliens, minors, Jews, lunatics, and felons) are ineligible to serve such office if they are willing. With the above exceptions, it may be stated generally, that every parishioner must serve the office of churchwarden if legally chosen into it." It does not, however, appear from *Steer* (*ib.*), who enumerates as "parochial lay officers" churchwardens, parish clerk, sexton and beadle, that churchwardens were ever indictable for refusing to serve, and the contrary appears from *Prideaux's Churchwarden's Guide*, pp. 39, 43, 16*th ed.* (1895). Parish constables are no longer appointed. The following persons are disqualified

from being overseers:—Those concerned in contracts for goods for relief of the poor, as to the union in which the parish is, 12–13 V. 103, 6; the master of the workhouse or relieving officer, 13–14 V. 101, 6; an assistant overseer, 29–30 V. 113, 10; a person convicted of felony, fraud, or perjury, 4–5 W. 4, 76, 48; a person convicted of corrupt practices at a municipal election, 47–8 V. 70. (*Steer*, as above, p. 361.) It is not any defence that the defendant resides in the jurisdiction of a private leet within the hundred for which he is elected; *Genge*, p. 671; or that no constable had ever before been appointed for the place. *Terrey*, 2 *Keb.* 557 (1670).

The punishment is fine or imprisonment, or both. *Bower*, 1 *B. & C.* 587 (1823).

By 53–4 V. 21, 7: "If any collector or any person appointed to be an officer, and employed in relation to duties of excise, deals or trades in any goods subject to any such duty, or carries on or is concerned in any trade or business subject to any law of excise, he shall be guilty of a misdemeanor, and shall, on conviction, forfeit his office or employment, and be incapable of ever holding any office or employment in or relating to the excise." Cf. p. 193 and p. 198.

The Official Secrets Act, 1889.] By 52–3 V. 52, extended to the Census Acts 63–4 V. 4, 11 (3) and c. 6, 7 (3), "1.—(1) (*a*) Where a person for the purpose of wrongfully obtaining information—

(i.) enters or is in any part of a place belonging to Her Majesty the Queen, being a fortress, arsenal, factory, dockyard, camp, ship, office, or other like place, in which part he is not entitled to be; or

(ii.) when lawfully or unlawfully in any such place as aforesaid, either obtains any document, sketch, plan, model, or knowledge of any thing which he is not entitled to obtain, or takes without lawful authority any sketch or plan; or

(iii.) when outside any fortress, arsenal, factory, dockyard, or camp belonging to Her Majesty the Queen, takes or attempts to take without authority given by or on behalf of Her Majesty, any sketch or plan of that fortress, arsenal, factory, dockyard, or camp; or

(*b*) where a person knowingly having possession of, or control over any such document, sketch, plan, model, or knowledge as has been obtained or taken by means of any act which constitutes an offence against this Act at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interest of the State, to be communicated at that time; or

(*c*) where a person after having been entrusted in confidence by some officer under Her Majesty the Queen with any document, sketch, plan, model, or information relating to any such place as aforesaid, or to the naval or military affairs of Her Majesty, wilfully and in breach of such confidence communicates the same when, in the interest of the State, it ought not to be communicated;

he shall be guilty of a misdemeanor, and on conviction be liable to imprisonment with or without hard labour, for a term not exceeding one year, or to a fine, or to both imprisonment and a fine.

(2) Where a person having possession of any document, sketch, plan, model, or information relating to any fortress, arsenal, factory, dockyard, camp, ship, office, or other like place belonging to Her Majesty, or to the naval or military affairs of Her Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person to whom he knows the same ought not, in the interest of the State, to be communicated at that time, he shall be guilty of a misdemeanor, and

be liable to the same punishment as if he committed an offence under the foregoing provisions of this section.

(3) Where a person commits any act declared by this section to be a misdemeanor, he shall, if he intended to communicate to a foreign State any information, document, sketch, plan, model, or knowledge obtained or taken by him, or entrusted to him as aforesaid, or if he communicates the same to any agent of a foreign State, be guilty of felony, and on conviction be liable at the discretion of the court to penal servitude for life, or for any term not less than five years, or to imprisonment for any term not exceeding two years with or without hard labour.

2.—(1) Where a person, by means of his holding or having held an office under Her Majesty the Queen, has lawfully or unlawfully either obtained possession of or control over any document, sketch, plan, or model, or acquired any information, and at any time corruptly or contrary to his official duty communicates or attempts to communicate that document, sketch, plan, model, or information to any person to whom the same ought not, in the interest of the State, or otherwise in the public interest, to be communicated at that time, he shall be guilty of a breach of official trust.

(2) A person guilty of a breach of official trust shall—

(*a*) if the communication was made or attempted to be made to a foreign State be guilty of felony, and on conviction be liable at the discretion of the court to penal servitude for life, or for any term not less than five years, or to imprisonment for any term not exceeding two years, with or without hard labour; and

(*b*) in any other case be guilty of a misdemeanor, and on conviction be liable to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine, or to both imprisonment and a fine.

(3) This section shall apply to a person holding a contract with any department of the Government of the United Kingdom, or with the holder of any office under Her Majesty the Queen as such holder, where such contract involves an obligation of secrecy, and to any person employed by any person or body of persons holding such a contract, who is under a like obligation of secrecy, as if the person holding the contract and the person so employed were respectively holders of an office under Her Majesty the Queen.

3. Any person who incites or counsels, or attempts to procure another person to commit an offence under this Act, shall be guilty of a misdemeanor, and on conviction be liable to the same punishment as if he had committed the offence." An indictment, evidently under this s., was quashed because the person whom the prisoners conspired to procure to commit an offence against this Act "was not in actual 'possession' of the documents required, and therefore could not be convicted under the indictment." *Stuart and Page*, 130 *C. C. C. Sess. Pap.* 855 (1899).

4. "The expenses of the prosecution of a misdemeanor under this Act shall be defrayed in like manner as in the case of a felony.

5. . . . The expression 'British possession' means any part of Her Majesty's dominions not within the United Kingdom.

6.—(1) This Act shall apply to all acts made offences by this Act when committed in any part of Her Majesty's dominions, or when committed by British officers or subjects elsewhere.

(2) An offence under this Act, if alleged to have been committed out of the United Kingdom, may be inquired of, heard, and determined, in any competent British court in the place where the offence was committed, or in her Majesty's High Court of Justice in England or the Central Criminal Court, and 42 G. 3, 85, shall apply in like manner as if the offence were mentioned in that Act, and the Central Criminal Court as well as the High Court possessed the jurisdiction given by that Act to the Court of King's Bench.

(3) An offence under this Act shall not be tried by any court of general or quarter sessions, nor by any court out of the United Kingdom which has not jurisdiction to try crimes which involve the greatest punishment allowed by law.

7.—(1) A prosecution for an offence against this Act shall not be instituted except by or with the consent of the Attorney-General. . . .

8. In this Act, unless the context otherwise requires—

Any reference to a place belonging to Her Majesty the Queen includes a place belonging to any department of the Government of the United Kingdom or of any of Her Majesty's possessions, whether the place is or is not actually vested in Her Majesty;

Expressions referring to communications include any communication, whether in whole or in part, and whether the document, sketch, plan, model, or information itself or the substance or effect thereof, only be communicated;

The expression 'document' includes part of a document;

The expression 'model' includes design, pattern, and specimen;

The expression 'sketch' includes any photograph or other mode of representation of any place or thing;

The expression 'office under Her Majesty the Queen,' includes any office or employment in or under any department of the Government of the United Kingdom, and so far as regards any document, sketch, plan, model, or information relating to the naval or military affairs of Her Majesty, includes any office or employment in or under any department of the Government of any of Her Majesty's possessions.

9. This Act shall not exempt any person from any proceeding for an offence which is punishable at common law, or by military or naval law, or under any Act of Parliament other than this Act, so, however, that no person be punished twice for the same offence."

Felony, &c., by office-holders.] See p. 193.

Census of Production Act, 1906.] By 6 E. 7, 49, 6 (1), (5) the illegal disclosure of any return or any knowledge officially obtained is a misdemeanor punishable by imprisonment (maximum term, two years with or without hard labour) or fine, or both.

OFFICERS, MILITARY AND NAVAL—OFFENCES BY.

Military officers who neglect to assist civil officers of justice in arresting soldiers under their command are guilty of misdemeanor, by 44–5 V. 58, 162 (3). In the case of naval officers, that duty is regulated by *Admiralty Instruction*, 774, cl. 1. See *Stephens's Manual of Naval Law* (1901), p. 376. Cf. pp. 646–7, 653.

As to punishment for felony, &c., see p. 193.

As to the law of escape, see p. 745.

PERJURY.

PERJURY is within the Vexatious Indictments Act.

At common law.] Perjury at common law "seemeth to be a wilful false oath, by one who being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not." 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 1. The proceedings, however, are not confined to courts of justice. See p. 679.

"On the trial of an indictment for perjury, the proofs relate to 1, the authority to administer the oath; 2, the occasion of administering the oath; 3, the taking of the oath; 4, the substance of the oath; 5, the materiality of the matter sworn; 6, the falsity of the matter so sworn; 7, the corrupt intention of the defendant." 2 *Stark. Ev.* 621, 2*nd ed.*

Authority to administer an oath.] See p. 668. It is not necessary to prove the appointment of the administerer (*e.g.* a master in chancery, surrogate, or commissioner); it is sufficient to show that he has acted in that character. See pp. 6, 17, 670. But as this evidence is only presumptive, it may be rebutted, and the defendant may show that there was no appointment, or that it was illegal. Thus, after *proof* that the oath in question had been made before a person who *acted as* a surrogate, the defendant showed that he had not been duly appointed according to the canon, and was acquitted. *Verelst*, p. 6. But where the authority is derived from a special commission, issued to him for that purpose, "it is necessary to prove the authority, by the production and proof of the commission which created the special authority." 2 *Stark. Ev.* 622, 2*nd ed.* So, upon an indictment for perjury against a bankrupt before the commissioners in passing his last examination, L. Ellenborough ruled that it was necessary to give strict proof of the bankruptcy, "for unless the defendant really was a bankrupt the examination was unauthorised." *Punshon*, 3 *Camp.* 96; 3 *B. & C.* 354 (1811). See also *Ewington*, 2 *Moo. C. C.* 223; *Car. & M.* 319 (1841), where there was no good petitioning creditor's debt, p. 680.

Where a cause was referred by a judge's order, and it was directed that the witnesses should be sworn, " . . . before a commissioner *duly authorised*," and a witness was sworn before a commissioner for taking affidavits (under (repealed) 29 Car. 2, 5), it was held that she was not indictable for perjury, the commissioner not being "duly authorised" by the statute to administer an oath for a *viva voce* examination. *Hanks*, 3 *C. & P.* 419 (1828). So as to an affidavit used in the Court of Admiralty, and sworn before a Master Extraordinary in chancery, not having any authority to administer oaths in matters before the Court of Admiralty, though it was the practice of that court to receive such affidavits. *Stone*, 1 *Dears. & P. C. C. R.* 251; 23 *L. J. M. C.* 14 (1853). So as to an arbitrator under 9–10 V. 95, 77 (repealed), not having authority to administer an oath. *Hallett*, p. 199.

Where perjury was charged on what was in effect the affidavit on an interpleader rule, and the indictment set out all necessary allegations (verdict,

judgment, writ, levy, &c.), but omitted to state that any rule was obtained according to the provisions of the Interpleader Act; Coleridge J. held that the indictment was bad, as the affidavit did not appear to be made in a *judicial* proceeding; since for anything that appeared it might have been a voluntary oath. *Bishop, Carr. & M.* 302 (1842).

Where a trial took place when the court had no jurisdiction (on a technical ground), a witness could not be indicted for perjury thereat. *Cohen*, 1 *Stark. N. P. C.* 511 (1816); *Buxton* v. *Gouch*, 3 *Salk.* 269 (1707). But a false oath taken before commissioners, whose commission is at the time in strictness determined by the death of the king, though they do not know it, is perjury. 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 4.

By 5–6 W. 4, 50, 78, justices can punish furious driving but not *expressly* furious riding: perjury was alleged upon an information for *riding*; it was held that defendant could not be convicted. *Bacon*, 11 *Cox C. C.* 540 (1870), *per* Kelly, C.B. But another view of the s. was taken in *Williams* v. *Evans*, 1 *Ex. Div.* 277 (1876), so that *Bacon* is overruled.

Informality in bastardy cases.] Perjury was committed before magistrates upon the second application for a bastardy order, a former one having been dismissed on the merits; but it was held, whether that dismissal was a defence or not, that the magistrates had jurisdiction to administer an oath. *Cooke*, 2 *Den. C. C. R.* 462; 21 *L. J. M. C.* 136 (1852).

A summons was granted by a justice against a putative father, more than twelve months after the birth, in which it was alleged that he had within the twelve months paid money for the maintenance of the child; but instead of alleging that the mother had given *proof* that such money had been paid, as the statute required, alleged that the mother stated (not on oath) that it had been paid. The defendant appeared, with an attorney, but took no objection of any sort, but swore that he had never paid any money for maintenance. Perjury was assigned, and proved at the trial; but it was also proved that the mother's statement, upon which the summons was issued, was not made on oath. It was held (*dissentiente* Martin B.), that the proceedings before the magistrate were civil and not criminal, and, therefore, that the defect in the proceedings was an irregularity which was capable of being and had been waived by the defendant; consequently, that the jurisdiction of the magistrates was well founded, and the defendant rightly convicted of perjury. *Berry, Bell C. C.* 46; 28 *L. J. M. C.* 70 (1859).

So, where a woman upon oath swore to the father of her child, but no deposition in writing was taken, a summons was issued and the defendant appeared, it was held that by so appearing, the defendant had waived the irregularity. *Fletcher, L. R.* 1 *C. C. R.* 320; 40 *L. J. M. C.* 123 (1871).

In a similar case no evidence had been given before the justices that defendant had paid any money for the maintenance of the child within twelve months after its birth, and he had not in fact done so, but he took no objection at the hearing on that account, though the summons was in the form in the schedule to 8–9 V. 10, alleging as a fact such payment. Held, that the justices in petty sessions had jurisdiction to hear the complaint, as the defendant had waived the irregularity which related to process only, and was not essential; and that the conviction was therefore good. *Simmons, Bell C. C.* 168; 28 *L. J. M. C.* 183 (1859).

In another similar case, where the information laid by the mother was duly proved, but not the summons, the putative father having appeared and evidence having been given on both sides, it was held, that he having so appeared, and not having raised any objection to the summons, it was not necessary to give evidence of its existence at the trial of one of his witnesses for perjury. *Smith, L. R.* 1 *C. C. R.* 110; 37 *L. J. M. C.* 6 (1867), and see pp. 678–9.

Other cases.] An affidavit of debt made under 1–2 V. 110, 8 (repealed), and sworn before a registrar of the court of bankruptcy, is sworn before a competent authority, though no bankruptcy existed and none might ever exist. *Dunn*, 16 *L. J. Q. B.* 382 (1847).

So perjury may be assigned on an inquest held before a deputy coroner, though there is no lawful or reasonable cause for the absence of the coroner. *Johnson, L. R.* 2 *C. C. R.* 15; 42 *L. J. M. C.* 41 (1873).

Perjury was alleged to have been committed on the hearing of an information under the Licensing Acts, and it was held that the beerhouse-keeper's license must be produced, otherwise there was no proof that he was duly licensed so as to give the justices jurisdiction. *Lewis*, 12 *Cox C. C.* 163 (1872).

"It seemeth clear that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority for their so doing; or before those who are legally authorised to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no matter of force, but are altogether idle." 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 4. Cf. p. 668.

Authority alleged in the indictment.] Therefore, where the oath was alleged to have been taken, "before justices *assigned to take the said assizes*," the said justices having then and there power, &c., but in fact the trial was before one judge, who was sitting under the commission of *oyer* and *terminer* and gaol delivery, the conviction was quashed. *Lincoln*, *Russ. & Ry.* 421 (1820). But the allegation that the oath was taken before *one* of the judges of assize, though the names of *both* appear in the caption of the indictment, is good. *Alford*, 1 *Leach* 150 (1776). See *Coppard*, p. 688.

Where the justices were described as for the county when in fact they were for the borough, it was held that the judge had power to amend. *Western, L. R.* 1 *C. C. R.* 122 (1868); cf. p. 176. See *Callanan*, p. 679.

As to the evidence under older statutes, see p. 693.

Indictment and evidence.] See 14–15 V. 100, 20, set out p. 694.

An indictment stated that the defendant went before a magistrate and was sworn, and that being so sworn he did falsely, &c., "say, depose, swear, charge, and give the said justice to be informed," that he saw, &c.; it was held by the judges that this sufficiently showed that the oath was taken in a judicial proceeding. *Gardiner*, 8 *C. & P.* 737; 2 *Moo. C. C.* 95 (1839), pp. 687, 691. But where the indictment merely stated that the defendant, intending to subject W. M. to the penalties, &c., of felony, went before two magistrates, and "did depose and swear," &c. (setting out a deposition, which stated that W. M. had stolen a 5*l.* note from him), Coleridge J. held that it was bad, as it did not show that any charge of felony was pending, or that any judicial proceeding was pending before the magistrates. *Pearson*, 8 *C. & P.* 119 (1837).

There must be formal proof of the commencement of proceedings before justices by production of the summons or information or charge book. *Hurrell*, 3 *F. & F.* 271 (1862). Where, however, the indictment against a witness alleged that defendant had been duly summoned, but did not aver that the summons was preceded by any information, and neither was produced at the trial, it was held good, as defendant appeared and made no objection. *Shaw, L. & C.* 579; 34 *L. J. M. C.* 169 (1865), p. 691; cf. the bastardy cases, above. But where a warrant was issued, illegally, because

without a written information or oath as required by Jervis's Act, under which S. was arrested and, without objection, convicted by justices of assaulting, &c., a constable, it was held by nine judges to one, after two arguments, that the constable was rightly convicted of perjury on that occasion against S., for the justices had jurisdiction to hear that charge, although the warrant upon which he was brought before them was illegal, and ought not to have issued—as the defendant being present in court, the illegality of the process by which he was brought there was immaterial. *Hughes*, 4 *Q. B. D.* 614; 48 *L. J. M. C.* 151; 14 *Cox C. C.* 284 (1879), *C. C. R.*

It was alleged that defendant had filed a petition for protection from process in the county court, and perjury was charged against him in subsequent proceedings; this sufficiently showed jurisdiction in the county court, without alleging that defendant had resided for six months within the jurisdiction. *Walker* v. *R.*, 27 *L. J. M. C.* 43 (1857).

An information under 1–2 W. 4, 32, 30 (p. 484), and under s. 41 (now mostly repealed), and 6–7 W. 4, 65, 9 (repealed), if laid by a person not deposing on oath to the matter of charge, must distinctly show that the charge was deposed to by some other credible witness on oath. If it leaves this doubtful, all further proceedings upon it are without jurisdiction; and if the defendant is summoned, and appears, a witness cannot be convicted of perjury. *Scotton*, p. 485; see also *Goodfellow*, *Car. & M.* 569 (1842), p. 687. Cf. *Parker*, p. 485. But unless a statute requires it, an information need not be upon oath or even in writing. *Millard*, 1 *Dears. & P. C. C.* 166; 22 *L. J. M. C.* 108 (1853); and cf. *Hughes*, above. See *Dillon*, p. 2, where there was no evidence of the destruction of the information. It is not necessary in the *indictment* to show the *nature* of the authority of the administerer of the oath, though it must be proved. *Callanan*, 6 *B. & C.* 102 (1826), pp. 678, 683.

Perjury was alleged at the trial of "a certain indictment for misdemeanor" at quarter sessions, &c., but did not state what the misdemeanor was, nor that the sessions had jurisdiction, it was held that the substance of the offence upon the trial for perjury was sufficiently stated within s. 20, p. 694, and further that competent authority to administer the oath need not be averred (though it must be proved). *Dunning*, *L. R.* 1 *C. C. R.* 290 (1871); see above.

Judicial and other proceedings.] Where a feme sole obtained judgment and then married, and afterwards took out a judgment summons in her maiden name, the judge amended the summons, by substituting her husband's and her names as plaintiffs. It was held by the Q. B. that the amendment was without jurisdiction, and therefore there was no cause in the altered name, and a conviction for perjury at the hearing after the amendment could not be supported. *Pearce*, 9 *Cox C. C.* 258; 3 *B. & S.* 531 (1863). Giving evidence in court and swearing an affidavit on a motion in a suit are equally judicial proceedings, and there may be a separate perjury (and punishment) in each. *Castro* v. *R.*, pp. 73, 174, 220. Even at common law, judicial proceedings had a wide meaning, and there might be perjury outside them. "Any false oath is punishable as perjury which tends to mislead the Court in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment which is to be given in the cause; as where a person who offers himself to be bail for another knowingly and wilfully swears that his substance is greater than it is. Also . . . not only such oaths as are taken upon judicial proceedings, but also all such as any way tend to abuse the administration of justice are properly perjuries; as . . . before a justice in order to induce him to compel another to find sureties for the peace, &c.; or . . . before commissioners appointed by the king to

inquire of the forfeitures of his tenants' estates, &c. Also . . . before commissioners appointed by the king to inquire" into defective titles. 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 3. At common law the court need not be of record. *Griepe*, 5 *Mod.* 348; 12 *Mod.* 139; 1 *L. Raym.* 256 (1697). A false oath against simony by a clergyman at his institution is perjury. *Lewis*, 1 *Str.* 70 (1718). False evidence on oath before a grand jury is perjury. *Hughes*, 1 *C. & K.* 519 (1844), p. 689.

A man could be indicted for perjury in his own cause, *e.g.* in an answer in chancery, or in an affidavit "concerning some collateral matter." 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 5—even when parties were not competent witnesses for themselves. Now, a prisoner who commits perjury in his own defence may be indicted. *Wookey*, 63 *J. P.* 409 (1899), where he was convicted both on his original trial and that for perjury.

"A juror who gives a verdict contrary to manifest evidence" cannot be charged with perjury, for "he is not sworn to depose the truth, but only to give a true judgment upon the depositions of others." *Hawk. Ib.*

Prisoner was convicted of taking a false oath before a surrogate (to procure a marriage licence); but the judges recommended a pardon because perjury could not be charged upon such an oath. (They were also of opinion that as the indictment did not charge that the defendant took the oath to procure a licence, or that he did procure one, no punishment at all could be inflicted.) *Foster, Russ. & Ry.* 459 (1821); cf. *Alexander*, 1 *Leach* 63 (1767); and see also *Anon.*, 1 *Vent.* 370 (1685), p. 175, and the observations, 2 *Deac. Dig. C. L.* 1001. But a surrogate certainly has power to administer the oath, and such a false oath, whether perjury or not, is certainly a misdemeanor, for the matter is of public concern. *Chapman*, pp. 199, 257, 682. And so is a false affidavit before a commissioner for affidavits in the Q. B. under the Bills of Sale Act, 1854 (repealed). *Hodgkiss, L. R.* 1 *C. C. R.* 212; 39 *L. J. M. C.* 14 (1869).

The object of the perjury need not be attained, *Wookey*, above; the perjury is complete at the moment when the oath is taken. Thus where the perjury was in an affidavit which could not, from informalities in the *jurat* (p. 62), be used as it was intended, Littledale J. held it indictable. *Hailey, Ry. & Moo. N. P. C.* 94; 1 *C. & P.* 258 (1824), see p. 682. So it was ruled by Tenterden C.J. that prisoner filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury in that affidavit, though no motion is ever made for an injunction. *White, Moo. & M.* 271 (1829). Cf. *Ewington*, p. 676.

As to the compulsory answers of a bankrupt being used against him, see *Scott*, pp. 45, 238, and the other cases, *ib.* As to 46–7 V. 52, 17, 27, see pp. 45, 268. But unless the answers under s. 27 are given in the presence of the registrar, though he administered the oath, there cannot be perjury. *Lloyd*, 19 *Q. B. D.* 213; 56 *L. J. M. C.* 118; 10 *Cox C. C.* 235 (1887); *C. C. R.*, p. 689, because there was no examination by "the Court" within s. 27.

By 29–30 V. 109, 67, it is provided, that if any person should wilfully and corruptly give false evidence upon oath or affirmation, before any court-martial held under that (Naval Discipline) Act, he should be liable to the penalties of wilful and corrupt perjury. There is the same provision as to the army, 44–5 V. 58, 126 (2). A civilian must, of course, be tried by a civil court. It was doubted whether an indictment framed upon the Naval Act was within the Vexatious Indictments Act, p. 160, or not; but the words of the *Army* Act leave no doubt on the subject as to the army. *Heane*, pp. 175, 176, 694, whence it seems that at common law there can be perjury before a court-martial.

False swearing before a local marine board is perjury, for the board is a

tribunal invested with judicial powers, and enabled to inquire on oath and pass a sentence affecting the status of the accused before it. *Tomlinson*, *L. R.* 1 *C. C. R.* 49 (1866).

By 4 G. 4, 34, 2 (repealed), all complaints which arise between masters or mistresses and their apprentices, as to wages, &c., may be heard and determined before a justice of the peace. A former apprentice, having left, summoned his late master under this Act for wages, and on the hearing swore falsely. It was held that this was perjury, inasmuch as the magistrate had, at all events, jurisdiction to determine whether the relation of apprenticeship continued or not. *Proud*, *L. R.* 1 *C. C. R.* 71 (1867).

L. Tenterden C.J. held that an indictment for perjury would not lie under 7 G. 4, 57, 71 (repealed), against an insolvent debtor for certain offences, such offences being substantively punished under s. 70, saying, "It by no means necessarily follows that perjury must be committed in a false oath taken under a particular statute. Though a high misdemeanor, it would not be perjury unless so made by the statute requiring the oath." *Mudie*, 1 *Moo. & R.* 128 (1831), pp. 682, 691.

Indictment—The occasion and circumstances of the oath.] The occasion of administering the oath must be proved as stated. Thus, if the perjury were committed on the trial of a cause at *nisi prius*, the record ought to be produced in order to show that such a trial was had, p. 684, and 2 *Stark. Ev.* 622, 2*nd ed.*, citing *Hardres*, 118 (*Olive* v. *Gwin*, 1658), 1 *Str.* 162; 4 *Hawk.* Bk. 2, ch. 46, s. 7; and for this purpose the *postea* alone (p. 141) without a copy of the final judgment, was held sufficient. *B. N. P.* 243*a*, citing *Iles* (1741), see pp. 138–9, 141. See as to the present practice, *Scott*, p. 139. A variance between the name of the person "associated" with the judge who tried the cause, on the *nisi prius* roll as set out in the indictment, and that in the judgment roll was held to be fatal. *Eden*, 1 *Esp.* 97 (1794). See also *Fellowes*, 1 *C. & K.* 115 (1843), where the county court was misdescribed in every count. But where an indictment alleged throughout a trial before a sheriff, but in fact the trial took place before his deputy, not the under-sheriff, it was held by a majority no variance. *Dunn*, pp. 176, 688. The indictment must still show the authority to administer the particular oath in question, and the occasion or circumstances of its being taken: to allege a general authority is not enough. *Macdonald*, 21 *Cox C. C.* 70 (1905) —commissioner for oaths, under 52–3 V. 10, 2, 7 (amended 53–4 V. 7; 54–5 V. 50).

On an indictment in respect of an affidavit sworn under the old practice in the insolvent debtors' court by an insolvent there must be proof that the court by its practice required such an affidavit. And such proof is not given by a clerk of the official assignee producing printed rules, purporting to be rules of the court, which he has obtained from the clerk of the rules, but which are not otherwise shown to be rules of the court, the clerk professing to have no other knowledge of the practice, but being in the habit of distributing such copies himself. *Koops*, 6 *Ad. & E.* 198 (1837).

Indictment—the taking of the oath.] It is sufficient in the indictment to state that the defendant *duly* took the oath. *M'Carther*, 1 *Peake N. P. C.* 155 (1793). But where it was averred that he was *sworn on the Gospels*, and he was in fact so sworn, but it appeared that he had also been sworn afterwards according to the custom of his own country (Scotland), by holding up his hand, the latter oath alone would have been held a fatal variance. *Ib.*

On an indictment in respect of an answer in chancery, it is enough to produce the original answer signed by defendant, and to prove his handwriting,

and to call the master who subscribed the *jurat* (p. 62), this proves the identity of defendant. *Morris*, p. 142; *Benson*, *ib.*, p. 688. See p. 141. Where an affidavit of service of notice was in question, but (a copy of) the notice was not annexed, an acquittal was directed. *Hudson*, 1 *F. & F.* 56 (1858).

The oath as stated in the indictment was that the prisoner should speak "the truth, the whole truth, and nothing but the truth," and it was proved to have been administered in the form that the prisoner should "true answer make." Watson B. held that this was not a material variance. *Southwood*, 1 *F. & F.* 356 (1858).

In *Hailey*, p. 680, the affidavit was signed only with the mark of the defendant, and the *jurat* did not state where it was sworn, nor that the affidavit was read over to her. Littledale J. said, "As the defendant is illiterate, it must be shewn that she understood it. Where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents; but in the case of a marksman it is not so. If in such a case the master by the *jurat* authenticates the fact of its having been read over, we give him credit, but if . . . not . . . he ought to be called to prove it. I should have difficulty in allowing the parol evidence of any other person to that fact."

The prosecution must give precise and positive proof that defendant was the person who took the oath; *Brady*, 1 *Leach* 327 (1784), where, though there was no doubt about his identity, prisoner was acquitted for want of evidence as to the actual swearing; but this rule must not be taken to exclude circumstantial evidence. *Price*, 6 *East* 323 (1805); 2 *Stark. Ev.* 624, *2nd ed.* As to personation, see pp. 402–3.

The recital in the *jurat* of the place where the oath is administered, is sufficient evidence that it was administered there—for purposes of venue. *Spencer*, *Ry. & Moo. N. P. C.* (1824), p. 684; *Hailey*, above. But the *jurat* is not conclusive as to the place of swearing. *Emden*, 9 *East* 437 (1808).

Indictment—Affirmations.] The making of a false affirmation by a Quaker or a Moravian is practically perjury for all purposes; 3–4 W. 4, 49, and 1–2 V. 77, p. 103. The same is the effect of 51–2 V. 46, 1, for which see p. 103.

False oath not necessarily perjury.] See *Mudie*, p. 681, and *Chapman*, p. 680; and see *De Beauvoir*, 7 *C. & P.* 17 (1835); and see also *Harris*, *ib.* 253 (1835); and *Dodsworth*, 8 *C. & P.* 218 (1837)—the former relating to the oath of a parliamentary candidate as to his property qualification, the two latter to that of a voter as to his registration; in all the *bonâ fides* of the defendants was established, and they were acquitted. Cf. p. 399.

By 5–6 W. 4, 62, abolishing unnecessary oaths, p. 399, and substituting declarations in lieu thereof (but which, by s. 7, does not extend to proceedings in courts of justice, or before justices of the peace), persons making false declarations shall (s. 21, p. 694), be guilty of a misdemeanor.

Indictment—The "substance" of the oath.] In proving the substance of the matter sworn to, it was long a question how far it was incumbent on the prosecution to prove the whole of the defendant's statement relative to the same subject-matter, as where he has been both examined and cross-examined, or whether it was sufficient merely to prove so much of the substance of the oath as was set out on the record, leaving it to the defendant to prove any other part of the evidence given by him, which qualified or corrected or explained the part set out. Thus L. Kenyon ruled, that the whole of the defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part, it would

not be perjury. *Jones*, *Peake N. P. C.* 51 (1791), p. 688; see also *Dowlin*, *ib.* 227 (1793); 5 *T. R.* 311, p. 684; *Anon. cor.* L. Gifford (betw. 1812 and 1824), cited in *Rowley* (1825), *Ry. & Moo. N. P. C.* 300; 1 *Moody C. C.* 111, p. 684; but the better opinion seems to the contrary; see below. "This doctrine of compelling the prosecutor to prove more than a *primâ facie* case to establish the defendant's guilt is an anomaly in the criminal law; for in general the party indicting is not bound to anticipate matters of defence which it lies on the prisoner to bring forward . . . nor does it seem that in this case the party indicted would sustain hardship in being compelled to shew that he had corrected the part of his evidence assigned as was done in [*Carr*, p. 684] 1 *Sid.* 418 [pp. 71–2]." 2 *Chitty Cr. L.* 312*b*, 2*nd ed.*

It was formerly thought that an oath did not amount to perjury unless sworn in absolute and direct terms, and that if a man swore according as he *thought*, *remembered*, or *believed* only, he could not be convicted of perjury. 3 *Inst.* 166. But the modern doctrine is otherwise. It is said by L. Mansfield to be "certainly true, that a man may be indicted for perjury in swearing that he *believes* a fact to be true, which he must know to be false." *Pedly*, p. 121. The difficulty, if any, is in the proof that he did not "think" so. *Schlesinger*, pp. 121, 687. See pp. 121, 689, and *Parker*, *ib.*

A statement may be verbally true, but substantially false, as in a case mentioned by L. Mansfield. The witness swore that he left the person, whose health was in question, "in such a way that were he to go on as he then was, he could not live two hours. It afterwards turned out that the party was very well, but had got a bottle of gin to his mouth, and true it was in a sense of equivocation, that had he continued pouring the same liquor down, even for much less time than two hours he was infallibly a dead man." 2 *Lofft's Gilb. Ev.* 662 (1791).

No case appears to have occurred of an indictment for mere matter of *opinion*.

In *Stolady*, 1 *F. & F.* 518 (1859), Pollock C.B. said that it was not a sufficiently precise allegation to found an indictment, that the prisoner swore that a certain event did not happen between two fixed dates, *i.e.* he swore a defendant had been with him every Sunday between those days; his attention not having been called to the particular day in question. Cf. p. 690.

As to perjury on a question which need not legally be answered, see *Gibbon*, p. 686.

Where the evidence given at a trial by the defendant contained all the matter charged in an indictment as perjury, but other statements, not varying the sense, in fact, intervened between the matters set out, Abbott C.J. held the apparent continuity of the evidence set out immaterial, since the effect of what was stated was not varied. *Solomon*, *Ry. & Moo. N. P. C.* 252 (1825). The same as to several parts of an affidavit. *Callanan*, p. 679. Where the perjury was set out continuously, though the count contained several distinct charges of perjury, L. Ellenborough said, "Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words, but must you not prove that he swore in substance and effect the whole that you have stated? . . . It is essential . . . that words set out in the record should be either literally or substantially proved." *Leefe*, 2 *Camp.* 134; 4 *B. & C.* 852 (1809). Where defendant "in substance and to the effect following" swore, &c., and the sworn information was made by him and his wife jointly, and by him after her, it was held to be no variance. *Grindall*, 2 *C. & P.* 563 (1827). Under the old bankruptcy practice it was not necessary to set out verbatim in the indictment "the tenor of the petition"; it was sufficient to set it out truly in substance and effect; and where "commission" was used for "commissioners," as the context plainly showed, this was not a variance

Dudman, 4 *B. & C.* 850 (1825). Where an information was reproduced in an indictment, but the word *time* accidentally omitted therein, from "at the same time" was put in, it was held a fatal variance; the proper way being to set forth the deposition literally, and to supply the sense by an *innuendo*. *Taylor*, 1 *Camp.* 404 (1808). So where *houses* appeared in the indictment, professing the *substance and effect* of a bill in Chancery, in which, in fact, *house* was used. *Spencer*, p. 682.

A clerical error will not be material if the sense is not altered thereby; *e.g.* *under tood* for *understood;* though the averment be "to the tenor and effect *following.*" *Beech*, 1 *Leach* 133; *Cowp.* 229 (1775).

A witness stated that he, as clerk of a solicitor, in a case had paid particular attention to it, but could not undertake to say that he had given the whole of the prisoner's testimony (and swore that nothing else was said to qualify it), but to the best of his recollection he had given all that was material to the inquiry, and relating to the transaction in question, Littledale J. thought that this evidence was *primâ facie* sufficient, and that if there was anything else material then sworn by the prisoner, he might prove it on his part. No such evidence having been given, the prisoner was convicted, and the judges held that the conviction was right. *Rowley*, p. 683. "When it has once been proved that particular facts positively and deliberately sworn to by the defendant, in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn." 2 *Stark. Ev.* 625, 627, *2nd ed.* See *Chitty, C. L.*, cited p. 683. Thus, where defendant had answered (in chancery) that she had received no money, but upon exception to this, she put in another answer, explaining that she meant "before such a day," on a trial at bar, an acquittal was directed. *Carr*, 1 *Sid.* 418; 1 *Russ. Cri.* 393 (1676), p. 683. In 1786 a judge and a jury made strong comment on an indictment by Watson against Hurry; the latter, in an action against the former for a small sum, having first sworn that Watson was indebted to him, but having immediately added [to me], "as agent to Mr. Shipley"; and Hurry ultimately recovered 3000*l.* from Watson for malicious prosecution. *Hurry*, 1 *Lofft's Gilb. Ev.* 55.

Evidence at previous trial, &c.] Upon a trial for an indecent assault, the woman having admitted on cross-examination that what was done was done with her consent, no other witnesses were called, and the court directed an acquittal. The accused, however, denied *the fact*, and indicted her for perjury. She was allowed in her defence to call as witnesses all those who might have been called upon the former trial, including those to whom she had complained immediately after the alleged assault, and she was acquitted. *Harrison*, 9 *Cox C. C.* 503 (1864).

The written deposition of the defendant taken down before the magistrate was put in to prove what he then swore—perjuriously, as alleged—and it was proposed to call the attorney for the prosecution to prove some other matters sworn to by the defendant, not in the depositions; Park J. held that this could not be done. *Wylde*, 6 *C. & P.* 380 (1834). See p. 58.

Perjury is an exception to the general rule that one of the four kinds of copies of a record, p. 138, is admissible. If it is alleged in an affidavit or deposition, the original must be produced (unless the prisoner has it, or it is lost, &c.). So the original record must be produced, and prisoner's signature and that on the jurat must be proved. *T.* s. 1535. See p. 681 and p. 687.

Materiality.] It must either appear on the face of the facts set forth in the indictment that the matter sworn to was material, or there must be an express averment to that effect. *Dowlin*, p. 683; *Nicholl*, 1 *B. & Ad.* 21

(1830), p. 687; *M'Keron* (1792), cited in *Dowlin*; 1 *Russ. Cri.* 353. Where there was an express averment that a letter was material that let in evidence to prove that it was so. *Bennett*, 2 *Den. C. C. R.* 240; 3 *C. & K.* 124; 5 *Cox C. C.* 207; 20 *L. J. M. C.* 217 (1851)—this is the principle deduced from the case by (*C. & K.* and) 1 *Russ. Cri.* 358, *n.*, but all the reports, as is there said of the first three, are "very unsatisfactory." Where the perjury was assigned on the defendant's denial, in an answer in chancery, of his having agreed, upon forming a company, of which he was a director, to advance 10,000*l.* for three years to answer any immediate calls, but there was no averment that this was material, nor did it appear for what purpose the bill was filed nor what was prayed; the judgment was arrested because the questions entirely depend on the purpose for which the suit is instituted. *Bignold* (1824), 1 *Russ. Cri.* 354. So of a similar answer denying a promise which would have been absolutely void by the Statute of Frauds, though it might be false swearing. *Benesech*, 2 *Peake* (*Add. Cases*), 93 (1797). See p. 686.

Materiality is obviously relative. "It seemeth clear that if the oath . . . be wholly foreign from the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury. . . . As if upon a trial in which the question is, whether such a one was *compos* or not, a witness introduces his evidence by giving a history of a journey which he took to see the party, and happens to swear falsely in relation to some of the circumstances of the journey. Also . . . where a witness being asked by a judge, whether A. brought a certain number of sheep from one town to another all together, answered that he did so, whereas in truth A. did not bring them all together, but part at one time and part at another, yet" he "was not guilty of perjury, because the substance of the question was, whether A. did bring them all or not, and the manner of bringing them was only a circumstance. And upon the same ground . . . where a witness being asked, whether such a sum of money were paid for two things in controversy between the parties, answered that it was, where in truth it was paid only for one of them by agreement, such witness ought not to be punished for perjury, because as the case was, it was no way material whether it were paid for one or both. Also . . . a witness who swore that one drew his dagger, and beat and wounded J. S., where in truth he beat him with a staff, was not guilty of perjury, because the beating only was material.

But perhaps in all these cases it ought to be intended that the question was put in such a manner that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him, through inadvertency, to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances, which afterwards appear to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. And upon these grounds I cannot but think the opinion of these judges very reasonable, who held that a witness was guilty of perjury, who in an action of trespass for breaking the plaintiff's close, and spoiling it with sheep, deposed that he saw thirty or forty sheep in the said close, and that he knew them to be the defendant's because they were marked with such a mark which he knew to be the defendant's mark, where in truth the defendant

never used such a mark; for the giving such a special reason for his remembrance could not but make his testimony more credible than it would have been without it; and though it signified nothing to the merits of the cause whether the sheep had any mark at all or not, yet inasmuch as the assigning such a circumstance, in a thing immaterial had such a direct tendency to corroborate the evidence concerning what was most material, and consequently was equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue, there doth not seem to be any reason why it should not be equally punishable." 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 8, citing 2 *Rolle R.* 41, 368 (cases in 1619, 1624); *Palmer*, 382; and *Hetley*, 97 (1629); he concludes that no general rule can be laid down, but *materiality* must be judged in each case. In *Tyson*, *L. R.* 1 *C. C. R.* 107; 37 *L. J. M. C.* 7 (1807), a witness, to establish an alibi, swore a prisoner was (i.) at a given place at a given time; (ii.) that he had lived there for two years; and (iii.) that he had never been absent thence for more than three nights. (ii.) and (iii.) were clearly proved to be false, and they were held material as strongly supporting (i.), which, if true, acquitted the prisoner.

A vendor having obtained a verdict in an action on a contract, the defendants filed a bill in chancery for a discovery of other parol terms, and to restrain him from execution on his judgment. His answer to the bill denied the existence of other parol terms. On an indictment for this answer, Coleridge J. held that the prayer of the bill being not to enforce the parol terms, but to obtain relief (on the ground of fraud) from the contract, the denial was upon a matter material and relevant to the suit, and, therefore, indictable. *Yates*, *Carr. & M.* 132 (1841), pp. 4, 686.

All false statements wilfully and corruptly made by a witness as to matters which effect his credit are material. *Tyson*, above. Where a man had been charged, in December, under the Licensing Acts, and had falsely sworn that he had not, when similarly charged in November, authorised a plea of guilty, it was held that such a statement was material. *Baker*, 1895, 1 *Q. B.* 797; 64 *L. J. M. C.* 177; *C. C. R.*

A question having no general bearing on the matters in issue may be made material by its relation to the witness's credit. "Every question on cross-examination that goes to the credit of a witness is material," *per* L. Denman C.J. *Overton*, p. 199. In *Phillpotts*, 2 *Den. C. C. R.* 302; 21 *L. J. M. C.* 18 (1857), the perjured evidence was afterwards withdrawn and was inadmissible, but it was held that this could not purge the false swearing; this was followed (after two arguments, by eleven judges to two), in *Gibbon*, *L. & C.* 109; 31 *L. J. M. C.* 98 (1861), where in a bastardy case (against H.) the woman was cross-examined as to whether she had not had connection with G. in September; the question was material—owing to dates—only in so far as it affected her credit. She denied this, but G. was called and swore that she had. His conviction for this perjury was sustained, although his evidence was legally inadmissible and ought not to have been received. See also *Mullany*, *L. & C.* 593; 34 *L. J. M. C.* 111 (1865), where perjury as to a christian name induced a judge to strike out a cause; held, material.

The *degree* of materiality is not, as it seems, to be measured. Thus the impugned evidence need not be sufficient for the party to recover upon, for evidence may be very material, and yet not full enough to prove directly the issue in question. *Rhodes*, at 889, pp. 71, 689. So if the evidence is "but circumstantially material," it is sufficient, *per* Holt C.J. *Griepe*, p. 680.

If in answer to a bill filed by A. for redemption of lands assigned to him, by B., the defendant swear that he had no notice of the assignment, and therefore insists on tacking to his mortgage another bond debt due from B., this

is a material fact. *Pepys, Peake N. P. C.* 187 (1792). To a claim for specific performance (purchase of land) defendant had relied on the Statute of Frauds (the agreement not being in writing), and had also denied having entered into any such agreement; upon this denial he was indicted; Abbott C.J. held that the denial of an agreement which by the statute was not binding upon the parties, was wholly immaterial. *Dunston, Ry. & Moo. N. P. C.* 109 (1824), see p. 685; but see *Bartlett* v. *Pickersgill* (1760), cited in 4 *Burr.* 2255; 4 *East* 577 *n.*, where there was a conviction for denying a parol agreement (to buy land) though the court of equity had refused to enforce it. This was not followed in *Dunston*, because it did not appear that in *Bartlett* v. *Pickersgill*, the statute had either been pleaded or relied on. It became a material question, whether *on the occasion of a certain alleged arrest* L. touched K., &c. The defendant's evidence as set out was, "L. put his arms around him and embraced him"; innuendo, that L. had *on the occasion to which the said evidence applied* touched the person of K. It was held by the K. B. that the materiality of this evidence did not sufficiently appear in the indictment, where it was set out. *Nicholl*, p. 684. An indictment stated that L. stood charged by W. before a justice of the peace, with having committed an offence against the game laws on 12th August, 1843, and that upon the hearing C. B. falsely swore that he did not see L. during the whole of the said 12th August, &c.; and that *at the time he the said* C. B. *swore as aforesaid, it was material and necessary* for the said justice, to inquire of, and be informed by the said C. B., whether he, &c., did see the said L. at all during the said 12th day, &c. It was held by the judges that this averment of materiality was insufficient, because consistently with it the evidence might have been material for the justice in *some other* matter. *Bartholomew*, 1 *C. & K.* 366 (1844). Where it was averred to be material "to know the state of the said C. F. E.'s dress at the time the alleged offence was so charged to have been committed": this was held by the judges to be a sufficient averment of materiality, to allow the prosecutor to show that the flap of his trousers was not unbuttoned (as sworn by the defendant). *Gardiner*, pp. 678, 691. A witness charged for having sworn at a trial that he did not write certain words in the presence of D.—averred to be material—it was held, on objection that D.'s presence was clearly not material, that the presence of D. might be material, though it does not appear otherwise than by the averment; immateriality could not be assumed against the record. *Schlesinger*, pp. 121, 683, 688. Where a plaintiff swore falsely before a judge without a jury that she had never been tried at the Old Bailey, and had never been in custody at a police station—she had, in fact, been acquitted—Campbell C.J. held, that there was evidence of materiality (on the ground that the falsehood made the judge believe her evidence more readily), but he left the question to the jury, who found her guilty. *Lavey*, pp. 199, 689, and below.

As to the production of original documents to prove (*inter alia*) materiality, see p. 684. A rule *nisi*, in answer to which an affidavit in question has been made, must be produced. If evidence on a civil trial be in question, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material, as well as the record. 2 *Stark. Ev.* 626, *2nd ed.*

Patteson J. held that an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by the said J. G. upon his oath," was not a good averment of materiality. *Goodfellow*, p. 679; the usual form is "that it became material whether such a thing happened or existed."

Materiality—Judge or jury?] In *Bashford* (1906) the recorder of London ruled that materiality was for the judge, but consented to state a case, *Law*

Journal, Dec. 1, 1906, 769, where it is stated that the question has never been decided by the Court for C. C. R. In *Lavey*, L. Campbell C.J. asked, "Is materiality a question for the judge?" and expressly asked the jury whether they had any doubt the evidence impugned was material, and directed them that their verdict (above) must depend on that (alone).

Materiality of variance from indictment.] This materiality must not be confused with that *of the oath.* It must appear on the face of the indictment that the oath taken was material, and averments must be proved as laid. 1 *Russ. Cri.* 353. Where a date was not alleged as part of the record, and turned out to be wrong, it was held not material, and the variance not fatal, as it was not matter of description. In the same case it was alleged that when defendant signed a policy underwritten by A., B., C., &c., on a given date, he well knew, &c., but it was proved that A. (only) did not underwrite it on that day, L. Ellenborough held the variance fatal, as a fact was alleged "material with reference to the knowledge of the defendant." *Hucks*, p. 30 (1816). See p. 176. And where the perjury was in an answer to a bill alleged to have been filed in a particular term, and a copy produced was of one amended in a subsequent term, it was held to be no variance, the amended being part of the original bill. *Waller*, 2 *Stark. Ev.* 623 (1708). Where the bill was stated to have been filed by A. against B. (the prisoner) "*and another*," and in fact it was filed against B., C., and the attorney-general, but the perjury alleged was on a passage which was material between A. and B., L. Ellenborough held the variance immaterial, as it would have been enough to allege that the bill was filed against B. *Benson*, pp. 142, 682. See also *Baily*, 7 *C. & P.* 264 (1835). An indictment for perjury set out part of another, but omitted a word. It was insisted that this was a fatal variance, but Buller J. said, that [though] the word *tenor* [commonly used of indictments] has so strict and technical a meaning as to make a literal recital necessary, yet the words [here used] "in manner and form following, that is to say," meant nothing more than a *substantial* recital. *May* (1799), 1 *Russ. Cri.* 338. Where the indictment stated that an *issue* came on to be tried, and the evidence showed that it was an information containing several counts, to each of which the general issue was pleaded, the variance was held immaterial. *Jones*, p. 683. A bill in chancery had been amended *after* the answer, in which perjury was alleged, put in. A person from the six clerks' office, who produced the bill, was called, who stated that the amendments were made by a clerk in that office, whose handwriting he knew. L. Tenterden was of opinion that this was sufficient proof of the amendments, but did not think them material. *Laycock*, 4 *C. & P.* 326 (1830).

A trial actually took place before Littledale J.; the record did not show before whom, but the *postea* stated it to have been before Sir C. Abbott C.J. &c. L. Tenterden ruled, that this was not a variance, explaining . . . that the *postea* is so made up when a judge of the court sits for the chief justice. *Coppard, Moody & Malk.* 118 (1827), p. 678. In *Meek*, p. 141, it was held by Williams J. that there was no variance, as whether perjury had been committed could not depend on an informality in the indictment being tried. Allegation that "a certain action . . . came on to be tried in due form of law," and was "duly tried by a jury, &c."; it appeared by the record that the trial ended in a non-suit, it was held that the indictment was good. *Bray*, pp. 161, 694. See *Dunn*, p. 681. So in *Schlesinger*, pp. 121, 683, 687, the actual trial was before the secondary (practically the under-sheriff of London), but the averment "before the sheriffs" was held good. The indictment alleged, that a judgment was entered up, "afterwards *in or as of* Trinity term," 5 W. 4, but the examined copy of the record of the judgment was dated "June the 26, 5 Will. 4;" Patteson J. refused to amend either the date or

the disjunctive "*or*." *Cooke*, p. 177, where see his reasons. An allegation that the defendant made his warrant of attorney, directed to R. W. and F. B., "then and *still* being attornies" of the K. B., is proved by putting in the warrant; for, as he admitted, they were at the time of execution, the presumption is they still are; see *Presumption* in Index. *Ib.* An allegation that judgment was "entered up" in an action, is proved by the production of the judgment book from the judgment office by a clerk therefrom. *Gordon*, *Carr. & M.* 410 (1842), p. 141. An indictment stated that four commissioners —being all—were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, "or any three or two of them," were so commanded to examine witnesses; this was held by Coleridge J. to be a fatal variance, and he would not allow an amendment. *Hewins*, p. 177. See also *Lloyd*, p. 680.

Where it was averred that a cause was depending between A. B. and C. D. (defendant, in perjury), L. Denman C.J. held that a notice of set-off given by the defendant intituled in "A. B. *v.* C. D." was not sufficient to support the allegation. *Stoveld*, 6 *C. & P.* 489 (1834). As to what is not an examined copy of a bill in chancery, see *Christian*, p. 140, where it was averred that the perjury took place in "a certain action of contract pending in the [county] court," &c., "before J. M., then and there being judge . . . and . . . having . . . competent authority to administer the oath," &c.; it was held that it sufficiently appeared that the court was held in pursuance of 9–10 V. 95 (repealed), and that there was a regular judicial proceeding over which the judge had jurisdiction. *Lavey* v. *R.*, pp. 199, 687. See *Rowland*, pp. 2, 143, and 51–2 V. 43, 28, 180.

In a trial of a bankrupt for perjury in proceedings under the old bankruptcy practice the indictment averred exactly the same facts necessary to confer jurisdiction on the court as the bankrupt had set out in his petition. That petition was produced, and was the only evidence against him of those facts, but it was held by five judges sufficient so long as there was no contradiction. *Westley*, 29 *L. J. M. C.* 35; *Bell C. C.* 193 (1859). In the same case several other objections to the indictment were taken, not now of any practical importance. It was held that of the proceedings of a court of record *omnia præsumuntur rite esse acta* [p. 17], and Pollock C.B. stated his opinion (and that, he believed, of the other four judges), generally, that where the title of an Act of parliament is not accurately stated, but sufficiently so to enable "the judges, who know the titles of all the Acts that have ever been passed," to know with certainty what Act is meant, any minor inaccuracy is immaterial.

Falsity of the matter sworn—Evidence.] One distinct assignment of perjury at least must be proved. *Rhodes*, pp. 71, 686. And where the defendant's oath is as to his belief only, it may be proper to aver that "he well knew" the contrary of what he swore. See 2 *Chitty C. L.* 312, and p. 683.

". . . the defendant swears to the best of his recollection, and it requires very strong proof, in such a case, to show that the party is wilfully perjured; I do not mean to say that there may not be cases in which a party may not be proved to be guilty of perjury, although he only swears to the best of his recollection; but I should say that it was not enough to shew merely that the statement so made was untrue." *Per* Tindal C.J., *Parker, Carr. & M.* 639 (1842), p. 691.

It is not enough to show two contradictory oaths (*e.g.* before a magistrate and a grand jury) as *non constat* which of the contradictory statements was the true one. *Per* Tindal C.J., *Hughes*, p. 680; but see p. 691 and *Harris*, p. 692.

Where the prosecutor gave no evidence upon one of several charges of

perjury, L. Denman refused to allow the defendant to show that the matter was not false. *Hemp*, 5 *C. & P.* 468 (1833).

F. was indicted for perjury, in an affidavit in a cause, wherein he was plaintiff and E. defendant, that E. owed F. 50*l.* The cause came on after indictment found, and all matters in dispute were referred by consent to a barrister, who found that E. owed F. nothing. This award was admitted against F., who was convicted, but a new trial was ordered, as it was no proof of the falsity of what had been sworn: acquittal on second trial. *Fontaine Moreau;* see p. 3.

Where the averment was that the prisoner had sworn that he saw W. at about 11.15 "in the forenoon" of a particular day, and the evidence only proved that he had sworn that he saw W. at about 11.15, but had not sworn whether it was forenoon or afternoon, it was held that the averment was not proved, and Day J. directed an acquittal. *Bird*, 17 *Cox C. C.* 387 (1891).

If perjury is alleged in a county court, it is not necessary that the judge's notes should be produced. *Morgan*, p. 3.

Corrupt intention.] "Evidence is essential, not merely to show that the defendant swore falsely in fact, but also, as far as circumstances tend to such proof, to show that he did so corruptly, wilfully, and against his better knowledge." 2 *Stark. Ev.* 627, 2*nd ed.* In this, as in other cases of intent, the jury may infer the corrupt motive from the circumstances. *Knill*, 5 *B. & Ald.* 929, *n.* (1822), p. 692.

There must be proof that the false oath "was taken with some degree of deliberation; for if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise or inadvertency, or a mistake of the true state of the question," this would not "amount to voluntary and corrupt perjury." 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 2; 4 *Bl. Com.* 137. See *Stolady*, p. 683.

Witnesses—Corroboration.] "It is a general rule that the testimony of a single witness is insufficient to" convict "on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another." 2 *Stark. Ev.* 626, 2*nd ed.*; 4 *Hawk. P. C.* Bk. 2, ch. 46, s. 10, see below; 4 *Bl. Com.* 358. "But this rule must not be understood as establishing that *two witnesses* are necessary to disprove the fact sworn to by the defendant; for, if any material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction." *Lee* (1766), 1 *Russ. Cri.* 368. So "it does not appear to have been laid down that *two witnesses* are necessary to disprove the fact sworn to by the defendant; nor does that seem to be absolutely requisite. But at least one witness is not sufficient; and, in addition to his testimony, some other independent evidence ought to be produced." 1 *Phill. Ev.* 141, 6*th ed.* "There must be something in the corroboration which makes the fact sworn to not true, if that be true also." *Per* Alderson B. in *Boulter*, below.

A distinction, however, appears to be taken between proving positive allegations in the indictment, and disproving the truth of the matter sworn to by the defendant; the latter, it is said, requiring the testimony of two witnesses. Thus, Hawkins (above) adds, "but the *taking of the oath* and *facts deposed* may be proved by one witness only." So it is said by Starkie (on this passage), that it seems the "contradiction must be given by *two direct witnesses;* and that the negative, supported by one direct witness and

by circumstantial evidence, would not be sufficient." He adds that he had been informed that it had been so held by L. Tenterden. 2 *Ev.* 2*nd ed.*, 626, *n.*

In *Champney*, 2 *Lew. C. C.* 258 (1836), Coleridge J. said, "One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, L. Tenterden was of opinion that two witnesses were *necessary* to a conviction." In *Mudie*, p. 681, L. Tenterden doubted whether a single witness was enough against the defendant's oath in bankruptcy that that witness had paid, and the production of his book to prove it, where *several* individuals each swore that *he* had not paid at the time. Tindal C.J. distinctly held in *Parker*, p. 689, that such corroboration is not sufficient; there must be corroboration of each debt, &c., as to which there is an assignment. "The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction." *Per* Coleridge J., *Yates*, pp. 4, 686; but in *Shaw*, p. 678, Erle C.J. said, "It is well-ascertained law that, upon an indictment for perjury, it is necessary to have more than the evidence of one witness alone; for that is but the oath of one against one, which leaves the matter even, and entitles the prisoner to an acquittal. The prosecution must do more than that. They must turn the scale by corroborating their witness. The degree of corroboration, however, which is necessary is not definable and any attempt to define it will prove illusory. It must be something which, in the opinion of the tribunal before which it is brought, is deserving of the name of corroboration." "Where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the [solitary] witness who spoke to such assignment, on the facts contained in the other [two] assignments"—and there was abundant evidence of guilt in those two. *Virrier*, 12 *Ad. & E.* 317 (1840), p. 190; 1 *Russ. Cri.* 370. In *Boulter*, 2 *Den. C. C. R.* 396; 21 *L. J. M. C.* 57 (1852), the prisoner stated in a trial that in June, 1851, he owed no more than one quarter's rent to his landlord; the latter swore that the prisoner owed five quarters' rent at that date; to corroborate whom, a witness proved that in August, 1850, the prisoner had admitted to him that he then owed three or four quarters' rent. Held not to be sufficient corroboration, for the money might have been paid intermediately. Defendant swore that he saw the prosecutor committing an offence, and saw the flap of his trousers unbuttoned. Prosecutor deposed that he did not commit the offence, and that his trousers had no flap; and to confirm him, his brother proved that at the time in question he was not out of his presence more than three minutes, and his trousers had no flap. This was held by Patteson J. to be sufficient corroboration. *Gardiner*, pp. 678, 687. A., to prove an alibi for B., had sworn that B. was not out of his sight between 7 a.m. and 10 a.m. on a certain day, and on this perjury was assigned; Patteson J. held that evidence by one witness that at 8.30 a.m. B. was at one place on foot, and by another witness that at 9 a.m. A. was walking at another place six miles off, was sufficient corroboration. *Roberts*, 2 *C. & K.* 607 (1848).

Where a statement by the prisoner himself is given in evidence, contradicting the matter sworn to by him, it has been held not to be necessary to call two witnesses to prove the falsity; one witness, with proof of the admission, being sufficient. The defendant made information upon oath that three women were concerned in a riot at his mill (which was dismantled by a mob, on account of the price of corn); and afterwards, at the sessions, when the rioters were indicted, having been tampered with in favour of the women, he

then swore that they were not at the riot. There was no other evidence on the trial for perjury to prove that the women were in the riot, but his own information, which was read. The judge and other judges thought this evidence sufficient, and the defendant was convicted and transported. *Anon.*, 5 *B. & Ald.* 939 *n.* (1764); 1 *Russ. Cri.* 372. So where the only evidence was that defendant had sworn contradictorily before a committee of the House of Commons, and before the House of Lords. *Knill*, p. 690. Perjury in an affidavit as to his bill of costs was charged against a solicitor, only one witness was called, and in lieu of a second, it was proposed to put in the bill of costs, delivered to the client; it was objected that this was not sufficient, the bill not having been delivered on oath; Denman C.J. was clear that the bill delivered by the defendant was sufficient, or that even a letter written by him contradicting his statement on oath, would be sufficient to make a second witness unnecessary. *Mayhew*, 6 *C. & P.* 315 (1834). There appears, however, to be an objection to this evidence, which is not easily removed, namely, that there is nothing to show which of the statements made by the defendant is the false one where no other evidence of the falsity is given. So *Hughes*, p. 689. Hence, Holroyd J. said, "Although you may believe that, on one or other occasion" prisoner "swore that which was not true, it is not a necessary consequence that she committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances, at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict where it is not possible to tell which was the true and which was the false." *Jackson*, 1 *Lewin C. C.* 270 (1823). So in *Harris*, 5 *B. & Ald.* 926 (1822), the K. B. were of opinion (at 937), that perjury could not "be legally charged and assigned by shewing such contradictory depositions, with an averment that each of them was made knowingly and deliberately, but without averring or shewing in which of the two depositions the falsehood consisted." So where defendant was charged with perjury on a trial at the sessions, Gurney B. held that his deposition before the magistrate, entirely contradicting what he swore at the trial, was not in itself sufficient proof that the latter was false, but that there must be corroboration that he swore falsely at the trial, which having been given (viz. of the truth of the deposition) he was found guilty. *Wheatland*, 8 *C. & P.* 238 (1838). See 1 *Russ. Cri.* 373, *n.*

Prisoner was charged with having falsely sworn that certain invoices, bearing certain dates, were produced by her to one C. C. was called, and swore that she had not produced the invoices which she had deposed to, but that she had produced others; and he produced a memorandum of them he had made at the time, which showed that they were not those sworn to. Cockburn C.J. held that the memorandum was a sufficient corroboration. *Webster*, 1 *F. & F.* 515 (1859).

The prisoner, who was a policeman, having laid an information against a publican for keeping his house open after lawful hours, swore on the hearing that he knew nothing of the matter, except what he had been told, and that "he did not see any person leave the defendant's house after eleven" on the night in question. It was proved by the magistrates' clerk that the prisoner, when laying the information, said that he had seen four men leave the house after eleven, and that he could swear to one as W. It was also proved, that on two other occasions the prisoner made a similar statement to two other witnesses, and that W. and others did in fact leave the house after eleven o'clock on the night in question. The prisoner moreover admitted at the hearing of the summons that he had received money from the publican to

settle the matter, and there was much evidence to this effect. It was held that the evidence was sufficient to prove the perjury, and that the conviction was right. *Hook, Dears. & B. C. C.* 606; 27 *L. J. M. C.* 222 (1858). Benjamin Linton was indicted for that he applied to a surrogate, to grant a marriage licence and unlawfully contriving to obtain such licence in fraud of a certain Act, took his oath, &c., before the surrogate, and then falsely swore amongst other things that he had the consent of the father of the girl, by which means he unlawfully obtained the licence. Archibald J., York Spring Assizes, 1874, ruled that two witnesses of the falsity of the allegation of consent were necessary; for that the indictment disclosed an offence similar to perjury, and that the objection was that there was only oath against oath. It was true the first [the husband's] oath was not made in a court of justice, but if that objection prevailed, the father [by his single oath] alone could convict the husband of perjury, but the husband could not [by his single oath] alone convict the father if he falsely swore in court that he had not consented. (This case seems only to be reported in earlier editions of this work.)

Statutes.] The principal is 5 El. 9, the operation of which is, however, more confined than that of the common law; though it does not (see s. 13 or 7) restrain in any manner the punishment of perjury at common law; hence it has seldom been the practice to proceed against offenders by indictment under it.

By s. 1 (or 3) the procuring any witness to commit perjury in any matter in suit, by writ, &c., concerning any lands, goods, &c., or when sworn *in perpetuam rei memoriam*, is punishable by the forfeiture of twenty pounds.

S. (1 or) 5 seems to be repealed so far as it relates to the incompetency of witnesses who have been convicted of perjury, by 6–7 V. 85, 1, which provides that witnesses are not to be incapacitated from giving evidence by reason of crime. See 3 *Russ. Cri.* 659.

S. (2 or) 6 enacts, that if any person or persons, either by subornation, "unlawful procurement, sinister persuasion, or means of any others, or by their own act," consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person so offending, and being thereof duly convicted or attainted by the laws of this realm, shall forfeit twenty pounds, and have imprisonment by the space of six months, without bail or "mainprize" (*i.e.* delivery to sureties).

It appears that a person cannot be guilty of perjury within the meaning of this statute, in any case wherein he may not be guilty of subornation of perjury within the same statute, and as the subornation of perjury there mentioned, extends only to subornation in "matters depending in suit by writ, action, bill, plaint, or information, in anywise concerning lands, tenements, or hereditaments, or goods, chattels, debts, or damages, &c.," no perjury upon an indictment or criminal information can bring a man within the statute. 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 19; *Bac. Ab. Perjury* (*B*). The statute only extends to perjury by witnesses, and therefore no one comes within the statute by reason of a false oath in an answer to a bill in chancery, or in swearing the peace against another, "or in a presentative made by him as homager of a court baron . . . or for taking a false oath before commissioners appointed by the king to make an enquiry concerning his title to certain lands." *Hawk. ib.* s. 20. It seems the better opinion that a false oath taken before the sheriff upon a writ of enquiry of damages, is within the statute. *Ib.* s. 21. "No false oath can be within the statute unless the party against whom it was sworn suffered some kind of disadvantage by it, for otherwise it cannot be said that any one was grieved, hindered, or molested by it . . . therefore, in every prosecution upon the statute it is necessary to set forth the

record of the cause wherein the perjury complained of is supposed to have been committed; and also to prove at the trial of the cause, that there is actually such a record by producing the record itself, or a true copy of it, which must agree with that which is set forth in the pleadings, without any material variance; for otherwise it cannot legally appear that there ever was such a suit depending, wherein the party might be prejudiced in the manner supposed . . . in an action by more than one," the false oath "must appear to have been prejudicial to every one of the plaintiffs." *Ib.* s. 23; *Bac. Ab. Perjury* (*B*).

By 14–15 V. 100, 19, p. 824, any court, judge, justice, &c., may direct any person suspected of perjury in *any* evidence, &c., to be prosecuted. By s. 20, indictments for perjury are simplified, by making it "sufficient to set forth the substance of the offence charged . . . and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed, or subscribed without setting forth the bill, answer, informations, indictment, declarations or any part of any proceeding either in law or in equity and without setting forth the commissioner or authority of the court or persons before whom such offence was committed." By s. 21, p. 824, an indictment for subornation of perjury, p. 695, is simplified.

By s. 22: "A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall, upon the trial of any indictment for perjury, or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same." Cf. p. 137.

The indictment alone, without the record of the trial or the certificate of it under this s. (22) is insufficient proof of the proceedings at which the perjury is alleged. *Coles*, 16 *Cox C. C.* 165 (1887); cf. p. 695.

As to the Vexatious Indictments Act, see p. 160.

Where no application was made to the judge for his consent to prosecute at the time of the alleged perjury, *i.e.* the trial, but about a fortnight afterwards the prosecutor's attorney went before the judge without summons or affidavit, and laid before him a newspaper containing a report of the trial. The judge wrote upon it, "I consent to the prosecution in this case," and signed his name; this was held to be a sufficient consent within the Act. *Bray*, pp. 161, 688.

Various statutes make false evidence perjury, or punishable as perjury.

Thus, by 5–6 W. 4, 62, 5, 21, false declarations relating to the revenue and other matters are made misdemeanors; see pp. 399, 682. As to 29–30 V. 109, 67 (courts martial), see *Heane*, p. 680. As to a creditor under the Debtors Act, 32–3 V. 62, 14, see p. 262. Under the Marriage Acts persons making false declarations are liable to the penalties of perjury; 19–20 V. 119, 2, 18, and 55–6 V. 23, 15. False evidence given before an arbitrator or umpire appointed under the Agricultural Holdings Act, 1900, 63–4 V. 50, 2 (7), is made the subject of perjury; so of parliamentary candidate or election agent, under 46–7 V. 51, 33 (7), p. 399. So also before Public Works Loan Commissioners under 38–9 V. 89, 44. Also at inquiries held by direction of the Commissioners of Customs, 39–40 V. 36, 36. Falsely swearing under the Yorkshire Registries Act, 1884, 47–8 V. 54, 47; or the Commissioners for Oaths Act, 52–3 V. 10, 7, p. 681. As to Board of Trade inspectors, see p. 719. As to the evidence of a child not upon oath, see

pp. 328, 723; a similar provision is contained in 4 E. 7, 15, 15 (1), which gives power to whip a boy under fourteen committing this offence; see p. 328.

Punishment.] Perjury is punishable at common law with fine and imprisonment at the discretion of the court.

By 2 G. 2, 25, 2: "The more effectually to deter persons from committing wilful and corrupt perjury or subornation of perjury . . . besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county for a term not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper." The rest of this s. is not repealed, but relates partly to transportation and partly to prison breach (p. 715).

By 3 G. 4, 114, there may be a sentence of hard labour.

By 7 W. 4 & 1 V. 23 (repealed) the pillory was abolished.

Venue.] See p. 682.

SUBORNATION OF PERJURY.

See the statutes as to perjury, p. 693.

Subornation of perjury at common law is the "procuring a man to take a false oath amounting to perjury, who actually takes such oath. . . ." But if he "do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished not only by fine but also by infamous punishment." 2 *Hawk. P. C.* Bk. 1, ch. 69, s. 10. See 1 *Russ. Cri.* 197.

Upon an indictment there must be proved (1) the inciting by the defendant, and that he knew that the evidence to be given was false; and (2) the taking of the false oath by the witness, &c. See 14–15 V. 100, 21, pp. 694, 824. Cf. p. 257.

Evidence.] If the person suborned has been convicted, it will not, as it seems, be sufficient against the suborner to prove merely the record of the conviction; but the whole evidence must be gone into as upon the former trial; cf. *Coles*, p. 694. The prisoner was indicted for procuring one Macdaniel, who had been convicted, to take a false oath. The record of Macdaniel's conviction for perjury was produced. "But it was insisted for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was correct; that Reilly had a right to controvert the guilt of Macdaniel, and that the evidence given on Macdaniel's trial ought to be submitted to the consideration of the present jury, and the recorder obliged the counsel for the crown to go through the whole case in the same manner as if the jury had been charged to try Macdaniel." *Reilly*, 1 *Leach* 455 (1787), p. 109. Upon this case Starkie remarks: "This authority seems at first sight to be inconsistent with that class of cases in which it has been held that as against an accessory before the fact to a felony, the record of the conviction of the principal is evidence of the fact. If the prisoner, instead of being indicted as a principal, in procuring, &c., had been indicted as accessory before the fact, in procuring, &c., the record would clearly have been good *primâ facie* evidence of the guilt of the principal. It is, however, to be recollected that this doctrine

rests rather upon technical and artificial grounds than on any clear and satisfactory principle of evidence." 2 *Ev.* 627, 2*nd ed.* It may also be observed that the indictment for subornation of perjury does not set forth the *conviction* of the false swearer, but only the preliminary circumstances and the taking of the oath; forming an allegation of his *guilt*, and not of his *conviction*; and in *Turner*, pp. 47, 735, the judges expressed a doubt whether, if an indictment against a receiver stated, not the *conviction*, but the *guilt* of the principal felon, the record of that conviction would be sufficient evidence of the guilt.

PERSONATION. *See* FALSE PERSONATION.

PERVERSION OF JUSTICE.

For the general principle, see p. 321.

As to offences by judges in the judicial office, see p. 670, and 1 *Anson on the Constitution*, p. 367, *3rd ed.*, and 2 *ib.*, Pt. 1, p. 222, *3rd ed.* The only instance of an address from both houses of parliament for the removal of a judge was in *Sir Jonah Barrington's case* (1828) for "malversation in office." See 2 *Todd, Parliamentary Government in England*, p. 736. See also the impeachment of *L. St. Albans*, "for bribery and corruption in the execution of his office." 2 *St. Tr.* 1087 (1620).

Merely offering a judge a bribe is criminal. 3 *Inst.* 147.

As to bribery of other judicial officers, and generally, see p. 281. Counsel "are punishable for any foul practice as other ministers of justice are." 3 *Hawk. P. C.* Bk. 2, ch. 22, s. 30, and see p. 588. There is an indictment "against a counsellor for betraying his client's cause and taking fees of the other side," *Walker* (1655) in *Tremaine's Pleas of the Crown*, 261. See also *Anon.*, 6 *Mod. R.* 137 (1705), and, generally, *Marchant's Barrister-at-Law*, ch. 6.

As to the abuse of legal process, see p. 402, and *Process*, in Index.

For the specific offences of *Maintenance* and *Embracery*, see pp. 587 and 589 respectively. For *Perjury*, see p. 676, and especially pp. 679–80, and for *Subornation*, pp. 78, 695.

As to the corruption of witnesses, see p. 88, and as to their protection from arrest, intimidation, or any tampering, see pp. 96–7, and cf. p. 589.

Conspiracy "to defeat the public justice of the kingdom" may be charged, as in *Macdaniel*, p. 352 (1756 to 1759), where several persons had sworn away the life of an innocent man to get the reward for a conviction.

Printed comment—Newspapers.] As to libel, see pp. 568, 569. In *Spenceley* v. *De Willott*, p. 88, a rule *nisi* for a new trial was granted because "plaintiff had published a statement of the case which was distributed about the court and the hall [Westminster] before and at the trial."

In *Reason*, pp. 8, 626, &c., where a dying declaration had got into print, Pratt L.C.J. said, "And there is, too, an examination in print; that ought not to be, and the person that did it ought to be censured. Are juries to be prepossessed? Here is a printed pamphlet, whereof the title is Mr. Lutterell's Cry for Justice." Counsel for the crown said that it was in the prisoner's favour. "If the examination is true," said the L.C.J., "it ought to be produced, and the prisoners ought to come fairly to their trial, and, if guilty, God forbid but they should suffer, but not by passionate insinuations in print; and it is an unprecedented thing, and if it comes out who did it, I shall take a course with them; it is a way of preventing all manner of justice" (16 *St. Tr.* 33).

During and after the hearing before a magistrate, and between that and the trial of certain prisoners, ultimately convicted, and during the trial a "publication went far beyond any fair and *bonâ fide* report of the proceedings before the magistrates. They (*sic*) contained, couched in florid and sensational form, a number of statements highly detrimental to [the prisoners].

Much of these statements related to matters of which evidence would not have been admissible against them in any event, and purported to be the result of investigations made by the 'special crime investigator' of the newspaper" (*per* L. Alverstone C.J.). Both the editor and the reporter were indicted and convicted, and the Court for C. C. R. held that the offence was indictable; it might also be contempt of court. *Tibbits* v. *Windust*, 20 *Cox C. C.* 70 (1901). See also *Jolliffe*, pp. 57, 168, 352. The ultimate conviction of the prisoners attacked had nothing to do with the matter. *Ib.*, and *Williams* and *Romney*, p. 16.

As to assisting convicted or arrested persons to escape, see pp. 156, 392, 716, 744.

As to *compounding* offences, see p. 345.

PIGEONS—OFFENCES AS TO.

LARCENY may be committed of tame pigeons, even although unconfined, p. 427; and by 24–5 V. 96, 23: "Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay over and above the value of the bird any sum not exceeding two pounds."

Where B. gave notice to A. that if A.'s pigeons continued to come on to his land and injure his crops he would shoot them, and he afterwards did shoot one and left it on the ground, it was held that this was not an unlawful killing within the meaning of the s., for the section applies only to such acts as would be of the nature of larceny. *Taylor* v. *Newman*, 4 *B. & S.* 89; 22 *L. J. M. C.* 186 (1863): approved in *Hudson* v. *Macrae*, p. 430.

See *Smith* v. *Dear*, 20 *Cox C. C.* 458 (1903).

PIRACY AND SLAVE-DEALING.

Common law.] "The offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. But it is no felony at common law." 2 *East P. C.* 796; 4 *Bl. Com.* 72; 1 *Hawk. P. C.* Bk. 1, ch. 37, s. 4. Before 28 H. 8, 15 (repealed as to piracy), the offence was only punishable by the civil law, and that statute does not make it a felony. By other statutes, however, the offence is made felony. See the Seventh Report of the Commissioners on Criminal Law (1843), p. 70.

Statutes 11 (& 12) *W.* 3, 7.] By s. 8 (or 7): "If any of his Majesty's natural-born subjects or denizens of this kingdom shall commit any piracy or robbery, or any act of hostility against other his Majesty's subjects upon the sea under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender and offenders and every of them shall be deemed adjudged and taken to be pirates, felons, and robbers. . . ."

By s. 9 (or 8): "If any commander, or master of any ship, or any seaman or mariner, shall in any place where the admiral hath jurisdiction betray his trust, and turn pirate enemy or rebel, and piratically and feloniously run away with his or their ship or ships or any barge boat ordnance ammunition goods or merchandizes or yield them up voluntarily to any pirate; or shall bring any seducing messages from any pirate enemy or rebel; or consult combine or confederate with or attempt or endeavour to corrupt any commander master officer or mariner to yield up or run away with any ship goods or merchandizes or turn pirate or go over to pirates or if any person shall lay violent hands on his commander whereby to hinder him from fighting in defence of his ship and goods committed to his trust or that shall confine his master or make or endeavour to make a revolt in the ship shall be adjudged deemed and taken to be a pirate, felon, and robber. . . ."

It was decided by the judges, that the making, or endeavouring to make, a revolt on board a ship, with a view to procure a redress of what the prisoners may think grievances, and without any intent to run away with the ship, or to commit any act of piracy, is an offence within this s. *Hastings*, 1 *Moo. C. C.* 82 (1825).

8 *G.* 1, 24.] By s. 1: "If any commander or master of any ship or vessel, or any other person or persons, shall . . . any wise trade with any pirate, by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas, with any ammunition, provision, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with or supply or correspond with any pirate, felon, or robber upon the seas, or if any person or persons shall any ways consult, combine, or confederate or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of such piracy, felony, or robbery,—such offender and offenders and every of them shall . . . be deemed adjudged and taken to be guilty of piracy, felony, and robbery . . . and in case any

person or persons belonging to any ship or vessel, whatsoever, upon meeting any merchant-ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and, though they do not seize and carry off such ship, or vessel, shall throw over-board or destroy any part of the goods or merchandizes belonging to such ship or vessel, the person or persons who shall be guilty thereof shall in all respects be deemed and punished as pirates as aforesaid."

18 *G.* 2, 30.] By s. 1, all persons being natural-born subjects or denizens of his Majesty, who, during any war, shall commit any hostilities upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, against his Majesty's subjects by virtue or under colour of any commission from any of his Majesty's enemies, or shall be any other ways adherent, or giving aid or comfort to his Majesty's enemies upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, &c., may be tried as pirates, felons, and robbers in the Court of Admiralty, on ship-board or upon the land, in the same manner as pirates, &c., are by 11–12 W. 3, above, directed to be tried.

Under this statute it has been held, that persons adhering to the king's enemies, merely cruising in enemy's ships with intent to take the king's and his subjects' ships, may be tried as pirates under the usual commission granted by virtue of 28 H. 8, 15. *Evans*, 2 *East P. C.* 798 (1782).

5 *G.* 4, 113—*dealing in slaves.*] By s. 9, the carrying away, conveying, or removing of any person upon the high seas as a slave or for the purpose of his or her being imported or brought into any place as a slave, or being sold or dealt with as such, or the embarking or receiving on board any person for such purpose—or assisting in such acts—is made piracy, felony, and . . . robbery. . . . By s. 10, p. 457, the dealing in slaves, generally, and other offences connected therewith, are made felony.

By 7 W. 4 & 1 V. 91, the punishment of death, imposed by this s. (9), is abolished. See p. 520.

The provisions of 5 G. 4, 113, 10, are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade anywhere. *Per* Maule and Wightman JJ., *Zulueta*, p. 165. In order to convict of having employed a vessel for slave trading, it is not necessary to show that the vessel which carried out goods was intended to be used for bringing back slaves in return; but it will be sufficient if there was a slave adventure, and the vessel was in any way engaged in the advancement of that adventure. *Ib.*

In 1845, the Felicidade, a Brazilian schooner, fitted up as a slaver, surrendered to H.M.S. Wasp. She had no slaves on board. The captain and all his crew, except Majaval, one of the prisoners, were taken out of her and put on board the Wasp. Cerqueira, the captain, was sent back to the Felicidade, which was then manned with sixteen British seamen, and placed under the command of Lieutenant Stupart. The lieutenant was directed to steer in pursuit of the Echo, a Brazilian brigantine, having slaves on board, and commanded by the prisoner Serva. The Echo surrendered, and was then taken possession of by Mr. Palmer, a midshipman, who went on board her, and sent Serva and eleven of the crew of the Echo to the Felicidade. The next morning Lieutenant Stupart took command of the Echo, and placed Mr. Palmer and nine British seamen on board the Felicidade, in charge of her and the prisoners. The prisoners shortly after rose on Mr. Palmer and his English crew, killed them all, and ran away with the vessel. She was recaptured by a British vessel, and the prisoners were brought to this country,

and tried at Exeter for murder. The jury found them guilty. According to the summing up of Platt B. the Felicidade was in the lawful custody of her Majesty's officers, and all on board that vessel were within her Majesty's admiralty jurisdiction; and the jury ought to find the prisoners guilty of murder, if satisfied by the evidence that they plotted together to slay all the English on board, and run away with the vessel; that, in carrying their design into execution, Majaval slew Mr. Palmer, and that the other prisoners were present, and abetted him in the murder. Ultimately the judges, by eleven to two, held the conviction to be wrong on the ground of there being no jurisdiction in an English court to try an offence committed on the Felicidade, and that if, as was argued, the Crown had lawful possession through its officers, there was no evidence to prove that possession. *Serva and others*, p. 101.

"*Taking*" *in piracy.*] The prosecutor must give evidence of facts which, had the transaction occurred within the body of a county, would have rendered the offender guilty of larceny or robbery at common law. He must therefore show a taking *animo furandi* and *lucri causâ*. It has been said that if a ship is attacked by a pirate, and the master, for her redemption, gives his oath to pay a sum certain, though there is no taking, yet it is piracy by the law marine, but by the common law there must be an actual taking, though but to the value of a penny, as in robbery on the highway. 1 *Beawes, Lex Mercatoria, 6th ed.* (1813), 355. If a ship is riding at anchor, with part of the mariners in her boat, and the rest on shore, so that none remain in the ship, if she be attacked and robbed, it is piracy. *Ib.*

Who may be guilty of piracy.] The subject of a foreign power in amity with this country may be punished for piracy committed upon English property. 1 *Beawes, Lex Merc. 6th ed.* (1813), 353. Where the master of a vessel with goods on board, having insured ship and goods at London and Rotterdam, ran the goods on shore in England, with intent to defraud the owners and insurers, and when the ship was burned (probably by him), "protested" ship and cargo, as usual in case of insurance, on an indictment for piracy and stealing the goods, it was held to be only a breach of trust and no felony, and that it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined. *Mason*, 2 *East P. C.* 796; 8 *Mod.* 74 (1723). Thus where several seamen on board the King Charles II. seized the captain, "he not agreeing with them, and, after putting him ashore, carried away the ship and afterwards committed several piracies," it was held that "this force upon the captain, and carrying the ship away, (which was explained by their use of it afterwards) was piracy" and they were executed. *May*, 2 *East P. C.* 796 (1696). The prisoners were convicted upon a count for feloniously and *piratically* stealing sixty-five fathoms of cable, &c., upon the high seas, within the jurisdiction of the admiralty. It appeared that they were Deal pilots, who, having been applied to by the master to take a vessel into Ramsgate, had, in collusion with him, cut away the cable, value 58*l.*, and part of the anchor, which had before been broken, for the purpose of causing an average loss to the underwriters; they contrived to tow away the cable and convert it to their own use. It was objected that the offence of the prisoners was not larceny, having been committed by them jointly with the master of the vessel, not for the purpose of defrauding the owners, but for the purpose of defrauding the underwriters for the benefit of the owners. A majority of the judges, however, held the conviction right. *Curling, Russ. & Ry.* 123 (1807).

Accessories.] Accessories to piracy were triable only by the civil law, and, if their offence was committed on land, they were not punishable at all before

11–12 W. 3, 7, 10. And now by 8 G. 1, 24, 3, all persons whatsoever who, by that s. (10), are declared to be accessory to any piracy or robbery therein mentioned, are declared to be principal pirates, felons, and robbers, and shall be in every way dealt with as such.

The knowingly receiving and abetting a pirate (on the sea) within the body of a county is not triable at common law, for where the common law cannot punish the principal, it cannot punish the accessory. *Query:* Whether the Admiralty has jurisdiction in such case. *The Case of the Admiralty*, 6 *Coke Rep.* Pt. 13, 51 (1610).

Venue and trial.] See pp. 67, 213, and *Coombe*, p. 216.

By 46 G. 3, 54, "all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried . . . according to the common course of the laws of this realm, used for offences committed upon the land within this realm, and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the king's commission or commissions, under the Great Seal of Great Britain, to be directed to any such four or more discreet persons as the lord chancellor, &c., shall from time to time think fit to appoint." The commissioners are to have the same powers as commissioners under the 28 H. 8.

Chinese coolies rose at sea against the French captain and crew of a French vessel which was conveying them from Macao to Peru, killed them, took the vessel back to China, and abandoned her. Some were tried in China; one fled to Hong-Kong. The judicial committee of the Privy Council ultimately decided that the murder by a Chinese of one who was not a subject of China, outside of China, was not a crime against the laws of China (within the ordinance regulating extradition between Hong-Kong and China), though it might be against French law; the prisoner, therefore, could not be extradited to China on this ground. But he ought to have been committed for trial at Hong-Kong for piracy, *jure gentium*, for this is justiciable anywhere. *Attorney-General for Hong-Kong* v. *Kwok-A-Sing*, *L. R.* 5 *P. C.* 179; 12 *Cox C. C.* 565 (1873).

Punishment.] By 7 W. 4 & 1 V. 88, 1 (repealed), so much of the former Acts as relates to the punishment of the crime of piracy, or of any offence, by any of the said Acts declared to be piracy, or of accessories thereto respectively, is repealed.

By s. 2: "Whosoever with intent to commit, or at the time of or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon."

By s. 3: "Whosoever shall be convicted of any offence which by any of the Acts hereinbefore referred to amounts to the crime of piracy, and is thereby made punishable with death, shall be liable . . . to be transported beyond the seas [now to penal servitude] for the term of the natural life of such offender" (see p. 198).

By s. 4: "In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

POISONING.

Intent or attempt to murder.] See 24–5 V. 100, 11, 14, p. 651. Cf. p. 232 (*Abortion*), and *Williams*, p. 258.

Intent to commit an indictable offence.] By 24–5 V. 100, 22: "Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . ." (see p. 198).

Endangering life or inflicting grievous bodily harm.] By s. 23: "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony . . ." Conclusion as in s. 22 above, but maximum term, ten years.

Intent to injure, aggrieve, or annoy.] By s. 24: "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude" (see p. 198). See p. 233, and cf. p. 252.

Persons charged with felony of administering poison may be convicted of misdemeanor.] By s. 25; "If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor."

Poisoning fish.] See 24–5 V. 97, 32, p. 766, and cf. p. 430.

Drugs in abortion.] See 24–5 V. 100, 58, 59, p. 232.

Drugs in outrage on woman.] See 48–9 V. 69, 3, p. 722.

The intent.] Administering cantharides to a woman with intent to excite her sexual passion, in order that prisoner may have connection with her, was held to be within 23–4 V. 8, 2 (repealed), where the words are identical with s. 24, above. *Wilkins, L. & C.* 89; 31 *L. J. M. C.* 72 (1861). But where cantharides was administered in so small a quantity as to be insufficient to occasion

injury or to produce any effect on the human system, it was held by Cockburn C.J. that there was no offence within s. 24, despite the intent to annoy, because it could not, in that form be said to be noxious. *Hennah*, p. 233. The question is whether the drug in the form and quantity in which it is administered is noxious or not. *Cramp*, p. 233.

Sale of poisoned grain, seed, meal, or flesh.] 26–7 V. 113, and 27–8 V. 115, forbid the sale of poisoned grain, seed, &c., or flesh, under penalties (summary jurisdiction).

POST-OFFICE—OFFENCES RELATING TO THE.

Statutes.] By 7 W. 4 & 1 V. 32, all enactments relative to offences committed against the post-office were repealed, and the law was consolidated and further provisions made, by 7 W. 4 & 1 V. 36, which is amended by 47–8 V. 76.

By 32–3 V. 73, 23, telegraphic messages (originals and transcripts) are post letters within the meaning of 7 W. 4 & 1 V. 36. See p. 783.

Opening or detaining letters.] By 7 W. 4 & 1 V. 36, 25: "Every person employed by or under the post-office [p. 711] who shall contrary to his duty open or procure or suffer to be opened a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall in England and Ireland be guilty of a misdemeanor, . . . and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet; provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal secretaries of state, and in Ireland under the hand and seal of the Lord Lieutenant of Ireland."

As to the punishment under the following ss., see p. 198; the part of 47–8 V. 76, 13, which regulated it, is repealed.

7 W. 4 & 1 V. 36.

Stealing, embezzling, secreting, or destroying letters.] By s. 26: "Every person employed under the post-office [p. 711], who shall steal, or shall, for any purpose whatever, embezzle, secrete, or destroy a post letter, shall in England and Ireland be guilty of felony . . . and shall at the discretion of the court either be transported beyond the seas for the term of seven years or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life" (see p. 198).

Stealing out of letters.] By s. 27: "Every person who shall steal from or out of a post letter any chattel or money or valuable security shall in England and Ireland be guilty of felony . . . and shall be transported beyond the seas for life" (see p. 198).

Stealing letter-bags, &c.] By s. 28: "Every person who shall steal a post letter bag, or a post letter from a post letter bag, or shall steal a post letter from a post-office, or from an officer of the post-office, or from a mail, or shall stop a mail with intent to rob or search the same, shall in England and Ireland be guilty of felony . . . and shall be transported beyond the seas for life" (see p. 198).

Stealing from a post-office packet.] By s. 29: "Every person who shall

steal or unlawfully take away a post letter bag sent by a post office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall in England and Ireland be guilty of felony . . . and shall be transported beyond the seas for any term not exceeding fourteen years" (see p. 198).

Receivers.] By s. 30: "Every person who shall receive any post letter, or post letter bag, or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof shall amount to a felony under the post office Acts [see Index], knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post, shall in England and Ireland be guilty of felony . . . and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every receiver, howsoever convicted, shall be liable to be transported beyond the seas for life" (see p. 198).

Offences by other parties—fraudulently retaining letters, &c.] By s. 31: "Whereas post letters are sometimes by mistake delivered to the wrong person, and post letters and post letter bags are lost in the course of conveyance or delivery thereof, and are detained by the finders in expectation of gain or reward . . . every person who shall fraudulently retain, or shall wilfully secrete, or keep, or detain, or being required to deliver up by an officer of the post-office, shall neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post letter bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same, or by any other person, shall in England and Ireland be guilty of a misdemeanor . . . and being convicted thereof shall be liable to be punished by fine and imprisonment."

Accessories and procurers.] By s. 36: "Every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the post office Acts, shall in England and Ireland be guilty of a misdemeanor . . . and being thereof convicted shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years." See also s. 37, below.

Venue.] By s. 37: "The offence of every offender against the post office Acts may be dealt with, and indicted and tried and punished, and laid and charged to have been committed, in England and Ireland, either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended, or be in custody, as if his offence had been actually committed in that county or place . . . ; and where an offence shall be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter bag or post letter, or in respect of a post letter bag, or post letter, or a chattel, or money, or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail, or the person, or the post letter bag, or the post letter, or the chattel, or the money, or the valuable security sent by the post in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had been

actually committed in such county or place; and in all cases where the side or the centre or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal, or navigation, shall constitute the boundary of the two counties, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed in either of the said counties through which or adjoining to which or by the boundary of any part of which the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place; and every accessory before or after the fact to any such offence, if the same be a felony . . . and every person aiding or abetting or counselling or procuring the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried." Cf. s. 36, above.

By s. 39: "Where an offence punishable under the post office Acts shall be committed within the jurisdiction of the admiralty, the same shall be dealt with and inquired of and tried and determined in the same manner as any other offence committed within that jurisdiction." See p. 213.

Form of indictment.] By s. 40: "In every case where an offence shall be committed in respect of a post letter bag or a post letter, or a chattel, money, or a valuable security sent by the post, it shall be lawful to lay in the indictment . . . to be preferred against the offender, the property of the post letter bag, or of the post letter, or chattel, or money, or the valuable security sent by the post, in the postmaster-general; and it shall not be necessary in the indictment . . . to allege or to prove upon the trial or otherwise that the post letter bag or any such post letter or valuable security was of any value; and in any indictment or any criminal letters to be preferred against any person employed under the post office for any offence committed against the post office Acts, it shall be lawful to state and allege that such offender was employed under the post office of the United Kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment." A sovereign, found in the post, having probably dropped out of a letter, was rightly laid as the property of the postmaster-general, *Rathbone*, p. 711.

Punishment.] See p. 706, and p. 198.

By s. 42: "Where a person shall be convicted of an offence punishable under the post office Acts, for which imprisonment may be awarded, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction."

Interpretation clause.] By s. 47: ". . . the term 'letter' shall include packet, and the term 'packet' shall include letter; . . . and the term 'mail' shall include every conveyance by which post letters are carried, whether it be a coach, or cart, or horse, or any other conveyance, and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term packet boat; and the term 'mail bag' shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed, whether it does or does not contain post letters; . . . and the expression 'officer of the post-office' shall include the postmaster-general, and every deputy postmaster, agent, officer, clerk, letter-carrier, guard, post-boy, rider, or any other person employed in any business of the post-office, whether employed by the postmaster-general, or by any person under him, or on behalf of the post-office; . . . and the expression 'persons employed by or under the post-office' shall include every person employed

in any business of the post-office according to the interpretation given to officer of the post-office; . . . and the term 'post letter-bag' shall include a mail bag or box, or packet or parcel, or other envelope or covering in which post letters are conveyed, whether it does or does not contain post letters; . . . and the term 'postmaster-general' shall mean any person or body of persons executing the office of postmaster-general for the time being, having been duly appointed to the office by her Majesty; and the terms 'post-office Acts' and 'post-office laws' shall mean all Acts relating to the management of the post, or to the establishment of the post-office, or to postage duties from time to time in force; . . . and the term 'valuable security' shall include the whole or any part of any tally, order, or other security whatsoever, entitling, or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings-bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order, or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or order for the delivery or transfer of any goods or valuable thing; . . . and whenever the term 'between' is used in reference to the transmission of letters, newspapers, parliamentary proceedings, or other things between one place and another, it shall apply equally to the transmission from either place to the other; and every officer mentioned shall mean the person for the time being executing the functions of that officer. . . ." By 47–8 V. 76, 19, in both these Acts and in others "the expression 'post-letter' shall mean a postal packet, as defined by this Act, from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed, and a delivery of a postal packet of any description to a letter carrier or other person authorised to receive postal packets of that description for the post, shall be a delivery to the post-office, and a delivery at the house or office of the person to whom the postal packet is addressed, or to him or to his servant or agent, or other person considered to be authorised to receive the postal packet according to the usual manner of delivering that person's postal packets, shall be a delivery to the person addressed. The expression 'post-office' shall mean any house, building, room, carriage, or place where postal packets, as defined by this Act, or any of them, are by the permission or under the authority of the postmaster-general, received, delivered, sorted, or made up, or from which such packets, or any of them, are by the authority of the postmaster-general despatched, and shall include any post-office letter box. The expression 'post-office letter box' shall include any pillar box, wall box, or any other box or receptacle provided by the permission or under the authority of the postmaster-general for the purpose of receiving postal packets, or any of them, for transmission by or under the authority of the postmaster-general."

Post-office money orders.] By 11–12 V. 88, 4, "every officer of the post-office who shall grant or issue any money order with a fraudulent intent" is guilty of felony, and liable to seven years' transportation (see p. 198). Cf. p. 771. By s. 5, the property may be laid in the postmaster-general. S. 4, and that Act, generally, is extended to "postal orders" by 43–4 V. 33, which also provides against forgery of and fraud through these orders.

Injury to post-office property.] By 47–8 V. 76, 3: "A person shall not place or attempt to place in or against any post-office letter-box any fire, any match, any light, any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, or any fluid, and shall not commit a

nuisance in or against any post-office letter-box, and shall not do or attempt to do anything likely to injure the box, appurtenances, or contents.

Any person who acts in contravention of this section shall be guilty of a misdemeanor, and be liable on summary conviction to a fine not exceeding ten pounds, and, on conviction on indictment, to imprisonment with or without hard labour for a period not exceeding twelve months."

Explosive, inflammable, or deleterious substances, or indecent prints, words, &c.] By s. 4 (1): "A person shall not send or attempt to send a postal packet which either—(*a*) Encloses any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, any sharp instrument not properly protected, any living creature which is either noxious or likely to injure other postal packets in course of conveyance, or an officer of the post-office, or any article or thing whatsoever which is likely to injure either other postal packets in course of conveyance or an officer of the post-office, or (*b*) Encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book, or card, or any indecent or obscene article, whether similar to the above or not; or (*c*) Has on such packet, or on the cover thereof, any words, marks, or designs of an indecent, obscene, or grossly offensive character.

(2) Any person who acts in contravention of this section shall be guilty of a misdemeanor, and shall be liable on summary conviction to a fine not exceeding ten pounds, and, on conviction on indictment, to imprisonment with or without hard labour for a period not exceeding twelve months.

(3) The detention in the post-office of any postal packet on the ground of its being in contravention of this section shall not exempt the sender thereof from any proceedings which might have been taken if the same had been delivered in due course of post."

An editor inserted in his newspaper advertisements, not themselves offensive, of obscene books, &c., to be sold by foreigners abroad, well knowing to what the advertisements referred. A police officer wrote to the advertised addresses and obtained the books. A conviction for causing and procuring, &c., an offence against this s. was upheld, by virtue of 24–5 V. 94, 8, p. 158, as aiders and abettors in misdemeanor, are themselves principals. *De Marny*, 1907, 1 *K. B.* 388; 76 *L. J. K. B.* 210; 23 *T. L. R.* 221; *C. C. R.*, pp. 158, 660.

Opening or impeding delivery of letters.] By 54–5 V. 46, 10: "Any person not in the employment of the postmaster-general, who wilfully and maliciously with intent to injure any other person either opens or causes to be opened any letter which ought to have been delivered to such other person, or does any act or thing whereby the due delivery of such letter to such other person is prevented or impeded, shall be guilty of a misdemeanor, and be liable to a fine not exceeding fifty pounds, or to imprisonment not exceeding six months. Nothing in this section shall apply to a person who does any act to which this section applies where he is parent or in the position of a parent or guardian of the person to whom the letter is addressed.

A prosecution shall not be instituted in pursuance of this section except by direction of the postmaster-general.

A letter in this section means a post letter within the meaning of the Post Office (Protection) Act, 1884 [p. 709], and any other letter which has been delivered by post."

What is a post letter.] Under 7 W. 4 & 1 V. 36, 26, p. 706, it was held, where an inspector secretly put (but did not post) a letter, prepared for the purpose, containing a sovereign, amongst some letters, which a letter-carrier suspected of dishonesty was about to sort, and the latter stole the

letter and sovereign, that he was not rightly convicted of stealing *a post letter*, such letter not having been put in the post in the ordinary way, but was rightly convicted of larceny of the sovereign, laid as the property of the postmaster-general. *Rathbone*, 2 *Moo. C. C.* 242 (1841), p. 708; *Shepherd*, 25 *L. J. M. C.* 52 (1856), *C. C. R.* A post-office official put a half-sovereign into a letter, on which he wrote a fictitious address and posted it in the ordinary way. It was held that this was a "post-letter" within the s., and not the less so because it had a fictitious address. *Young*, 1 *Den. C. C. R.* 194 (1846); Pollock C.B. thinking he had ruled wrongly in *Gardner*, p. 187. Where a person took a letter containing notes to the post-office, which was at an inn, but did not post it, but laid it and the postage money on a table, telling the prisoner, a servant of the inn, who was not authorised to receive letters, that it was to be posted, and she said she would "give it to them," but stole the letter, &c.: Wightman J. held that this was not a "post letter" within the s. *Harley*, 1 *C. & K.* 89 (1843).

As to telegraphic messages, see pp. 706 and 783.

"*Employed by or under the post-office.*"] The employment of the offender "by or under the post-office" must be proved. It is not necessary in these cases to produce the actual appointment of the prisoner, it is sufficient to show that he acted in the capacity imputed to him. *Borrett*, p. 7; *Rees*, 6 *C. & P.* 606 (1834); *Shaw*, p. 72; *Ellins*, pp. 72, 712. A person employed at a receiving-house of the general post-office to clean boots, &c., and who occasionally assisted in tying up the letter-bags, was held not to be a person "employed by or under the post-office" within 52 G. 3, 143, 2 (repealed). *Pearson*, 4 *C. & P.* 572 (1831), p. 713. S. delivered two 5*l.* notes to Mrs. D., the wife of the postmaster of C., at which post-office money orders were not granted, and asked her to send them by G., the prisoner, a letter-carrier from C. to W., in order that he might get two 5*l.* money orders for them at the W. post-office. Mrs. D. gave these instructions to G., and put the notes by his desire into his bag. G. afterwards took the notes out of the bag, and pretended, when he got to the W. post-office, that he had lost them. It was found by the jury that G. had no intention to steal the notes when they were given to him by Mrs. D. It was held that this was not larceny (apparently on the ground that the notes were not in G.'s possession in the course of his duty as a post-office servant). *Glass*, 1 *Den. C. C. R.* 215 (1847), see p. 538, and below. The prisoner was employed to carry letters from C. A. to F., such employment being complete upon the delivery of the letters at F. Upon one occasion, at the request of the postmaster at F., the prisoner assisted in sorting the letters at that place, and whilst so engaged stole one of the letters containing money. It was held that he was "employed under the post-office," within s. 26, p. 706. *Reason*, 1 *Dears. & P. C. C.* 226 (1853). Coleridge J. distinguished *Glass*, above, on the ground that "it was not the business of the postmaster to get money orders." S., the postmistress of G., received from A. a letter unsealed, but addressed to B., and with it 1*l.* for a post-office order, 3*d.* for the poundage on the order, 1*d.* for the postage, and 1*d.* for the person who got the order. S. gave the letter unsealed and the money to the prisoner, who was the letter-carrier from G. to L., telling him to get the order at L., and enclose it in the letter, and post the letter at L. The prisoner destroyed the letter, never procured the order, and kept the money. Cresswell J. held that he was indictable under s. 26, as being at the time in the employment of the post-office. *Bickerstaff*, 2 *C. & K.* 761 (1848).

Where the prisoner was employed by a postmistress to carry letters from D. to B. at a weekly salary paid him by the postmistress, which was repaid to her by the post-office, it was held that he was a person employed by the

post-office within 52 G. 3, 143, 2 (repealed). *Salisbury*, p. 77; if one is so employed, it is not necessary that he should get possession in the course of his duty.

The prisoner was a letter-carrier employed by the post-office to deliver letters about Gloucester, and had been in the habit of calling at a lodge, and receiving letters there, and a penny upon each for the postage, and his practice was to deliver these letters at the Gloucester post-office; but he sometimes omitted to call at the lodge, and then the letters were taken and put into the post-office; when prisoner was ill another person had done exactly the same. Prisoner was charged with embezzling the pence thus received. It was urged that where the charge was of embezzling money received by virtue of his employment, it must be shown that it was the duty of prisoner to receive the money, and in this case it was his mere voluntary act, and he was neither bound to go to the lodge nor to receive the letters; but it was held by Coleridge J. that there was evidence to go to the jury, that the pence were received "by virtue of" prisoner's "employment." *Townsend, Carr. & M.* 178 (1841). Cf. p. 384.

Stealing, embezzling, secreting, or destroying—Evidence.] As to indictment, see p. 708.

Where prisoner secreted half a bank-note on one day, and the other half on another day, it was held to be a secreting of the note within 7 G. 3, 50 (repealed). "The doubt was, whether *secreting* in the statute did not mean the *original* secreting, as taking does; but" the judges "distinguished between taking and secreting, for after the prisoner had got possession of the second letter he secreted both." *Moore*, 2 *East P. C.* 582; 2 *Lea.* 575 (1792).

A post-office official made a mistake in the sorting of two letters containing money, and he threw the letters unopened down a water-closet in order to avoid a penalty attached to such mistake. It was held that this was a larceny of the letters and money, and also a secreting of the letters within s. 26, p. 709. *Wynn*, 1 *Den. C. C. R.* 365; 18 *L. J. M. C.* 51 (1848).

Where several securities, &c., are embezzled, see *Ellins*, pp. 72, 711. It is not necessary to prove the execution of the stolen instruments. *Ib.* Country bank-notes paid in London, and on their way to be re-issued, were held within 7 G. 3, 50 (repealed). *Ranson*, p. 558; *Willoughby*, p. 467, was a post-office case. As to post-office orders, &c., for money, see *Gilchrist, Vanderstein*, p. 467. None of the former statutes contained the word "coin" or "money." The prisoner was indicted under 7 G. 3, 50, above, for stealing a gold quarter-guinea, he being a sorter in the post-office; and it was objected successfully that as the letters contained *money*, and not securities for money, the case was not within the Acts. *Skutt*, 1 *Lea.* 106 (1774); 2 *East P. C.* 582. The security specified in the statute must be valid and available. *Pooley, Russ. & Ry.* 12; 2 *Leach* 887; 3 *B. & P.* 311 (1800), p. 803; unstamped draft.

A servant being sent with a letter, and a penny to pay the postage, and finding the office shut, put the penny inside the letter, and fastened it by means of a pin, and then put the letter into the box. A post-office messenger stole this letter with the penny in it. It was held by L. Denman C.J. that the prisoner might be convicted of stealing a post letter containing money, although the money was not meant for the addressee. *Mence, Carr. & M.* 234 (1841).

It seems that what is mentioned in the letter secreted, &c., will not be evidence against the prisoner to prove that the letter contained an enclosure mentioned in it. *Plumer*, p. 579, where both the letter opened and a bill mentioned in it were found in prisoner's, a sorter's, pocket. The letter was read, the judge reserving the point, which was not decided. See p. 79. The

letter had marked upon it, "paid 2s.," *i.e.* double postage. This was written by the clerk of the writer, who was not called; and there was also an official mark that two shillings had been paid. There being no other proof that a double letter had been posted, the judges held a conviction wrong. *Ib.*

On an indictment under repealed statutes, the jury found specially that prisoner was a person employed by the post-office in stamping and facing letters, and that he secreted a letter which came into his hands by virtue of his office, containing a 10*l.* note, but that he did not open the same, nor know that the bank-note was contained therein, but that he secreted it with intent to defraud the king of the postage (eightpence), which had been paid to him [and not to embezzle the note]. The prisoner, it is stated, remained in prison at least five years—which seems to imply that the judges thought he was guilty (but see *Howatt*, below)—but no judgment appears to have been given. *Sloper*, 2 *East P. C.* 583; 1 *Leach* 81 (1772).

Where prisoner, with intent to steal the mail-bags, pretended to be the guard, and procured them to be let down to him from the window of the post-office by a string, and carried them away; being found guilty, all the judges held the conviction right, on a count for stealing the letters out of the post-office, for his artifice in obtaining the delivery of them was the same as if he had actually taken them out himself. *Pearce*, 2 *East P. C.* 603 (1794). See *Kay*, below. It was held, also, that a letter-carrier taking letters out of the office, intending to deliver them to the owners, but to embezzle *the postage*, could not be indicted (under the *then* statutes) for stealing such letters. *Howatt*, 2 *East P. C.* 604; 1 *Lea.* 83 (1795); cf. *Sloper*, above.

What is a post-office.] It was held that a "receiving house" was not such, but such house was "a place for the receipt of letters" within the Act; and, if a shop, the whole shop, and not merely the box, was to be considered as "a place for the receipt of letters," and, therefore, the putting of a letter on the shop counter, or giving it to a person belonging to the shop, was a posting it. *Pearson*, p. 711. To constitute the offence under 52 G. 3, 143, 3 (repealed), of stealing a letter from the place of receipt, it was held, that the letter must be carried wholly out of the shop, and, therefore, if a person took and opened a letter in the shop, and there stole the contents, without taking it out of the shop, the case was not within that s. *Ib.* Cf. p. 711.

In whose possession letters in the post are.] In *Pearce*, above, "the property did not pass; the postmaster having no property in the mail-bag to part with." 2 *East P. C.* 673. The owner of a watch placed it with the seller to be regulated; prisoner, pretending by letter that he was the owner, desired the watchmaker to send it by post directed to the owner, and then by a further fraud obtained it from the postmaster. He was held to be rightly convicted of larceny, for, on receipt by the postmaster, the special property of the seller, the bailee ceased, "the general property of the true owner became entirely unincumbered, and drew to it the possession, unless the postmaster himself became the bailee. . . . But this he did not, according to *Pearce's case.*" *Kay, Dears. & B. C. C.* 231; 26 *L. J. M. C.* 119 (1857). See *Dowdeswell*, p. 541, and *Middleton*, p. 532, &c. See *Cryer*, p. 742.

PRISON BREACH.

See *Escape*, p. 391, *Rescue*, p. 744, and *Transportation*, p. 793.

Where a person is in custody on a charge of treason or felony and effects his escape by force, the offence is a felony at common law; where he is in custody on an inferior charge, it is a misdemeanor. 1 *Russ. Cri.* 899; see 1 E. 2, st. 2, below.

Upon a prosecution for prison breach there must be proved—1, the offence punished by the imprisonment; 2, the lawfulness of the imprisonment; and 3, the breaking of the prison.

Cause of the imprisonment.] The statute *de frangentibus prisonam*, 1 E. 2, st. 2 (or 23 E. 1, according to *The Statutes Revised*, from which the text is here taken), enacts, "that none from henceforth that breaketh prison shall have judgement of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such judgement, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise." If the offence, therefore, for which the person is arrested does not require judgment of life or member, prison-breach is not a felony. And if the offence for which the person is committed be supposed in the *mittimus* [= the authority to the gaoler to detain] to be of such a nature as requires a capital judgment, yet if in the event it be found of an inferior nature, and not to require such a judgment, it seems difficult to maintain that the breaking of the prison on a commitment for it can be felony. 3 *Hawk. P. C.* Bk. 2, ch. 18, s. 15. Perhaps the stating the offence in the *mittimus* to be one of lower degree than felony, will not prevent the breaking from being a felony, if in truth the original offence was not lower. *Ib.* A prisoner, on a charge of high treason, breaking prison, is only guilty of felony. *Ib.* s. 17. It is immaterial whether the person breaking prison had been tried or not. *Ib.* s. 16.

If the custody is upon a *capias*, or upon a *mittimus* (on suspicion of felony), he is within the statute, "be he never so innocent, and the prosecution never so groundless"; for he is bound to submit to his imprisonment, until "discharged by due course of law." But there is a distinction between the two, for a *capias* is a lawful warrant and matter of record, whether there has been a felony or not; but, if there has been none, breaking prison *on a mittimus* is no felony. 2 *Inst.* 590; 1 *Hale P. C.* 610; *Hawk. ib.* ss. 5–7. A man may therefore be convicted for breaking prison before he is convicted of the felony for which he was imprisoned. 2 *Inst.* 592; 1 *Hale*, 611; *Hawk. ib.* s. 18—"the breach of prison" being "a presumption of the guilt of the principal offense." *Hale*, 612. Yet if he has been tried and acquitted of the principal offence, he ought not to be indicted for the breaking. And if he has been so indicted before the acquittal, after it, he may plead *that* acquittal in bar to the indictment for breach. 1 *Hale P. C.* 611, 612. But a dismissal of a charge by magistrates is not tantamount to an acquittal upon an indictment. *Per* Martin B., *Waters*, 12 *Cox C. C.* 390 (1873), where prisoner, arrested without warrant, had been remanded by a magistrate without any evidence on oath, and had voluntarily appeared at the hearing; guilty, six weeks' imprisonment.

The imprisonment—the prison.] The imprisonment must be lawful; actual imprisonment will not be sufficient; it must be *primâ facie* justifiable. Therefore where a felony has been committed, but prisoner is apprehended for it, without just cause of suspicion, and the *mittimus* is informal, and he breaks prison, this will not be felony, though it would (probably) be otherwise if there were such strong causes of suspicion as justify his arrest and commitment. *Hawk. ib.* ss. 8, 15; 1 *Hale P. C.* 610. So if his imprisonment on *mittimus* is unjustifiable; see last paragraph.

The statute extends "to a prison in law," as well as to "a prison in deed," and to "lawfull arrest." 2 *Inst.* 589. An imprisonment in the stocks (*ib.*), or in the house of him who makes the arrest, or in the house of another, is sufficient. 1 *Hale P. C.* 609. So if one arrested for felony or suspicion thereof, felony, in fact, having been committed, violently rescues himself from the hands of the arrester. *Ib.* (relying on *Coke*, here cited). So *Hawk.* as above, s. 4, "for imprisonment is nothing else but a restraint of liberty."

"It is therefore enough if the gaoler have a sufficient notification of the offense for which he was committed, and the prisoner of the offense whereof he was arrested, and commonly, they know their own guilt, if they are guilty, without much notification." *Hale, ib.* 610.

The breaking.] An actual breaking of the prison with force, and not merely a constructive breaking, must be proved. "If the gaoler sets open the prison doors, and the felon escapes," this is no felony in the latter, though it may be in the former. *Hale, ib.* 611. And if the prison be fired, and the prisoner escapes to save his life, this excuses the felony, unless the prisoner himself set fire to the prison, or it be done with his privity. *Ib.*, after 2 *Inst.* 590. In these cases the breaking amounts to a misdemeanor only (escape). And so, if other persons without his privity break the prison and he escape. *Hawk.* as above, ss. 9, 10. "No breach of prison will amount to felony, unless the prisoner escape." *Hawk. ib.* s. 12 (p. 744), *e.g.* if he be taken away by force; 2 *Inst.* 590; 1 *Hale*, 611. A prisoner convicted of felony made his escape over the walls of Brixton prison, in accomplishing which he threw down some bricks from the top of the wall, which had been purposely placed there loose, without mortar, in the form of pigeon holes, for the purpose of giving an alarm, and so preventing escapes. A doubt arose whether there was such force used as to constitute prison-breaking, but the judges were unanimously of opinion that the conviction was right. *Haswell, Russ. & Ry.* 458 (1821).

Punishment.] Prison-breach is still felony at common law when the charge is one of treason or felony; upon any other inferior charge, it is punishable only "as a high misdemesnour by fine and imprisonment." 4 *Bl. Com.* 130; *Hawk.* as above, s. 21.

By 2 G. 2, 25, 2, of which the first part is set out, p. 694, any person committed to prison (or transported) for perjury and subornation thereof, who "shall voluntarily escape or break prison . . . shall suffer death as a felon without benefit of clergy. . . ." That this provision has not been repealed must, it is submitted, be due to inadvertence.

By 7–8 G. 4, 28, 8 (as amended): "Every person convicted of any felony not punishable with death, shall be punished in the manner prescribed by the statute or statutes especially relating to such felony; and every person convicted of any felony, for which no punishment hath been, or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable . . . to be transported beyond the seas for the term of seven years" (see p. 198). See, *e.g.*, p. 456.

Aiding prison-breach.] See 28-9 V. 126, 37, set out p. 393; see also p. 156. By s. 4, "prison" shall mean "gaol, house of correction, bridewell, or penitentiary; it shall also include the airing grounds or other grounds or buildings occupied by prison officers for the use of the prison, and contiguous thereto."

A crowbar is included in the words "any other article or thing." *Payne*, *L. R.* 1 *C. C. R.* 27; 35 *L. J. M. C.* 170 (1866).

An indictment under 4 G. 4, 64, 43 (repealed), need not have set out the means which had been used by the defendant to assist the prisoner to escape. *Holloway*, pp. 192, 199, in which the indictment charged that A., being a prisoner in a gaol, and endeavouring to effect his escape, had procured a key to be made to that end, and had made overtures to the defendant, a turnkey in the gaol, to induce him to assist him to escape; that the defendant received the key with intent to enable A. to escape, &c. It was held that the offence was stated with sufficient certainty, and that the allegation of the intent sufficiently showed an illegal act.

How far such assistance makes an accessory, see p. 156.

As to killing the prison-breaker, see p. 516.

PUBLIC COMPANIES—OFFENCES BY OFFICERS OF.

Embezzlement.] By 24–5 V. 96, 81: "Whosoever, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to" penal servitude not exceeding seven years (see p. 198). The s. refers for punishment to s. 75, for which see p. 163. Where a bank director, by arrangement with bank officials, but without the knowledge or consent of the board (in defiance of an express article of association) opened a "trust" account at a branch, and from time to time overdrew, and when the bank stopped payment about seven years after there had been any operation at all on the account, owed the bank a large sum on the overdrafts, he being solvent at the time the overdrafts were made, a conviction in the Isle of Man under this s. (*i.e.* under a local statute which incorporated it *verbatim*) was quashed by the Judicial Committee of the Privy Council on the ground that there was no evidence of fraudulent appropriation within the s. *Nelson* v. *R.*, 20 *Cox C. C.* 150; 1902, *A. C.* 250.

Keeping fraudulent accounts.] By s. 82: "Whosoever, being a director, public officer, or manager of any body corporate or public company, shall, as such, receive or possess himself of any of the property of such body corporate or public company, otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor. . . ." Punishment as under s. 81.

Destroying or falsifying books, &c.] By s. 83: "Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanor." Punishment as under s. 81.

Publishing fraudulent statements.] By s. 84: "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor." Punishment as under s. 81. A manager, who has acted throughout

as such, though not so appointed, is within this s. *Lawson*, 1905, 1 *K. B.* 541; 20 *Cox C. C.*; *C. C. R.*

Cf. on these ss. pp. 561–2.

Interpretation.] For "property," see s. 1, p. 522.

These offences are not triable at quarter sessions; see s. 87, p. 164; cf. p. 562.

Compulsory admission of offences.] See p. 237. Witnesses are not protected from answering incriminating questions under these ss.; but they cannot be convicted of any offence so disclosed.

Falsification of books, &c., of company.] By 25–6 V. 89, 166–168, directors, officers, &c., falsifying books, &c., and committing other offences in the course of winding up are guilty of a misdemeanor, and liable to two years' imprisonment with or without hard labour; and provision is made for the payment of the expenses of the prosecution.

As to falsification of accounts by other persons, see pp. 378, 426. "Any person" making a false return, report, certificate, &c., under the Companies Act, 1900, is liable to two years' imprisonment with or without hard labour, or to a summary conviction; 63–4 V. 48, 28.

Offences as to railway securities by railway directors, &c.] See 29–30 V. 108, 15–17, and 31–2 V. 119, 5; see p. 719.

Penalties.] "All offences under the Companies Acts [see Index] made punishable by any penalty may be prosecuted under the Summary Jurisdiction Acts." 7 E. 7, 50, 49.

RAILWAYS—OFFENCES RELATING TO.

Signing false statements, &c.] Delivering mortgage deeds, bonds or certificates without a statutory declaration, or signing false declarations, &c., are offences by directors or officers within 29–30 V. 108, 15–17, and 31–2 V. 119, 5 (statements, balance sheets, &c.); and a false statement upon oath to a Board of Trade inspector is perjury (s. 8 of the latter).

Misconduct of servants.] By 3–4 V. 97, 13: "It shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine-driver, guard, porter, or other servant in the employ of such company who shall be found drunk while employed upon the railway, or commit any offence against any of the bye-laws, rules, or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains, shall be or might be obstructed or impeded, and to convey such engine-driver, guard, porter, or other servant so offending, or any person counselling, aiding, or assisting in such offence, with all convenient despatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this Act; and every such person so offending, and every person counselling, aiding, or assisting therein as aforesaid, shall, when convicted before such justice as aforesaid (who is hereby authorised and required, upon complaint to him made upon oath, without information in writing, to take cognisance thereof, and to act summarily in the premises), in the discretion of such justice, be imprisoned with or without hard labour, for any term not exceeding two calendar months, or in the like discretion of such justice, shall for every such offence forfeit to her Majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned with or without hard labour as aforesaid. . . ." Extended by 5–6 V. 55, 17.

By 3–4 V. 97, 14, the case may be committed to quarter sessions, where the maximum punishment is two years' imprisonment with or without hard labour.

Setting fire to railway stations.] See p. 239.

Endangering the safety of passengers.] By 24–5 V. 100, 32: "Whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such

railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping." Cf. p. 171.

By s. 33: "Whosoever shall unlawfully and maliciously throw, or cause to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part, shall be guilty of felony, and being convicted thereof shall be liable"—conclusion as in s. 32, above, except as to whipping.

By s. 34: "Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."

Obstructing, &c., the line.] By 24–5 V. 97, 35: "Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway, any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully or maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck, using such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life"—conclusion exactly as in s. 32, above.

By s. 36: "Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."

Intent.] Where some one designedly placed on a railway obstructive substances, though not expressly to upset carriages, &c., it was held indictable under 3–4 V. 97, 15 (repealed), which corresponds partly to 24–5 V. 100, 36, and partly to s. 33, above. *Holroyd*, 2 *Moody & R.* 339 (1841), where defendant had indicted the company for a diversion, and asserted that the earth and rubbish on their line had been accidentally dropped by his workmen; the jury disagreed.

The prisoner was indicted under 14–15 V. 19, 7 (repealed), which is similar to s. 33, above, for throwing a stone into a railway carriage. There had been considerable popular excitement against a person who was about to travel by the train, and there was a crowd assembled at the time of his departure, and the prisoner threw a stone at this person (apparently whilst he was in the carriage). Erle J. expressly in view of the preamble in s. 4 and the terms of s. 6, considered "that the *intent to endanger the safety of any person* travelling on the railway, spoken of in both sections [viz. 6 and 7], must appear to have been an intent to inflict some grievous bodily harm, and such as would sustain an indictment for assaulting or wounding a person with

intent to do some grievous bodily harm." This intent accordingly, he left to the jury, who found not guilty. *Rooke*, 1 *F. & F.* 107 (1858). Where prisoner threw a stone over the parapet of a bridge, which fell upon the tender of a passing engine, but there was no one on the tender at the time, though there was on the engine, it was held that he could not be convicted under s. 7, above, where the words required some person on the vehicle struck. *Court*, 6 *Cox C. C.* 202 (1853). The omission is supplied in s. 33, p. 720.

What is a railway.] A railway finished (and used for conveying workmen and materials), but not yet open to the public, is within 3–4 V. 97, 15, above. *Bradford*, 29 *L. J. M. C.* 171 (1860); *C. C. R.* "Railway" is defined, 3–4 V. 97, 21, and there are other definitions for other purposes; see *Stroud's Judicial Dictionary.*

What is obstruction.] Prisoner altered the arms of a signal and the colour of two "distant" signal lights, with the result that the driver of a train slackened speed, and nearly brought the train to a standstill, causing delay. It was held that this was an obstruction within s. 36, p. 720. *Hadfield*, *L. R.* 1 *C. C. R.* 253; 39 *L. J. M. C.* 131 (1870). So also where a man caused a goods train, on which he wished to ride, to slacken speed by holding up his hands, as the officials do, it was held to be an obstruction. *Hardy*, *L. R.* 1 *C. C. R.* 278 (1871).

Distinction between felonies and misdemeanors.] 24–5 V. 97, 35, and 24–5 V. 100, 32, both p. 720, make some offences felonies. S. 36 of the former, and s. 34 of the latter—*ib.*—make the same acts done *without* intent a misdemeanor. See an important point in *Gilmore*, p. 171.

As to offences on railways, see pp. 490, 659.

RAPE AND DEFILEMENT.

Rape.] By 24–5 V. 100, 48: "Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . ." (see p. 198).

Indecent assault.] See pp. 250, 256.

Abduction.] See p. 226.

"*Carnal knowledge.*"] By 24–5 V. 100, 63: "Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only." This definition applies to offences under 48–9 V. 69, 4, p. 723. *Marsden*, 1891, 2 *Q. B.* 149; 60 *L. J. M. C.* 171; 17 *Cox C. C.* 297; *C. C. R.* Cf. p. 778.

Procuration.] By 48–9 V. 69, 2: "Any person who—

(1) Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connexion, either within or without the Queen's dominions, with any other person or persons; or

(2) Procures or attempts to procure any woman or girl to become, either within or without the Queen's dominions, a common prostitute; or

(3) Procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere; or

(4) Procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions,

shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused." Cf. p. 352.

Threats or fraud, or administering drugs.] By s. 3: "Any person who—

(1) By threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(3) Applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused." Cf. p. 252, and as to sub-s. 3, p. 229.

Girl under thirteen years of age.] By s. 4: "Any person who—

unlawfully and carnally knows any girl under the age of thirteen years

shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years . . . [see p. 198].

Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. [See p. 258.]

Provided that in the case of an offender whose age does not exceed sixteen years [cf. *Waite*, pp. 258, 727, and see p. 256], the court may, instead of sentencing him to any term of imprisonment, order him to be whipped, as prescribed by 25 & 26 Vict. c. 18 . . . and the said Act shall apply, so far as circumstances admit, as if the offender had been convicted in manner in that Act mentioned; and if, having regard to his age and all the circumstances of the case, it should appear expedient, the court may, in addition to the sentence of whipping, order him to be sent to a certified reformatory school, and to be there detained for a period of not less than two years, and not more than five years.

The court may also order the offender to be detained in custody for a period of not more than seven days before he is sent to such reformatory school.

Where upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused: provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn. [Cf. p. 328.]

Personating husband.] Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape." Cf. p. 253.

Girl between thirteen and sixteen.] By s. 5, "any person who—

(1) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years; or

(2) Unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile [cf. p. 519],

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. [Cf. p. 256.]

Provided that it shall be a sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

Provided also, that no prosecution shall be commenced for an offence under sub-section one of this section more than *six* months after the commission of the offence." *Six* here is an amendment by 4 E. 7, 15, 27, p. 329. *Chandra Dharma, &c.*, 1905, 2 *K. B.* 335: *C. C. R.*, are now only important as confirming "the rule . . . that . . . statutes which make alterations in procedure are retrospective."

It is not a criminal offence for a girl between the ages of thirteen and sixteen to aid and abet a male person in committing or to incite him to commit an offence upon herself. *Tyrrell*, 1894, 1 *Q. B.* 710; 63 *L. J. M. C.* 58; 17 *Cox C. C.* 716; *C. C. R.* If evidence of other offences may be given at all (see *Other Offences* in Index) they must be, in a charge under this s., *legal* offences. Now, to make the *legal* offence within sub-s. 1 of this s. the prosecution must be commenced within a certain time (proviso 2). Hence when there was no evidence in chief of such acts (between prisoner and prosecutrix) out of the time and nothing in prisoner's cross-examination of her witnesses to let it in, but he *in answer to cross-examination* denied all such acts, Pollock C.B. refused to allow her to be called to contradict him, because it would not have been evidence in chief. *Beighton*, 18 *Cox C. C.* 535 (1897); this seems to be the only explanation of this case. But see p. 730. But where prisoner was committed for trial for rape, the offence having been committed less than three months before such committal, but was subsequently indicted and tried *under s.* 5 (1) more than three months after the offence, it was held that the proviso had been complied with, since by s. 9, p. 725, a charge of rape includes a charge of the misdemeanor under s. 5. *West*, 1898, 1 *Q. B.* 174; less fully reported, 18 *Cox C. C.* 675; *C. C. R.* See p. 485.

Householder, &c., permitting offences.] By s. 6: "Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof—

induces or knowingly suffers any girl of such age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally,

(1) shall, if such girl is under the age of thirteen years, be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life or for any term not less than five years . . . [see p. 198]; and

(2) if such girl is of or above the age of thirteen and under the age

of sixteen years, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years."

Abduction of girl under eighteen.] See p. 227.

Unlawful detention.] By s. 8: "Any person who detains any woman or girl against her will—

(1) In or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally, or

(2) In any brothel,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connexion, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person witholds from such woman or girl any wearing apparel or other property belonging to her, or, where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.

No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel."

On indictment for rape, certain misdemeanors may be found.] By s. 9: "If upon the trial of any indictment for rape, or any offence made felony by section four of this act [p. 723], the jury shall be satisfied that the defendant is guilty of an offence under section three, four, or five [above] of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault [p. 256], and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanor of indecent assault." See p. 729.

Custody of girls under sixteen.] By s. 12: "Where on the trial of any offence under this Act it is proved to the satisfaction of the court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, it shall be in the power of the court to divest such father, mother, guardian, master, or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the court may direct, and the High Court shall have the power from time to time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect." Cf. p. 326.

Other criminal proceedings.] By s. 16: "This Act shall not exempt any person from any proceeding for an offence which is punishable at common law, or under any Act of parliament other than this Act, so that a person be not punished twice for the same offence."

Vexatious Indictments Act.] By s. 17, every misdemeanor under this Act is within that Act, p. 160, "and no indictment under the provisions of this Act shall in England be tried by any court of quarter sessions."

Costs.] By s. 18: "The court before which any misdemeanor indictable under this Act, or any case of indecent assault, shall be prosecuted or tried may allow the costs of the prosecution, in the same manner as in cases of felony, and may in like manner, on conviction, order payment of such costs by the person convicted; and every order for the allowance or payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony." See p. 207.

Spouses as witnesses.] See pp. 104, 107, 829–31.

Female lunatic.] See p. 519.

Definition of rape.] Part of 13 E. 1, st. 1 (the 2nd stat. of Westminster, 1285), c. 34 (repealed), is as follows:—"It is provided that if a man from henceforth do ravish a woman, married, maid, or other, where she did not consent, neither before nor after, he shall have judgement of life and of member. And likewise where a man ravisheth a woman, married lady, damsel or other, with force, although she consent after, he shall have such judgement as before is said, if he be attainted at the king's suit, and there the king shall have the suit." This has been held to contain the right definition of rape. *Fletcher, Bell C. C.* 63; 28 *L. J. M. C.* 85; 8 *Cox C. C.* 131 (1859); *Camplin*, 1 *C. & K.* 746; 1 *Den. C. C.* 89 and *Addenda*, p. xvii.; 1 *Cox C. C.* 220 (1845); and other cases—all discussed p. 728. Coke defines it "the unlawfull and carnall knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will." 3 *Inst.* 60. Hale follows Coke, 1 *P. C.* 628. Hawkins's definition is "having unlawful and carnal knowledge of a woman by force against her will," Bk. 1, ch. 41, s. 2; repeated 1 *East P. C.* 434. In these definitions, the words "against her will" must be taken to mean no more than "without her consent," if the above-mentioned cases are to be taken as correct law. Cf. *Fletcher, L. R.* 1 *C. C. R.* 39; 35 *L. J. M. C.* 172 10 *Cox C. C.* 248 (1866)[1]; p. 728. Stephen J. in *Clarence*, pp. 252, 728, defines rape as "having connection with a woman without her consent."

Age of offender.] See p. 805. An infant under the age of fourteen years is presumed by law unable to commit a rape, "but he may be a principal in the second degree, as aiding and assisting . . . if it appear by sufficient circumstances that he had a mischievous discretion, as well as in other felonies." 1 *Hale P. C.* 630; *Eldershaw*, 3 *C. & P.* 396 (1828)—common assault found; *Groombridge*, 7 *C. & P.* 582 (1836). Where the precise age was not proved, Patteson J. said, "I think that the prisoner could not in point of law be guilty of the offence of assault with intent to commit a rape, if he was at the time of the offence under the age of fourteen. And I think also that if he was under that age, no evidence is admissible to show that in point of fact he could commit the offence of rape." *Philips*, p. 17; common assault found. In *Jordan*, 9 *C. & P.* 118 (1839) (where a girl was jointly indicted for abetting him, p. 730), Williams J. held that the boy, if under fourteen years of

age (about which there was a doubt), could not be convicted of carnally knowing, &c., although it was positively proved that he had arrived at puberty. A boy under fourteen cannot be convicted under s. 4, p. 723, *Waite*, p. 258, &c.; but he can, though indicted under s. 4 (by s. 9, pp. 725, 730), be found guilty of an indecent assault. *Williams*, p. 258, &c. As to the *attempt*, see p. 258. If a boy under fourteen cannot be guilty of the *attempt*, he cannot be whipped under this Act, the only power to whip being given by s. 4, p. 723.

Who may be guilty.] A woman, it seems, may be convicted of rape as a principal in the second degree. *Ram*, pp. 152, 183, *per* Bowen L.J. where a husband and wife were jointly indicted and convicted for rape. Cf. *Jordan*, above, and p. 730.

As to a husband committing a rape upon his own wife, see *L. Audley* or *Castlehaven*, p. 106.

Indictment.] Where a prisoner was convicted of rape on an indictment, which charged that he "in and upon E. F., &c., violently and feloniously did make" (omitting the words "an assault") "and her the said E. F. then and there against her will violently and feloniously did ravish and carnally know against the form of the statute, &c."; it was held, by ten of the judges, that the omission of these words was no ground for arresting the judgment. *Allen*, 9 *C. & P.* 521 (1840).

What is "consent."] "It is no mitigation of this offence that the woman at last yielded to the violence, if such consent were forced from her by fear of death or by duress. Nor is it any excuse . . . that the woman consented after the fact, nor that she was a common strumpet; for she is still under the protection of the law and may not be forced; nor that she was first taken with her own consent, if she were afterwards forced against her will; nor that she was a concubine to the ravisher; for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment. All these latter circumstances, however, are material to be left to the jury in favour of the . . . accused, more especially in doubtful cases, and where the woman's testimony is not corroborated by other evidence." 1 *East P. C.* 444; 1 *Hale* 628, 631; 1 *Hawk. P. C.* Bk. 1, ch. 41, ss. 6-8; *Fletcher* (1859), p. 726, and below. See now, as to corroboration, 48-9 V. 69, 2, 3, 4, pp. 723-4.

Personation of a husband with a view to carnal knowledge, p. 253, has now been settled by the legislature to be rape, s. 4, p. 723. It will be useful, however, to mention some of the earlier decisions. The prisoner got into a woman's bed as if he had been her husband, and was in the act of copulation, when she made the discovery; upon which, and before completion, he desisted. The jury found that he had entered the house with intent to pass for her husband, and to have connexion with her, but not with the intention of forcing her, if she made the discovery. A majority of the judges (eight to four) held that the prisoner was not guilty of rape; several recommended a special verdict in such a case. *Jackson, Russ. & Ry.* 487 (1822); *Clarke*, 1 *Dears. & P. C. C. R.* 397; 24 *L. J. M. C.* 25 (1854). See as to the absence of intention to use force, *Stanton*, 1 *C. & K.* 415 (1844), and *Barrow*, *L. R.* 1 *C. C. R.* 156; 38 *L. J. M. C.* 20; 11 *Cox C. C.* 191 (1868), where, though *technical* force was used, a conviction was quashed, because as the woman was not asleep nor unconscious, consent was obtained, though by fraud, she believing the man to be her husband, who was, in fact, asleep at her side. But where a man intended to have connexion while the woman was asleep, and attempted to do so, it was ruled that he might be convicted,

as he was, of the attempt. *Per* Lush J., *Mayers*, 12 *Cox C. C.* 311 (1872). *Barrow*, above, was generally questioned in *Flattery*, 2 *Q. B. D.* 410; 46 *L. J. M. C.* 130; 13 *Cox C. C.* 388 (1877); *C. C. R.*, where the prisoner, under pretence of performing a surgical operation on a girl, had connexion with her, she submitting thereto, believing that he was treating her medically. The court on these facts held the prisoner to have been rightly convicted of rape, some judges greatly regretting the decision in *Barrow*. Nevertheless, in *O'Shay*, p. 253 (a very similar case to *Flattery*), Ridley J. following *Stephen Dig. Cr. L.* art. 270, p. 207, 5*th ed.*, held that the Criminal Law Amendment Act, 1885 (48–9 V. 69), had made *Flattery* no longer law, and that the true rule was (*ib.*) that "rape is overcoming a woman by force," and that a "conscious permission," though obtained by fraud, and although she did not know the nature of the act, does not amount to rape—the single exception being that made by the last par. of s. 4, p. 723: prisoner might be (and was) convicted of indecent assault, if the jury thought that by pretending to be a doctor the woman was induced to permit what she did.

In *Clarence*, pp. 252, 726, Stephen J. said, "The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to, in fact, into a rape are frauds as to the nature of the act itself, and as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done." In *Young*, 14 *Cox C. C.* 114 (1878), *C. C. R.*, which was almost exactly similar in circumstances to *Barrow*, except that the woman was asleep, and where the jury found that nothing in her conduct led the prisoner to believe that she consented, the court, on hearing that she was asleep, said that fact put an end to all doubt that the crime was rape.

Females—imbecile, drunk, &c.] In *Camplin*, p. 726, the prisoner made a girl quite drunk, and when she was in a state of insensibility, took advantage of it, and had connexion with her. The jury found the prisoner guilty, but that he gave her the liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having connexion with her. It was held by ten judges to three that the prisoner was properly convicted of rape. In *Fletcher* (1859), p. 726, the prisoner had carnal knowledge of a girl of thirteen, who made no resistance, but who, as the jury found, from defect of understanding, was incapable of giving consent. After much argument a conviction for rape was held good. "The question is," said L. Campbell C.J. "what is the real definition of the crime of rape, whether it is the ravishing a woman *against her will* or *without her consent*. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved. *Camplin's case* seems to me really to settle what the proper definition is; and the decision in that case rests upon the authority of an Act of Parliament [p. 726]. . . . We are bound by that definition."

The attention of the court was called to this last case in *Fletcher* (1866), p. 726, the circumstances of the two being very similar; here, however, prisoner alleged consent on that and other occasions. The jury found the prisoner guilty, but the court unanimously quashed the conviction, being of opinion that there must be some evidence that the act was against the female's will or without her consent, even if she was (as here) an idiot, and that in the absence of such evidence there was no case to go to the jury. Pollock C.B. argued that "if mere incapacity to consent," as in the case of a girl of tender years, "were sufficient to constitute the crime of rape," ss. 50, 51, of 24–5 V. 100 (now repealed), "would have been unnecessary," and he thought that to

make mere connexion with an idiot, a crime would equally require an Act. The *L. J.* report has a *quære* whether this case does not overrule *Fletcher* (1859). The two cases of *Fletcher* were further considered in *Barratt*, *L. R.* 2 *C. C. R.* 81; 43 *L. J. M. C.* 7 (1873). There prisoner was found guilty of an attempt at rape on a girl of fourteen and a half, who, beyond all doubt, was an idiot. The court, in affirming the conviction, stated that the rule laid down in *Fletcher* (1859) was right, and that it was not intended in *Fletcher* (1866) to depart from this rule, viz. that it is sufficient to show absence of consent but to show this is essential, but that in the latter there was not sufficient evidence of absence of consent. Blackburn J. pointed out that in *Fletcher* (1866) the degree of idiocy was much slighter than in *Fletcher* (1859), or in *Barratt*, and that where there is idiocy, the question must always be one of degree.

"It is submitted that the true rule must be, that where the man is led from the conduct of the woman to believe that he is not committing a crime known to the law, the act of connection cannot under such circumstances amount to a rape. In order to constitute rape there must, it would appear, be an intent to have connection with the woman notwithstanding her resistance." This opinion appeared in the 7th edition of this work (1868) by Mr. (afterwards Justice) J. F. Stephen. For the substance of what the same writer lays down in his *Digest*, see p. 728. In *Urry*, Lincoln Spring Assizes, 1873, this passage was approved of by Denman J. whose remarks, and those of Field J. in *Flattery*, and Huddleston B.'s reference to the former in *Young*, p. 728, see. Cf. also *Thurburn*, p. 550, where Parke B. said (in effect) that the guilt of one accused of stealing a bank-note he had found must depend upon the circumstances as they appear to *him*.

See further, as to the difference between consent and submission, p. 253.

Extent of the rape.] See s. 63, p. 722.

It has been made a question how far the circumstance of the hymen not being injured is proof that there has been no penetration. Where it was proved not to have been broken, Ashurst J. left it to the jury to say whether penetration was proved; for that if there were any, however slight, the rape was complete in law. The judges held a conviction right; "in such cases, the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity." *Russen*, 1 *East P. C.* 438 (1777). See *Gammon*, 5 *C. & P.* 321 (1832), and *Poore's Medical Jurisprudence* (1901), p. 326; cf. *Beck's Medical Jurisprudence*, 7*th ed.* (1842), p. 91. In *M'Rue*, 8 *C. & P.* 641 (1838), where the sufferer was a child under ten, the surgeon stated that her private parts internally were so much inflamed that he was not able to ascertain whether the hymen had been ruptured or not. Bosanquet J. (Coleridge and Coltman JJ. being present), said, "It is not necessary, in order to complete the offence, that the hymen should be ruptured, provided that it is clearly proved that there was penetration; but where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape." The prisoner was found guilty of an assault. But in *Hughes*, 2 *Moo. C. C.* 190 (1841), it was held, on a case reserved, that penetration, short of rupturing the hymen, is sufficient to constitute rape, and that *Russen*, above, so decided. So, in *Lines*, 1 *C. & K.* 393 (1844), Parke B. told the jury that if any part of the *membrum virile* was within the *labia* of the *pudendum*, no matter how little, this was sufficient to constitute a penetration, and the jury ought to convict the prisoner. As to this point, under s. 4, p. 723, see *Marsden*, p. 722.

On a charge of rape, prisoner may be found guilty of the *attempt*, by 14–15 V. 100, 9, p. 69. See also 48–9 V. 69, 9, p. 725.

Accessories.] Cf. pp. 259, 727. An indictment, charging the prisoner both as principal in the first degree, and as aiding and abetting other men in committing a rape, was held, after conviction, to be valid, upon the first count charging the prisoner as principal. It was held that evidence might be given of several rapes on the same woman, at the same time, by prisoner and other men each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *Folkes*, 1 *Moo. C. C.* 354 (1832). So a count charging A. with rape as a principal in the first, and B. as a principal in the second degree, may be joined with another charging them *vice versâ*—as the judgment is not different on either count. *Gray*, 7 *C. & P.* 164 (1835).

Credibility of the prosecutrix.] "The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame, if she presently discovered the offense, made pursuit after the offender, shewed circumstances and signs of the injury, whereof many are of that nature that women only are the most proper examiners and inspectors, if the place wherein the fact was done was remote from people, inhabitants, or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony when proved by others as well as herself." 1 *Hale P. C.* 633; cf. *East* 1 *P. C.* 445. See pp. 23, 256. "But, on the other side, if she concealed the injury for any considerable time after she had an opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned." *Ib.* See *Lillyman*, p. 24.

A famous caution is given by Hale, as to the accusation of rape: "An accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 *P. C.* 635.

As a general rule, the only point in which a witness's character can be impeached is his or her credibility, pp. 88, 119. The woman may be cross-examined as to her connexion with other men, but such questions only go to her credit, and, it was held by the judges, need not be answered, as tending to disgrace her—there being no exception to the ordinary rule (pp. 126–27) in rape. It was also held that prisoner had no right to call evidence that she had had connexion with any particular person. *Hodgson*, *R. & R.* 211 (1812). But if such questions are answered in the negative, the answer is conclusive. *Holmes*, pp. 89, 256. It appears that evidence to show that the prosecutrix is a common prostitute is still admissible. *Per* Kelly C.B. in *Holmes*, citing *Barker*, 3 *C. & P.* 589 (1829), where a question was allowed to show that the prosecutrix had since the alleged rape on her walked with a common prostitute, and another to show general lightness of character and, generally, of being a street walker. Still, a rape may be committed on a common prostitute, *per* Byles J. in *Holmes*. But as to connexion between prosecutrix and prisoner themselves, it is different. *Riley*, pp. 89, 256; *Martin*, 6 *C. & P.* 562 (1834), where Williams J. criticised the rule in *Hodgson*, above.

As to a child of tender years giving evidence without oath, see s. 4, p. 723. Where after such unsworn evidence the jury convicted the prisoner (charged under s. 4) of an indecent assault (by s. 9, see p. 727), the conviction was upheld, notwithstanding that the child's evidence would have been inadmissible had the charge been one of indecent assault. *Wealand*, 20

Q. B. D. 827; 44 *L. J. M. C.* 44; 16 *Cox C. C.* 402 (1888), *C. C. R.* But where there was one count under s. 4, and a second count for indecent assault, and there was no evidence to go to the jury on the first count, it was held that such unsworn evidence was not admissible on the second, and a conviction was quashed. *Paul*, 25 *Q. B. D.* 202; 59 *L. J. M. C.* 138; 17 *Cox C. C.* 111 (1890), *C. C. R.*, distinguished from *Wealand*. By 4 E. 7, 15, 15, and schedule, such evidence is admissible on many charges, including that of indecent assault against children. See p. 327.

Proof of age.] See p. 230. The age of the child, if material, must be proved; but see p. 328. Where the offence was committed on the 5th of February, 1832, and the father proved that, on his return home on the 9th of February, 1822, after an absence of a few days, he found the child had been born, and was told by the grandmother that she had been born the day before, and an examined copy from the register of baptism showed that she had been baptized on the 9th of February, 1822; this evidence was held insufficient to prove the age, as the grandmother (but not the mother) was alive. *Wedge*, 5 *C. & P.* 298 (1832).

Where the mother stated in examination in chief that her child was more than ten and under twelve, but upon cross-examination her evidence appeared extremely uncertain; yet it was left (with other uncertain evidence) to the jury, who found that the child was under twelve, and prisoner was convicted, the court refused to quash the conviction, as there was some evidence. *Nicholls*, 10 *Cox C. C.* 476 (1867), *C. C. R.* As to a copy of the register of births, see *Weaver*, p. 230. As to amending the age in the indictment, see *Shott*, p. 409.

Assault with intent to ravish.] It was formerly very common to prefer an indictment for an assault with intent to ravish, under 24–5 V. 100, 38, p. 250, where it was doubtful whether a rape had actually been committed.

A boy under fourteen cannot be found guilty of such an assault; p. 727.

On an indictment for an assault with intent to commit a rape, and for a common assault, Patteson J. held that evidence of prisoner having previously taken liberties with the prosecutrix, tendered by the prosecution, was not receivable to show the prisoner's intent. He also held, that, in order to convict on a charge of assault with intent to commit a rape, the jury must be satisfied, not only that prisoner intended to gratify his passions on her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. The only evidence was that he took hold of her. *Lloyd*, 7 *C. & P.* 318 (1836), where he was convicted of a common assault.

If upon an indictment for this assault prosecutrix prove a rape actually committed, prisoner may nevertheless be convicted by 14–15 V. 100, 12, p. 70.

See 43–4 V. 45, p. 256, as to the consent of a child under thirteen.

The old form of indictment for rape contained the words ". . . on her did make an assault and her the said &c. did unlawfully and carnally know." It was held in *Guthrie*, *L. R.* 1 *C. C. R.* 241 (1870), see p. 255, and cf. p. 496, that on such an indictment there could be a conviction for common assault. In indictments under s. 5, p. 724, the words "make an assault" are generally omitted, and it therefore seems doubtful whether in such cases a verdict of common assault would be good. But see *Bostock*, p. 256.

Householder, &c., permitting offence on his premises.] A parent who knowingly suffers her daughter to be on her premises for the purposes mentioned in s. 6, p. 724, is liable thereunder, though the girl's home is there. *Webster*, 16 *Q. B. D.* 134; 55 *L. J. M. C.* 63 (1885); *C. C. R.*

RECEIVING STOLEN GOODS.

When principal is guilty of felony.] By 24–5 V. 96, 91: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted, either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice: and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping." Cf. pp. 553 (partner), 556.

Separate receivers may be tried jointly.] By s. 93: "Whenever any property whatsoever shall have been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of in such a manner as to amount to a felony, either at common law or by virtue of this Act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

And convicted separately.] See s. 94, set out, p. 70.

Receiving where the principal is guilty of a misdemeanor.] By s. 95: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof, is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanour shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . [see p. 198], and if a male under the age of sixteen years, with or without whipping."

Guilty knowledge—Prevention of Crimes Act, 1871.] See p. 741. By 34–5 V. 112, 19: "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew

the property to be stolen which forms the subject of the proceedings taken against him.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days notice in writing shall have been given to the person accused, that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused." See *Jones*, and *Bromhead*, p. 741.

Venue.] See p. 742. By 24–5 V. 96, 96: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county or place where he actually received such property." See also s. 114, p. 218.

Joining counts for stealing and receiving.] See s. 92, p. 174.

Summary jurisdiction.] See 62–3 V. 22, 2, p. 376, as to young persons; adults are in the same position as if charged with embezzlement, *ib.* (42–3 V. 49, 12).

Indictment.] The usual practice against a receiver for a substantive felony is, merely to state the goods to have been "before then feloniously stolen," &c., without stating by whom.

Where it was objected to a count charging the goods to have been stolen by "a certain evil-disposed person," that it ought either to have stated the name of the principal, or else that he was unknown, Tindal C.J. said, the offence was not the receiving the stolen goods from any particular person, but receiving them knowing them to have been stolen. The question, therefore was whether the goods were stolen, and whether prisoner received them knowing them to have been stolen. *Jervis*, 6 *C. & P.* 156 (1833); see also *Wheeler*, 7 *C. & P.* 170 (1835), p. 741.

For the same reason, where the goods have been got by false pretences, they need not be set out in an indictment for receiving. *Taylor* v. *R.*, p. 356.

Where the goods have been stolen by some person unknown, it was formerly the practice to insert an averment to that effect, and such averment was held good. *Thomas* (1766), 2 *East P. C.* 781. But where the principal was known, the name was stated according to the truth. *Ib.* See *Walker*, p. 75, with which it may be difficult to reconcile, *Bush*, *ib.*

See also *Caspar*, *ib.* It has been doubted whether, where the indictment alleges that the prisoner received the goods in question from a person named, it must be proved that the receipt was in fact from that person. But where A. B. was indicted for stealing a gelding, and C. D. jointly for receiving it,

knowing it to have been "*so* feloniously stolen as aforesaid"; and A. B. was acquitted, Patteson J. held that the other prisoner could not be convicted upon that indictment. Whereupon another alleging "some person unknown" to have been the thief was preferred. *Woolford*, 1 *Moo. & R.* 384 (1834). But where a prisoner was indicted in one count for stealing goods, and in another for receiving the said goods, "*so* as aforesaid feloniously stolen," and the jury acquitted him of the stealing, but found him guilty of the receiving, upon motion in arrest of judgment, upon the ground that these findings were repugnant, the judges held the conviction to be good, because the words in the second count did not necessarily import that *he* had been the thief, and "after verdict the court would resort to any possible construction which would uphold the indictment against a purely technical objection." *Craddock*, 2 *Den. C. C. R.* 31; 20 *L. J. M. C.* 31 (1850). See *Huntley*, below.

The first count of an indictment charged F. in the usual form with obtaining meat from C. by false pretences. The third count charged that T., prisoner, the meat specified "then lately before unlawfully, knowingly, and designedly obtained from the said C. by false pretences, unlawfully did receive and have, he the said T., &c., well knowing, &c."

It was contended that the third count was bad since it did not set out the false pretences by which the meat was obtained, nor was there anything in it to identify the false pretence referred to with that set out in the first count. The court, however, held that the count was good since the gist of the offence under s. 95, p. 732, was the receipt of goods with knowledge that they had been obtained by some false pretence, and therefore it was sufficient to allege this. *Taylor* v. *R.*, 1895, 1 *Q. B.* 25; 64 *L. J. M. C.* 11; 18 *Cox C. C.* 45.

Where the indictment stated that prisoner received the goods from the person who stole them, and that the person who stole them was a person to the jurors unknown, and it appeared that the person who stole the property handed it to J. S., who delivered it to the prisoner; Parke J. held, that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and would not allow it to go to the jury to say, whether the person from whom he was proved to have received it was an innocent agent or not of the thief. *Elsworthy*, 1 *Lewin C. C.* 117 (1830).

But where three persons were jointly charged with a larceny, and two others as accessories, in separately receiving portions of the stolen goods; and the indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods; the principals were acquitted, but the receivers were (allowed by Gurney B. to be) convicted on the last two counts of the indictment. *Pulham*, 9 *C. & P.* 280 (1840).

The first count charged prisoner with stealing certain things, and the second with receiving "the goods and chattels aforesaid, of the value aforesaid, so as aforesaid feloniously stolen." The prisoner was acquitted upon the first count and convicted on the second. It was held that the words "so as aforesaid" might be rejected as immaterial, so that the allegation simply was that prisoner had received goods feloniously stolen; and that the conviction was good. *Huntley*, *Bell C. C.* 236; 29 *L. J. M. C.* 70 (1860); cf. *Craddock*, above. It is clear that there may be a conviction for receiving goods stolen by oneself.

As to the receiver being convicted though the thief is acquitted, see *Hughes*, pp. 153, 155.

Where it was averred that the prisoner (jointly indicted and convicted with the thief), "*Francis* Morris the goods and chattels, &c., feloniously did receive and have; he the said *Thomas* Morris then and there well knowing,"

&c., *Thomas* or *Francis* being a clerical error, the judges held that as the indictment would be good without the words "the said Thomas Morris," which might be struck out as surplusage, the conviction must stand. *Morris*, 1 *Leach* 109 (1774). For a similar mistake, see *Larkin*, p. 177.

Upon a joint indictment for receiving, there was no evidence of a joint receipt, but one prisoner was in the habit of receiving goods from the thief, and selling them to the other—each having a separate house—the court held, that s. 94, p. 70, extended to cases where the prisoners separately received the whole of the stolen property, and not only a part or parts. *Reardon and Blore*, *L. P.* 1 *C. C. R.* 31; 35 *L. J. M. C.* 171 (1866).

Indictment—Conviction of principal.] Where the indictment states a previous conviction of the principal, such conviction must be proved by the production of an examined copy of the record of the convictions, p. 137; where the record was "full of errors," but there was no doubt there had been a conviction, it was held that "an erroneous attainder of the principal is sufficient as against the accessory till reversed." *Baldwin*, *Russ. & Ry.* 241; 3 *Campb.* 265; 2 *Leach* 928, *n.* (1812), below. As to an indictment stating not the *conviction* but the *guilt* of the principal, see *Turner* (at 349), pp. 47, 696, &c. "When the accessary is brought to his trial after the conviction of his principal, it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor doth the indictment aver that the principal was in fact guilty. It is sufficient if it reciteth with proper certainty the record of the conviction. This is evidence against the accessary sufficient to put him on his defence; for it is founded on a legal presumption that everything in the former proceeding was rightly and properly transacted; but a presumption of this kind must, I conceive, give way to facts manifestly and clearly proved; as against the accessary the conviction of the principal will not be conclusive, and is as to him *res inter alios acta*. And, therefore, if it shall come out in evidence upon the trial of the accessary, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged, the accessary may avail himself of this and ought to be acquitted." *Foster C. C.* 365, see pp. 156–7. Where the principal has been convicted, it is sufficient in the indictment to state the *conviction* without stating the judgment. *Hyman*, 2 *Leach* 925; 2 *East P. C.* 782 (1801); *Baldwin*, above.

Thus, where the principal had been convicted, and on the trial of the receiver the conviction was proved, but it appeared on the cross-examination of the prosecutor that, in fact, the person convicted had only been guilty of a breach of trust and not of a felony, the prisoner, on the authority of Foster, in this passage, was acquitted. *Smith*, 1 *Leach* 288 (1783); the same authority was followed in *Prosser*, *ib.* 290, *n.* (1784).

The principal felon is a competent witness for the crown to prove the whole case against the receiver. *Haslam*, 1 *Leach* 418 (1786); *Price*, *Patram*, *ib.* 419, *n.* (1787); 2 *East P. C.* 782. As to the *confession* of the principal, see p. 47.

What is stolen property.] In *Dolan*, p. 204, the goods alleged to have been feloniously received had been found by the owner in the pockets of the thief; but were subsequently returned to him, and he was sent by the owner—in order to catch the receiver—to sell them, "where he had sold others." The thief thereupon went to the shop of the prisoner and sold the goods and gave the money to the owner. The thief pleaded guilty, and the receiver was convicted. It was held that the conviction was wrong, L. Campbell C.J. saying, "If an article once stolen has been restored to the master of that

article, and he having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the act of Parliament?" *Dolan* was followed in the case of *Schmidt*, *L. R.* 1 *C. C. R.* 15; 35 *L. J. M. C.* 94 (1866). There four thieves stole goods from a railway station, and afterwards one of them forwarded the stolen goods by the same railway. Meanwhile the theft was discovered, and a policeman in the employ of the company opened the parcel containing the stolen goods, and then gave it to a porter to keep till the next day, when he directed the porter to take it to its address at the prisoner's house. The indictment laid the property in the railway company, and it was held by a majority of the court (three to two) that a conviction could not be sustained, because there was an intentional delivery by the owners (the railway company) after the goods had been returned them. See also *Hancock*, 14 *Cox C. C.* (1878), *C. C. R.*, indistinguishable from *Dolan*, which was also followed in *Villensky*, 1892, 2 *Q. B.* 597; 61 *L. J. M. C.* 218.

Presumption arising from the possession of stolen property.] Recent possession of stolen property may, according to circumstances, support either the presumption that the prisoner stole the property *or equally* the presumption that he received it knowing it to be stolen; see *Longmead*, *L. & C.* 427 (1864), where such possession *unaccounted for* was held to warrant a conviction for *receiving*; and see, further, p. 18.

Stolen property having been discovered concealed in an outhouse, the prisoners were detected in the act of carrying it away thence at night, and were indicted as *receivers*, a bill for stealing having been ignored. There was no other evidence, and Patteson J. thought it was rather dangerous on this evidence to convict them of receiving. "It is evidence on which persons are constantly convicted of stealing." The prisoners were all found guilty of stealing, and therefore held to be entitled to be acquitted. *Densley*, *&c.*, 6 *C. & P.* 399 (1834).

Proof of the receiving.] There must be proof of an actual taking into possession by the receiver. Thus, where the persons who stole some fowls, sent them by coach in a hamper to Birmingham, with the sole direction that it would be called for, and prisoner when claiming the hamper as hers at the coach office, was immediately taken into custody; the Court for C. C. R. held her conviction, as receiver, to be wrong, on the ground, that "whoever had possession of the fowls at the coach office when the prisoner claimed to receive them, never parted with the possession; the prisoner, by claiming to receive the fowls, which never were actually or potentially in her possession, never in fact or law received them." *Hill*, 1 *Den. C. C. R.* 453; 18 *L. J. M. C.* 199 (1849). *Wiley*, 2 *Den. C. C. R.* 37; 20 *L. J. M. C.* 4 (1850), was twice argued. A., B. and C. were jointly indicted for stealing and receiving fowls. It was proved that about half-past four in the morning A. and B. were seen to go into C.'s father's house, where C., who was a higgler, lived, with a loaded sack, carried by A. A. and B. remained in the house about ten minutes, and were then seen to come out of the back door preceded by C. with a candle, A. again carrying the sack on his shoulders, and to go into a stable belonging to the same house; the stable-door was shut by one of them, and on the policemen going in they found the sack on the floor tied at the mouth, and the three men standing round it as if they were bargaining, but no words were heard. The bag when opened was found to contain, *inter alia*, the stolen property. On C. being charged with receiving the poultry knowing it to be stolen, he said, "he did not think he would have bought the hens." A. and B. were convicted of stealing, and C. of receiving, on both of two

joint indictments. But on this evidence eight out of twelve of the judges held that C. could not be convicted of receiving stolen goods, inasmuch as though there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C. had no possession, either actual or constructive. But Patteson J. one of the majority, said, "I don't consider a manual possession or even a touch essential to a receiving; but it seems to me, there must be a control over the goods by the receiver, which there was not here." In accordance with this opinion, in a case where the jury found that a stolen watch was in the hands or pocket of an accomplice (absconded), but under *prisoner's* absolute control, the Court for C. C. R. held that he might be convicted as a receiver of stolen property, although he had in fact never touched the property, or had manual possession of it. *Smith*, 1 *Dears. & P. C. C.* 494; 24 *L. J. M. C.* 135 (1855) where L. Campbell C.J. lays it down for certain that there may be a joint possession in thief and receiver, as he had said in *Wiley*, in which (he had been in the minority, and) he here says the judgment proceeded on that principle.

Receiver or thief?] It frequently happens that a doubt arises whether the acts done amount to a receiving, or to a stealing, "accomplice or receiver in general," as in the following cases:—from which it appears that if the prisoner took part in the transaction, while the act of larceny by others was continuing, he will be guilty as a principal in the larceny, and not as a receiver. Dyer and Disting were indicted for stealing a quantity of barilla, the property of Hawker. The goods, consigned to Hawker, were on board ship at Plymouth. Hawker employed Dyer, who was the master of a large boat, to bring the barilla on shore, and Disting was employed as a labourer, in removing the barilla after it was landed in Hawker's warehouses. The jury found that while the barilla was in Dyer's boat some of his servants, without his consent, removed part of the barilla and concealed it in another part of the boat. They also found that Dyer afterwards assisted the persons on board, who had separated this part from the rest, in removing it from the boat for the purpose of carrying it off. Graham B. (after consultation), was of opinion, "that though for some purposes, as with respect to those concerned in the actual taking and separation, the offence would be complete as an asportation [p. 530] in point of law, yet, with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit, and Dyer having assisted in the act of carrying it off was, therefore, guilty as principal." *Dyer* (1801), 2 *East P. C.* 767. The rest of the barilla having been lodged in Hawker's warehouse, several persons, employed by him as servants, conspired to steal a portion of it, and accordingly removed part nearer to the door. Soon afterwards these persons, together with Atwell and O'Donnell, who had agreed to purchase part, came and assisted the others (who took it out of the warehouse) in carrying it from thence. Being all indicted as principals in larceny, it was objected that these two were only receivers, the larceny being complete before their participation in the transaction; but Graham B. held, as in the previous case, viz. that the felony might be complete as regards some of the principals, and yet that it was a continuing transaction as to those who joined in the same plot before the goods were actually carried away from the premises; and all the defendants having concurred in, or been present at the act of removing the goods from the warehouse where they had been deposited, they were all principals; and the prisoners were convicted accordingly. *Atwell*, 2 *East P. C.* 768 (1801).

In the following case the removal of the goods was held to be so complete that a person concerned in the further removal was held not to be guilty of the *original larceny*. Hill and Smith, in the absence of the prisoner, broke open the prosecutor's warehouse, and took thence goods, putting them in the street about thirty yards from the warehouse. They then fetched the prisoner, who was apprised of the robbery, and who assisted in carrying the property to a cart, which was in readiness. Bayley J. was of opinion that this was a continuation of a larceny, and constituted a new taking, and that the prisoner, who was present aiding and abetting in that continuation, was a principal in that portion of the felony, and liable to be found guilty; but the judges were of opinion, that as the property was removed from the owner's premises before prisoner was present, he could not be considered as the principal, and the conviction as such, was wrong. *King*, *Russ. & Ry.* 332 (1817). So in the following case of a joint indictment for stealing. A man having received articles into his cart, left it standing in the street. M'Makin came up and led away the cart. He then gave it to another man to take it to his (M'Makin's) house, about a quarter of a mile distant. Upon the cart arriving at the house, the prisoner Smith, who was at work there, having directed a companion to blow out the light, came up and assisted in removing the articles from the cart. For Smith it was argued that the *asportavit* was complete before he interfered, and *Dyer*, above, was cited. Lawrence J. after consultation, was of this opinion, and directed an acquittal. *M'Makin, and Smith*, *Russ. & Ry.* 333, *n.* (1808). The prisoner was indicted for stealing two horses. He and one Whinroe went to steal the horses. Whinroe left the prisoner when they got within half a mile of the place where the horses were, stole the horses, and brought them to the place where the prisoner was waiting for him, and he and the prisoner rode away with them. Bayley J. at first thought that the prisoner's joining in riding away with the horses might be considered a new larceny; but, on adverting to *King*, above, he thought this opinion wrong, and the judges were of opinion that the prisoner was an accessory only, and not a principal, because he was not present at the original taking. *Kelly*, *Russ. & Ry.* 421 (1820); see pp. 151-2. In another case, M., who was employed in loading sacks of oats, by previous concert with K., took oats from two of the sacks and put them in a nosebag in the absence of K., and hid the nosebag. K. returned in a few minutes, and took away the nosebag and its contents, M. then being within four yards of him. The judge held that K. was a receiver, but both were principals in the larceny, as it was all one transaction and each had been present at some part. *Kelly*, and *M'Carthy*, 2 *C. & K.* 379 (1847).

In *Owen*, p. 152, prisoner was seen walking backwards and forwards before the house, and occasionally looking up; and he and the actual thief were seen together at some distance, and part of the property found on him. The jury found as a fact that the thief threw the things out of the window, and that prisoner was waiting to receive them; but the judges held that prisoner was a principal, and that the conviction of him as receiver was wrong. And in *Perkins*, 2 *Den. C. C. R.* 459 (1852), where prisoner was, in fact, convicted of receiving (with the thief), though the facts probably showed a joint theft, the Court for C. C. R. held that a principal in the second degree, *particeps criminis*, could not at the same time be treated as a receiver. Maule J. said, the judge "seems to have intended to ask us whether in a case where a prisoner was in a popular sense guilty of receiving, he might be treated as a receiver, notwithstanding the fact that he was a principal in the theft; and it is clear that he cannot." But in M'*Evin*, 1 *Bell C. C.* 20 (1858), where prisoner was charged in one count with stealing and in another with receiving, the jury were told that it was open to them to find a verdict of guilty of stealing or receiving, and they found that of receiving, and it was

held right—in *Perkins* it having been stated as a fact that prisoner was a principal, which here the jury negatived; but where there was not sufficient evidence of receiving—prisoner probably in collusion with a barman got change over the counter out of a sovereign when he put down only a florin—but there was evidence of being a principal in the second degree, it was held not competent to the jury to find a verdict of receiving, and that being the only count against the prisoner his conviction was quashed. *Coggins*, 12 *Cox C. C.* 517 (1873), *C. C. R.*

Two prisoners were indicted for larceny. A. being in the service of prosecutor, was sent by him to deliver some fat to C. He did not deliver all of it to C., having previously given part of it to B. It being objected that B. ought to have been charged as receiver, Gurney B. said it was a question for the jury whether B. was present at the time of the separation, till which it remained in the master's possession, or received the fat afterwards. A. only was convicted. *Butteris*, 6 *C. & P.* 147 (1833). *James*, p. 531.

W. stole a watch from A., and while W. and L. were in custody together, W. told L. (as L. told a witness at the trial) that he had "planted" the watch under a flag in the soot cellar of L.'s house. After this L. was discharged from custody, and went to the flag and took up the watch, and sent his wife to pawn it. It was held by Pollock C.B. on the trial of L., who was re-arrested, that if L. took the watch in consequence of W.'s information, W. telling L. in order that he might use the information by taking the watch, L. was indictable for this as a receiver of stolen goods; but that, if this was an act done by L. in opposition to W., or against his will, it might be a question whether it would be a receiving (of which L. was convicted). *Wade*, and *Leigh*, 1 *C. & K.* 739 (1844). Upon the latter supposition it would be a larceny, see p. 558.

Joint receipt—Husband and wife.] It was at one time held that where two persons are indicted as joint receivers, it was not sufficient to show that one of them received the property in the absence of the other, and afterwards delivered it to him, there must be a joint receipt or a joint indictment. *Mary and John Messingham*, 1 *Moo. C. C.* 257 (1830); *Gray*, 2 *Den. C. C. R.* 86 (1851), where two persons being convicted, judgment was allowed against the prisoner who committed the earlier felony. But now, by 24–5 V. 96, 94, p. 70, this difficulty is removed.

A. and B. were charged with stealing molasses, and C. and D. with receiving them. A. and B. brought the goods to C.'s warehouse, and left them with D., his servant, who, after some hesitation, accepted them. C. was absent at the time, but it was clear on the facts that shortly after he came home he was aware of the molasses having been left, and there was strong ground for suspecting that he then knew they had been stolen. It was also clear that D., soon after the goods were left with him, was aware they had been unlawfully procured, as he was found disguising the barrels. Maule J. told the jury that if they were satisfied that C. had directed the goods to be taken into the warehouse, knowing them to have been stolen, and that D., in pursuance of that direction, had received them into the warehouse (he also knowing them to have been stolen) they might properly convict the prisoners of a joint receiving, which they did. *Parr, &c.*, 2 *Moo. & R.* 346 (1841).

Husband and wife were indicted jointly as receivers. The goods were found in their house. Graham B. told the jury that, "generally speaking, the law does not impute to the wife those offences which she may be supposed to have committed by the coercion of her husband, and particularly where his house is made the receptacle of stolen goods; but if the wife appears to have taken an active and independent part, and to have endeavoured to

conceal the stolen goods more effectually than her husband could have done, and by her own acts, she would be responsible as for her own uncontrolled offence." The judges resolved that as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of her husband, the conviction of the wife could not be supported, though she had been more active than her husband. *Archer and others*, 1 *Moo. C. C.* 143 (1826), p. 817.

A married woman was indicted for receiving stolen goods. The property had been stolen by the husband from his employer, and afterwards taken home and given to his wife. There was only a probability that she knew they were stolen, and nothing to show whether she had or not acted under her husband's control. The Court for C. C. R. held that under these circumstances she could not be convicted of the offence. *Brooks*, 1 *Dears. & P. C. C.* 184; 22 *L. J. M. C.* 121 (1853); see *Wardroper*, below, and p. 817.

A husband may be convicted of feloniously receiving property which his wife has voluntarily stolen, if he receives it knowing that she has stolen it. *M'Athey*, *L. & C.* 250; 32 *L. J. M. C.* 35 (1862): joint indictment, wife convicted of stealing.

Husband and wife were jointly indicted for receiving goods knowing, &c. The jury found both guilty, and that the wife received the goods "without the controul or knowledge of, and apart from her husband," and that he "afterwards *adopted his wife's receipt*." The Court for C. C. R. thought that upon this finding the husband could not be convicted, as it did not necessarily show that he had taken "any active part" in the matter, or did anything more than barely consent to what his wife had done. *Dring*, *Dears. & B. C. C.* 329 (1857).

But where the thief delivered goods to prisoner's wife, who paid him sixpence on account, and afterwards prisoner met the thief, and with a guilty knowledge agreed with him for the price, and paid the balance; it was held, distinguishing *Dring*, that there was no complete receipt by the wife, but that prisoner actively approved of and ratified her partial receipt, and was, therefore, rightly convicted. *Woodward*, *L. & C.* 122; 31 *L. J. M. C.* 91 (1862).

Where a husband and wife are indicted for jointly receiving, it is proper that the jury should be asked whether the wife received the goods either from, or in the presence of, her husband. And where counsel for the defence suggested that these questions should be put, and they were not put, the court quashed the conviction as against the wife. Here the goods were received in the husband's house; it was probable, therefore, that the husband was present, from which it would be presumed that the wife was acting under his control, but in his absence she had dealt with the goods in a way that plainly showed she knew they were stolen. It may be that this question need not be put in every case in which the husband and wife are both indicted for receiving, but only where the circumstances do not negative the presence of the husband. *Wardroper*, *Bell C. C.* 249; 29 *L. J. M. C.* 118 (1860). Where there was no evidence that the husband was present, nor that the wife was acting under his compulsion "the judge ought to tell the jury that there is nothing in the marital relation *per se* to protect a wife, and he ought further to tell the jury that, even if the husband was in the immediate neighbourhood, it was a question for them to decide whether the wife was acting independently." *Baines*, p. 198.

One count charged A. and B. with a burglary and with stealing, and C. and D. with receiving different parts of the stolen property; another count charged C. and D. with the substantive felony of jointly receiving the whole of the stolen property, and there were two other counts charging C. and D. *separately* with the substantive felony of receiving part thereof. It was

proved that A. and B. had committed the burglary, and stolen the property, but also shown that C. and D. had received it on different occasions, and quite unconnectedly with each other. It was objected that as distinct felonies had been committed by C. and D., they ought to have been tried separately. *Per* Littledale J. "There is certainly some inconsistency in this indictment; but the practice in cases of receivers is to plead in this manner." The prisoners were all convicted. *Hartall and others*, 7 *C. & P.* 475 (1836).

Where two receivers are charged in the same indictment with separate and distinct acts of receiving, it is too late after verdict to object that they should have been indicted separately. There ought to have been an application to make the prosecutor elect. *Hayes and others*, p. 186; cf. p. 175.

A first count charged W. and R. C. with killing a sheep, "with intent to steal one of the hind legs of the said sheep"; another count charged J. C. with receiving nine pounds' weight of mutton from "a certain evil-disposed person," he then knowing that the mutton had been stolen by the latter. Coleridge J. said, "This count is for receiving stolen goods, and it is joined not with another count against other persons for stealing anything, but with a count for killing with intent to steal, which appears to me an offence quite distinct in its nature from that imputed to the prisoner, J. C. I shall not stop the case, but I will take care that the prisoner, J. C., has any advantage that can arise from the objection, if, upon consideration, I should think it well founded." The prisoners were all convicted. *Wheeler, &c.*, p. 733.

Receiving from a wife goods stolen from the husband.] This is a misdemeanor at common law. It is only when the stealing amounts to a felony at common law or under 24–5 V. 96 (see p. 555), that the receiving is a felony, by s. 91 of that Act, p. 732. Hence the receiver from a wife of her husband's property stolen by her is not indictable for felony, and an indictment charging such a receipt as a misdemeanor is good; it should aver that the property was stolen from her husband, but this is not essential. *Payne*, 1906, 1 *K. B.* 97; 21 *Cox C. C.* 121; *C. C. R.* See *Streeter*, and *James*, p. 557.

Guilty knowledge and intention.] As to other articles of stolen property —part of the same transaction—besides those in the indictment, see *Dunn*, p. 82; as to the possession of other stolen articles, and evidence of a previous conviction, see this question discussed, p. 82, and cf. pp. 86–7, 190; and see 34-5 V. 112, 19, p. 732; *Jones*, 14 *Cox C. C.* 3 (1877); *Drage*, 14 *Cox C. C.* 85 (1878); *Carter*, 12 *Q. B. D.* 522; 53 *L. J. M. C.* 96; 15 *Cox C. C.* 448 (1884); *C. C. R.*, where it was held that evidence could not be given of other similar stolen property which prisoner had disposed of before the date of the stealing charged; it must be "found in his possession." *Jones* was followed in *Eromhead*, p. 49, where L. Alverstone C.J. said, "the mere fact of putting a count for receiving in the indictment will not make . . . evidence" of a previous conviction "admissible."

The *intention* of the receiver is not material, provided he knew the goods to be stolen. Where it was objected that there was no evidence of a conversion by the receiver, Gurney B. said, "If the receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same." *Davis*, 6 *C. & P.* 177 (1833). If one receive stolen goods "for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased" them. *Per* Taunton J., *Richardson*, 6 *C. & P.* 335 (1834).

Election.] See *Galloway*, and 24–5 V. 96, 92, p. 174. There may be as many counts charging a receiving of goods as there are counts charging the

stealing of those goods, and the prosecutor cannot be put to his election on what count or counts he will proceed. *Beeton*, 1 *Den. C. C. R.* 414; 18 *L. J. M. C.* 117 (1849); *Heywood*, p. 173.

Venue.] See p. 733. One half of a note issued by a bank at S. in Wiltshire was stolen in its transit through the post, and the prisoner was proved to have received it with guilty knowledge, but it was not proved to have been in his possession in Wiltshire. He posted it in Somersetshire in a letter, addressed it to the bank at S., requesting payment, which letter was duly delivered. It was held that, upon an indictment for receiving (under a repealed statute which permitted the venue wherever the receiver had the property "in his possession"), where the venue was laid in Wiltshire, the prisoner might be convicted, for the possession of the post-office servants, who were the agents of the prisoner to present the note at the bank at S., might be treated as the possession of the prisoner; and that, therefore, the prisoner might be tried in Wiltshire. *Cryer*, 26 *L. J. M. C.* 192; 7 *Cox C. C.* 335 (1857), *C. C. R.* "Even at common law the venue would perhaps be proper, treating the receiver as an accessory after the fact," *per* Cockburn C.J. Cf. the cases, p. 713.

The prisoners were indicted in Dorset, in several counts for stealing and receiving. M., one of them, was convicted only on a count which charged him with the substantive felony of receiving "at T. in the county of Somerset," no one being named as the thief. It was held that upon this indictment he could not be convicted, as there was no jurisdiction, though by other counts it appeared that the goods were stolen in Dorset. *Martin, &c.*, p. 203. Cf. *Rogers*, p. 564.

Where goods are stolen abroad, *e.g.* in Guernsey, prisoner cannot be convicted of receiving those goods in England. *Debruiel*, p. 564.

RELIGION, OFFENCES AGAINST.

As to blasphemy, see p. 565.

On p. 566 there are references to some of the Reformation legislation, creating what may be called "offences against religion," some of which *Stephen* (*Dig. Cr. Law, 5th ed., Arts.* 182–4), individually designates *Depraving the Lord's Supper, Depraving the Book of Common Prayer, Clergymen refusing to use the Book of Common Prayer.* These, as that writer says (*ib., note to Art.* 182), are "practically obsolete," and it is not, therefore, worth while to set out the provisions of the statutes mentioned on p. 566, all of which, as well as 2–3 E. 6, 1, are summarised by *Stephen, ib.*

Crawle (reported as *Crawle* v. *Crawle*) is a case of conviction on indictment (under a repealed statute) for not going to church. 1 *Vern.* 170 (1683). See *Petcherini*, p. 565.

In the Report, &c., of the Ecclesiastical Courts Commission (1883), vol. i., Historical Appendix (vi.), p. 162, there is "a collection of cases, illustrative of the manner in which matters relating to the doctrine, ritual, and discipline of the Church of England have been dealt with by the temporal courts since the middle of the fifteenth century," whence it appears that there has been no indictment under the Act of Uniformity (1 Eliz. 2) since 1795 (*Report*, p. xlv.).

For *Sacrilege*, see p. 764.

RESCUE.

The offence of rescue nearly resembles that of prison-breach, p. 714; and see p. 391. The subjects there treated must be compared throughout this chapter; and cf. *Luttrell's case*, p. 625.

Where the person rescued is in custody or under arrest for felony or suspicion thereof, the rescuing is felony also. 1 *Hale P. C.* 606. Where the offence of the rescued is a misdemeanor, that of the rescuer will be a misdemeanor also. 3 *Hawk. P. C.* Bk. 2, ch. 21, s. 6.

If the person rescued was imprisoned for felony, and was rescued before indictment, "the indictment must surmise a felony done, as well as an imprisonment for felony, or suspicion thereof; but if the party be indicted and taken by a *capias*, and rescued, then there needs only a recital that he was indicted *prout*, and taken and rescued." 1 *Hale P. C.* 607.

"Tho the rescuer may be *indicted* before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal be attaint." *Ib.* In such case, however, he may, as it seems, be indicted and tried for a misdemeanor, though not for a felony. *Ib.* 599.

The custody of the person rescued.] It is immaterial whether he was in the custody of a private person, or of an officer, or under a warrant of a justice of the peace, for where the arrest of a felon is lawful, the rescue of him is felony. But it seems necessary that the rescuer should have knowledge that the other is under arrest for felony, if he be in the custody of a private person, though if he be in the custody of a constable or sheriff, or in prison, he is bound to take notice of it. 1 *Hale P. C.* 606. If the imprisonment be so far irregular that the prisoner would not be guilty of prison-breach by making his escape, a rescuer is also excused: and the converse holds. 3 *Hawk. P. C.* Bk. 2, ch. 21, ss. 1, 2; 1 *Russ. Cri.* 905. See pp. 637–9.

In *Almey*, 3 *Jur. N. S.* 750 (1857), Erle J. held that the forcible rescue of a poacher in illegal custody is an indictable offence, though perhaps *the prisoner* might have lawfully resisted.

A warrant of a justice to arrest, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found, against a certain person, is good; and, therefore, if upon such warrant the party be arrested, and afterwards rescued, those who are guilty of the rescue may be convicted of a misdemeanor. *Stokes*, 5 *C. & P.* 148 (1831).

Indictment and Evidence.] The word *rescue*, or some word equivalent thereto, must appear in the indictment, and the allegation must be proved by showing that the act was done forcibly, and against the will of the keeper. *Burridge*, 3 *P. Wms.* at 481 (1735), p. 157; what was held by all the judges in *Stanley*, below, to be "incorrectly decided," was the *sentence* in the second trial (see *ib.* 500). 3 *Hawk. P. C.* Bk. 2, ch. 18, s. 12, p. 715, seems to apply to rescue; also b. 2, ch. 21, s. 3. As to the form of indictment, see p. 793.

Punishment.] The offence of rescuing a person in custody for a capital felony was formerly punishable as a felony "within clergy" at common law (*i.e.* not with death or transportation, but the distinction is now abolished, p. 241). *Stanley and seven others*, *Russ. & Ry.* 432 (1821). But now, by 1–2 G. 4, 88, 1, "if any person shall rescue, or aid and assist in rescuing, from the

lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas [see p. 198] for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years."

Aiding a prisoner to escape.] See pp. 393, and 716. *Burridge*, pp. 157, 744; *Allan*, p. 391.

Statutes.] The offence of assisting a prisoner to escape has, by various statutes, been subjected to different degrees of punishment.

By 25 G. 2, 37, 9: "If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue or set at liberty, any person out of prison who shall be committed for or found guilty of murder, or rescue, or attempt to rescue any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony . . ."

By 7 W. 4 & 1 V. 91, 1, persons guilty of the offences mentioned in this s. (9), are liable to be transported for life; see p. 198. As to aiding prisoners to escape, see 28–9 V. 126, 37, p. 716.

Upon (the partly repealed) 16 G. 2, 31, it has been held that that Act is confined to cases of prisoners expressly committed for treason or felony, and therefore escape from a commitment on *suspicion* only—which was bailable, while treason and felony were not—is not within the Act. *Walker*, 1 *Leach* 97 (1773); *Greeniff*, 1 *Leach* 363 (1784). It was likewise held that that statute did not extend to a case where the escape had been actually effected, but only to the attempt. *Tilley*, 2 *Leach* 662 (1795). Delivering any instrument is an offence within the Act, though the prisoner had been pardoned for the offence of which he was convicted, on condition of transportation; and a person may be convicted, though there is no evidence that he knew of the specific offence of which the prisoner he assisted had been convicted: *Shaw*, *Russ. & Ry.* 526 (1823). See as to the prisons, &c., within that statute, 1 *Russ. Cri.* 908, *n.*

Where the record of the conviction of the person aided is set forth and is produced by the proper officer, no evidence is admissible to contradict that record. *Shaw*, above.

By 52 G. 3, 156, aiding and assisting prisoners of war to escape is felony, punishable with transportation for life; see p. 198. See *Martin*, *R. & R.* 196 (1811), which was a trap to catch a person suspected of such assistance, but the judges held a conviction wrong, as there was no real intention to escape.

As to persons subject to military law escaping or permitting, &c., others to escape, see 44–5 V. 58, 20, 22. Persons not subject to military law would be subject to the ordinary law of rescue. As to naval prisoners, see 29–30 V. 109, 82.

As to rescuing *returned* transported convicts, see p. 793.

As to obstructing process and rescuing goods, see 1 *Russ. Cri.* 880.

Pound-breach.] An indictment for pound-breach, *i.e.* rescuing cattle distrained and impounded, was tried at Bedfordshire Quarter Sessions as late as 1893. *Butterfield*, 17 *Cox C. C.* 598.

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

For the distinction between the three, see p. 748.

The Riot Act.] By 1 G. 1, stat. 2, c. 5, s. 1: "If any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the publick peace . . . and being required or commanded by one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff, or bailiffs, or other head officer or justice of the peace of any city or town corporate where such assembly shall be, by proclamation to be made in the King's name in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, then such remaining or continuing together to the number of twelve or more after such command or request made by proclamation, shall be adjudged felony . . ."

By s. 5, opposing and hindering the making of the proclamation shall be adjudged felony, without benefit of clergy (p. 241), and persons assembled to the number of twelve, to whom proclamation should have been made, if the same had not been hindered, not dispersing within an hour after such hindrance, having knowledge thereof, shall be adjudged felons.

Persons convicted under these ss. are within the punishment of 7 W. 4 & 1 V. 91, 1, p. 745. Riot is within 3 G. 4, 114, p. 695.

Riotously injuring or demolishing buildings.] Cf. p. 608. By 24–5 V. 97, 11: "If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade, or manufacture, or any branch thereof, or any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . ." (see p. 198).

By s. 12: "If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force injure

or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, out-house, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, stalls, bridge, waggonway, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to . . . be kept in penal servitude for any term not exceeding seven years . . ." (see p. 203).

Indictment for felony—misdemeanor found.] S. 12 continues: "Provided that if upon the trial of any person for any felony in the last preceding section mentioned the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly."

Seamen riotously preventing the loading, sailing, &c., of vessels.] 33 G. 3, 67, 1, enacts, "that if any seamen, keelmen, casters, ship carpenters, or other persons riotously assembled together, to the number of three or more . . . shall unlawfully and with force prevent, hinder, or obstruct the loading or unloading, or the sailing or navigating, of any ship, keel, or other vessel, or shall unlawfully and with force board any ship, keel, or other vessel, with intent to prevent, hinder, or obstruct, the loading or unloading, or the sailing or navigating, of such ship, keel, or other vessel, every seaman, keelman, caster, ship carpenter, and other person, being lawfully convicted of any of the offences aforesaid, upon any indictment to be found against him, her, or them in any court of oyer and terminer, or general or quarter sessions of the peace . . . for the county, division, or district wherein the offence was committed, shall be committed" to prison for not less than six or more than twelve months. By s. 4, the Act shall not extend to any act, deed, &c., done in the service, or by the authority, of his Majesty. By s. 7, offences committed on the high seas shall be triable in any session of oyer and terminer, &c., for the trial of offences committed on the high seas within the jurisdiction of the admiralty: p. 215. And by s. 8, the prosecution for any of the said offences is to be commenced within twelve calendar months after the offence committed.

Riotous behaviour at burials.] Riotous or indecent behaviour at burials is made a misdemeanor by 43–4 V. 41, 7.

What is a riot.] A riot is defined by Hawkins to be "a tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another, against any one who shall oppose them, in the execution of some enterprize of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." 2 *P. C.* Bk. 1, ch. 65, s. 1. See *Langford*, p. 750.

An unlawful assembling (p. 748) must be proved; hence the difference from an affray, see p. 234; but if persons, being innocently assembled, on a dispute occurring, "form themselves into parties, with promises of mutual assistance, and then make an affray," it will be a riot; and, in this manner, any lawful assembly may be converted into a riot; so a person joining rioters is equally guilty "as if he had at first assembled with them for the same purpose." *Hawk. ib.* s. 3.

Evidence must be given "of some such circumstances either of actual force or violence, or, at least, of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the show of armour, threatening

speeches, or turbulent gestures." *Ib.* s. 5. But it is not necessary that personal violence should be done or offered. Thus, if a number of persons come to a theatre, and make a great noise and disturbance, so as to render the actors entirely inaudible, it will be a riot, though no personal violence is done to any individual, and no injury to the house. *Clifford* v. *Brandon* p. 351. But the unlawfulness of the object of three or more persons assembled, even though they actually carry out their unlawful object, does not necessarily constitute a riot, for they may do it peaceably, and without circumstances of force or violence. *Hawk. ib.*

"In some cases wherein the law authorises force, it is not only lawful but also commendable to make use of it; as for a sheriff or constable, or perhaps even for a private person to assemble a competent number of people, in order with force to suppress rebels, or enemies, or rioters." *Ib.* s. 2. So a private man "may assemble a meet company" in a peaceable manner to remove a common nuisance, or a nuisance to his own land, &c. Thus where a weir had been erected "cross a common river, where people have a common passage with their boats," and a number of persons assembled, with spades and other necessary instruments, for removing it, and did remove it by making "a trench in his land that did erect the weir," it was held to be neither a forcible entry nor a riot. *Dalt.* c. 137. So an assembly of a man's friends at his own house, for the defence of his person, or the possession of his house, against such as threaten to beat him in the former case, or to make an unlawful entry in the latter, is "indulged by law." 5 *Burn's Justice, Art.* "Riot" (30*th ed.*, p. 144); 1 *Russ. Cri.* p. 570. Cf. pp. 602, 647.

It must appear "that the injury or grievance complained of, and intended to be revenged or remedied by such an assembly must relate to some private quarrel only; as the inclosing of lands in which the inhabitants of a town claim a right of common . . . or suchlike matters relating to the interests or disputes of particular persons no way concerning the public; for wherever the intention of such an assembly is to redress public grievances, as to pull down all inclosures in general, or to reform religion, or to remove evil counsellors from the king, &c., if they attempt with force to execute such their intentions," the offence will amount to high treason. 2 *Hawk. P. C.* Bk. 1, ch. 65, s. 6. "Where the object of the insurrection," says East, "is a matter of a private or local nature, affecting, or supposed to affect, only the parties assembled, or confined to particular persons or districts, it will not amount to high treason, although attended with the circumstances of military parade usually alleged in the indictments on this branch of treason. As if the rising be only against a particular market, or to destroy particular inclosures [see *Birt*, below] to remove a local nuisance, to release a particular prisoner, unless imprisoned for high treason, or even to oppose the execution of an Act of parliament, if it only affect the district of the insurgents; as in the case of a turnpike act." 1 *P. C.* 75. As to prize-fights, see p. 234.

The "intent and purpose of meeting" must be proved, *Dalt.* c. 136, otherwise the defendants must be acquitted. Where persons assembled together for a purpose (in the manner hereinbefore described) do not proceed to execute their purpose, it is but an unlawful assembly (p. 751), not a riot [but see *Woolcock*, p. 749, under the statute]; if, after so assembling, they proceed or *move* to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only so assemble but proceed to execute their design, and actually execute it, it is then a riot. *Hawk. ib.* ss. 1, 8, 9; *Dalt. ib.*; *Birt and others*, 5 *C. & P.* 154 (1831), above; *Graham and Burns*, 16 *Cox C. C.* 420 (1888), p. 752, where Charles J. laid it down that unlawful assembly is always a question for the jury: verdict, not guilty of riot, guilty of unlawful assembly. All the authorities were reviewed in *Field and others* v. *The Receiver for the Metropolitan Police*

District (1907), 2 *K. B.* 853; 23 *T. L. R.* 736, where Phillimore J. (in his and Bray J.'s judgment), says, "We deduce that there are five necessary elements of a riot—(1) number of persons, at least three; (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage."

Suppression of riot.] See pp. 619, 642, 646, 647, 648, and cf. p. 516. Magistrates not only may but must put down an unlawful assembly. The degree of force they may use in dispersing it must depend on its size, &c., and circumstances. *Neale*, 9 *C. & P.* 431 (1839).

Refusing to aid constable in quelling a riot.] To support an indictment for refusing to aid a constable in quelling a riot, it is necessary to prove, 1st, that the constable saw a breach of the peace committed; 2nd, that there was a reasonable necessity for calling on the defendant for his assistance; and 3rd, that when duly called upon, the defendant, without any physical impossibility or lawful excuse, refused to do so. *Brown*, p. 234; *per* Alderson B. It is no defence to such an indictment that from the number of rioters the single aid of the defendant would not have been of any use. *Ib.*

A person charged to aid a constable, and who does so, is protected from assault *eundo, morando, et redeundo*. *Phelps, Carr. & M.* 180 (1841); *per* Coltman J. See resolutions 5 and 6, p. 614.

Proof under the Riot Act.] The proclamation in s. 2 of the "Riot Act," p. 746, concludes with the words "God save the King." Where, in the reading, these words were omitted, it was held that prisoners must be acquitted. *Child*, 4 *C. & P.* 442 (1830).

Where it was not proved that prisoner was among the mob during the whole of the hour, but he was proved to have been there at various times during the hour, it was held by Patteson J. that it was a question for the jury upon all the circumstances, whether he did substantially continue making part of the assembly for the hour; for, although he might have occasion to separate himself for a minute or two, yet, if in substance he was there during the hour, he would not be thereby excused. *James*, 1 *Russ. Cri.* 574 (1831); s.c. below.

The second or subsequent reading of the Act does not do away with the effect of the first reading, and the hour is to be computed from the time of the first. *Per* Patteson J., *Woolcock*, 5 *C. & P.* 516 (1833).

If there be "such an assembly that there would have been a riot if the parties had carried their purpose into effect, it would be within the Act, and whether there was a cessation or not is a question for the jury." *Ib.*; see p. 748.

An indictment under this Act for remaining assembled one hour after proclamation made, need not charge the original riot to have been in *terrorem populi*: it is sufficient if it pursue the words of the Act, for there is a distinction between an indictment for a riot and an indictment framed on this Act. *Per* Patteson J., *Warren James*, 5 *C. & P.* 153 (1831); s.c. above.

"*Riotously*" *demolishing or beginning to demolish buildings.*] The true meaning of the words "riotously, &c., assembled," not being explained by the Act, the common law definition of a riot must be resorted to, and, accordingly "if *any one* of her Majesty's subjects be terrified, this is a sufficient

terror and alarm to substantiate that part of the charge of riot." *Per* Patteson J. on identical words in a repealed statute, *Langford, Phillips, &c., Carr. & M.* 602; 2 *Moo. C. C.* 252 (1842), p. 747, where only a chimney was left standing. Absolutely total demolition is not necessary, if the house is no longer a house. *Ib.*; cf. *Adams*, below.

Although prisoners are indicted only for *beginning* to demolish, pull down, &c., yet in order to secure a conviction under s. 11, p. 746, it must appear that such a beginning was with intent to demolish the whole. "The beginning to pull down," said Parke J.—on identical words (repealed)—"means not simply a demolition of a *part*—but a part with an *intent* to demolish the *whole*. . . . If the prisoners meant to stop where they did (*i.e.* breaking windows and doors), and do no more . . . they are not guilty; but if they intended, when they broke the windows, &c., to go farther, and destroy the house, then they are guilty. . . . If they had the full means of going farther, and were not interrupted, but left off of their own accord, it is evidence . . . that they meant the work of demolition to stop where it did." It was proved that they began by breaking the windows, and having afterwards entered the house, set fire to the furniture; but no part of the house was burnt. Parke J. said to the jury, "If you think that they originally came there *without* intent to demolish, and the setting fire to the furniture was an afterthought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy the house. If they came originally *without* such intent, but had afterwards set fire to the house, then the offence would be arson. If you have doubts whether they originally came with a purpose to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner." *Ashton*, 1 *Lewin C. C.* 296 (1830). The same rule was laid down in the two following cases:—Prisoners about midnight came to a house, and having in a riotous manner burst open the door, broke some of the furniture, and all the windows, and did other damage, after which they went away, though there was nothing to prevent them committing further injury; Littledale J. told the jury that this was not a "beginning to demolish," unless they should be satisfied that the ultimate object of the rioters was to demolish the house; and that if they had carried their intentions into full effect, they would in fact have demolished it. That such was not the case here, for that they had gone away, having manifestly completed their purpose, and done all the injury they meant to do. *Thomas*, 4 *C. & P.* 237 (1830); and cf. *Batt*, p. 751. See also *Adams and ten others, Carr. & M.* 299 (1842); cf. *Langford*, above, where Coleridge J. said to a jury, "Before you can find the prisoners guilty, you must be of opinion that they meant to leave the house no house at all in fact. If they intended to leave it still a house, though in a state however dilapidated, they are not guilty under this highly penal statute." Injuries to *parts* of buildings are now provided for by s. 12, p. 746.

If in the felonious demolition of a house—which burning it is—by rioters, some of them set fire to the house itself, and others carry furniture out of the house, and burn it, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying the house and furniture; and if so, the jury ought to convict them. *Per* Tindal C.J., *Harris and twenty-eight others, Carr. & M.* 661 (1842). If a house be demolished by rioters by means of fire, one of them who is present while the fire is burning may be convicted for the statutory felony, although he is not proved to have been present when the house was originally set on fire. *Simpson, &c., and sixteen others, Carr. & M.* 669 (1842).

When an election mob pursued a person who took refuge in a public-house, upon which they attacked the house, threatening to pull it down unless he was given up, and broke the door and windows, and destroyed much of the furniture, but being unable to find the person they were in search of, went away; Tindal C.J. ruled, that the case was not within the statute (repealed), the object not being to destroy the house, but to secure the person. *Price and fifteen others*, 5 *C. & P.* 510 (1833). But in another case Gurney B. ruled that the prisoners might be convicted of beginning to demolish, though their *principal* object might be to injure an unpopular employer inside the house, provided it was *also* their object to demolish the house, on account of its having been used by him. *Batt*, 6 *C. & P.* 329 (1834), p. 750.

Rout.] See 2 *Hawk. P. C.* Bk. 1, ch. 65, s. 8, cited p. 748, and 1 *Russ. Cri.* 569.

Unlawful assembly.] "Any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies amongst the king's subjects, seems properly to be called an *unlawful assembly*; as where great numbers complaining of a common grievance meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly." *Hawk. ib.*, s. 9. "If persons assemble to obstruct the officers of the law, all parties so assembling are guilty of an unlawful assembly, whether a riot takes place or not," and if a homicide takes place in consequence, any obstructer may be "personally responsible," *per* Fitzgerald J., *M'Naughten*, 14 *Cox C. C.* 576 (1881); *Q. B. D. Ir.* See *Orton*, p. 594. The circumstances which constitute an unlawful assembly were much discussed in *Redford* v. *Birley*, 3 *Stark. N. P. C.* 76 (1822), where Holroyd J. said an unlawful assembly is where persons "meet together in a manner and under circumstances which the law does not allow, but makes it criminal in those persons meeting together in such a manner, knowingly, and with such purposes as are in point of law criminal." He then cited and adopted the language of Bayley J. in *Hunt* (1820; see Index of Cases): "All persons assembled to sow sedition, and bring into contempt the constitution, are in an unlawful assembly"; and also that used by him with regard to drillings; viz: "If the object of the drilling is to secure the attention of the persons drilled to disaffected speeches, and give confidence by an appearance of strength to those willing to join them, that would be illegal; or if they were to say, 'we will have what we want, whether it is agreeable to law or not,' a meeting for that purpose, however it may be masked, if it is really for a purpose of that kind, would be illegal. . . . If from the general appearance, and all its accompanying circumstances, it is calculated to excite terror, alarm, and consternation, it is generally criminal and unlawful," that is, Holroyd J. explains, "in all those persons who go for purposes of that kind, disregarding the probable effect and the probable alarm and consternation; and whoever gives countenance thereto is amenable as a criminal party." And it has been laid down by Alderson B. that "any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly," and the jury should take into their consideration "the way in which the meetings were held, the hour . . . at which the parties met, and the language used by the persons assembled, and by those who addressed them"; also "whether firm and rational men, having their families and property there, would have reasonable ground to

fear a breach of the peace for . . . the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage." *Vincent, &c.*, p. 348. See p. 759. In order to be unlawful, "the circumstances of terror" must "exist in the assembly itself, either in its object or mode of carrying it out"; for if the assembly is for a lawful purpose, and there is no intention of carrying it out unlawfully, the persons composing it would not be guilty of an unlawful or "tumultuous" assembly, although they knew that their assembly would be opposed, and had good reason to suppose that a breach of the peace would be committed by those who opposed it. "The Salvation Army" assembled to the number of above one hundred persons, and, forming a procession headed by flags and music, marched through the streets of Weston-super-Mare, as they had done on previous occasions. They were met by an organised band calling themselves "the Skeleton Army," who also were in the habit of parading the streets, and were "antagonistic to the Salvation Army." The two bodies met, and, as on several previous occasions, a general fight, and great uproar and disorder ensued. It was held by Field and Cave JJ. that the "captain" or other "officers" of the Salvation Army could not be convicted of unlawful assembly. *Beatty* v. *Gilbanks*, 9 *Q. B. D.* 308; 51 *L. J. M. C.* 117 (1882). Cf. *Graham*, p. 748, and see *Wise* v. *Dunning*, 20 *Cox C. C.* 121 (1901).

It was similarly held in another Salvation Army case that in order to prove an unlawful assembly it is not sufficient to show by evidence that what is done (procession, &c.) is calculated to and does excite others to a breach of the peace, if the assemblers did not know that their acts would lead to a breach of the peace. *Clarkson*, 17 *Cox C. C.* 483 (1892), *C. C. R.* As this case was decided purely on the absence of evidence, it is difficult to appreciate its relation to *Beatty* v. *Gilbanks*.

ROBBERY.

Robbery or stealing from the person.] By 24–5 V. 96, 40: "Whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . ." (See p. 198.)

Conviction for assault with intent to rob.] S. 41 is set out p. 70.

Assault with intent to rob.] By s. 42: "Whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this Act) be liable . . . to be kept in penal servitude . . ." (See p. 198.)

Robbery, &c., by armed, or more than one, person.] By s. 43: "Whosoever shall, being armed with any offensive weapon, or instrument, rob, or assault with intent to rob, any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any other person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . ." (see p. 198).

The "Garotting" Act, 26–7 V. 44, p. 249, applies to this s. For *Assault*, see *ib.*

Venue.] See p. 562.

Common law.] Robbery, "properly so called," is thus defined:—"A felonious taking of money or goods to any value from the person of another, or in his presence against his will, by violence or putting him in fear." 2 *East P. C.* 707. *Hawk.* says robbery is larceny which puts the person in fear. 1 *P. C.*, b. 1, c. 34 (1st pt.) *introdn.* Cf. p. 523.

The goods, &c., taken.] "Some thing must be taken, for an assault with intent to rob is an offence of a different and inferior nature." *East, ib.* It must have *some* value, though the gist of the offence is the force and terror. 3 *Inst.* 69; 1 *Hale P. C.* 532; 2 *East P. C.* 707; but it may be "of the value of a hundredth part of a farthing," *per* Parke B., *Morris*, p. 557. Thus, where a man was knocked down and his pockets rifled, but the robbers found nothing except a worthless slip of paper, they were convicted of robbery. *Bingley*, 5 *C. & P.* 602 (1833). The prosecutor had been decoyed by prisoner into a room for the purpose of getting money alleged to be owing from him. There were evident and abundant preparations for terrorising him. Prisoner seized a carving knife and threatening to take away his life, he was compelled to sign a promissory note for 2000*l.* upon a piece of stamped paper which was ready. It was objected on an indictment for robbery of the note, under 2 G. 2, 25 (repealed), that there was no property in the prosecutor, and so the judges held. They said that it was essential to larceny that the property stolen should be of some value; that the note in this case did not on the face of it import either a general or special property in the prosecutor, and that it was so far from being of any, the least, value to him,

that he had not even the property on the paper on which it was written, for both the paper and the ink were the property of prisoner, and the delivery of it by her to him could not, in the circumstances of the case, be considered as vesting it in him, but if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, and it was well settled that, to constitute "robbery," the property must not only be valuable, but it must also be taken from the person and peaceable possession of the owner. This was only a case of duress. *Phipoe*, 2 *Leach* 673; 2 *East P. C.* 599 (1795), pp. 557, 803: she was, however, convicted of a misdemeanor. See now 24-5 V. 96, 48, p. 787. Under 7-8 G. 4, 29 (repealed), prisoners, who had decoyed a man into a house, chained him up and compelled him to write a cheque and an order for delivery of deeds, were directed to be acquitted, for prisoners *knew* he had not the documents or the money upon him; hence, there was neither demanding property with menaces, nor an assault with intent to rob—following *Phipoe;* but if the demand with menaces merely fails because the threatened person has not the property on him, the offence is the same. *Edwards*, 6 *C. & P.* (i.) 515; (ii.) 521 (1834).

The taking.] Cf. p. 529. In order to constitute a *taking*, there must be a *possession* of the robber. Therefore, if a man, having a purse tied to his girdle, is assaulted by a thief, and, in the struggle the girdle breaks, and the purse falls to the ground, this is no robbery, because no taking; but if the thief once has it in his hand, though after the girdle breaks he does not touch it, it is a robbery. 1 *Hale P. C.* 533. See *Peat* and *Lapier*, p. 529. Though it was formerly (about 1700, 2 *East P. C.* 703) held that a sudden taking or snatching of any property from a person unawares was sufficient to constitute robbery, "the contrary doctrine appears to be now established" (*e.g. Gnosil*, 1 *C. & P.* 304 (1824), where prisoner jerked a watch out of a man's pocket; he was not convicted of highway robbery, but of larceny only); "and that no taking by violence will at the present day be considered as sufficient to constitute robbery, unless some injury be done *to the person*," as in *Lapier*, "or unless there be some previous struggle for the possession of the property, or some force used to obtain it." 2 *Russ. Cri.* 82. See p. 755.

Felonious intent.] This is "as essential" in robbery as in larceny, p. 527. And as there must be a felonious intent with regard to the goods *charged*, it is not enough that the prisoner had at the same time an intent to steal other goods. A. assaulted B. on the highway with a felonious intent, and searched his pockets for money, but finding none, pulled off the bridle of B.'s horse, and threw that and some bread which B. had in pannels about the highway, but did not take anything from B. Upon a conference of all the judges, this was resolved to be no robbery, because nothing was taken from B. "The better reason seems to be that the particular goods taken were not taken with a felonious intent, for surely there was a sufficient taking and separation of the goods from the person." *Anon.*, 2 *East P. C.* 662 (1698).

Though prisoner took the goods with violence and menaces, yet if it be under a *bonâ fide* claim, it is no robbery. Prisoner had set wires in which game was caught. The gamekeeper, finding them, was carrying them and a pheasant in them away when prisoner stopped him, and desired him to give them up. The gamekeeper refused, upon which prisoner, lifting up a large stick, threatened to beat out the keeper's brains if he did not deliver them. The keeper fearing violence delivered them. Vaughan B. said "I shall leave it to the jury to say, whether the prisoner acted on an impression that the wires and pheasants were his property; for, however he might be liable to penalties for having them in his possession, yet if the jury think that he

took them under a *bonâ fide* impression that he was only getting back the possession of his own property, there was no *animus furandi*, and . . . the prosecution must fail": acquittal. *Hall*, 3 *C. & P.* 409 (1828). See also *Boden*, 1 *C. & K.* 395 (1844).

If the original assault is not made with the intent of robbing the property subsequently taken, but the intent arises before the property is taken, it is sufficient; as where money, offered to a person endeavouring to commit a rape, is taken by him. Prisoner assaulted a woman, with intent to ravish her, and she, without any demand made by him, offered him money, which he took, and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, till he was interrupted. A considerable majority of the judges held this to be robbery, on the ground that the woman, "from violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and the prisoner, by taking it, derived that advantage to himself from his felonious conduct; though his original attempt were to commit a rape." *Blackham*, 2 *East P. C.* 711 (1787).

Common Assault.] The question of the *animus furandi* often arises in cases where, after a quarrel and assault, property has been carried away. The question in these cases is, whether the things were taken in frolic, or from accident, or from malice, but not *animo furandi*. If the jury negative the intent to rob, prisoner cannot be convicted of a common assault. *Woodhall*, 12 *Cox C. C.* 240 (1872); p. 70.

The taking from the person.] Where prisoner and his confederates in a crowd "hustled" a man, and the former got his hand into a coat, so that a pocket-book in an inside pocket was "just lifted out," but, in the movement, returned, prisoner being convicted, six of the judges thought that he was not rightly convicted of stealing from the person, because, from first to last, the book remained about the person of the prosecutor: four were of a contrary opinion; but they were unanimous that the simple larceny was complete. *Thompson*, 1 *Moo. C. C.* 78 (1825). In *Simpson*, 1 *Dears. & P. C. C. R.* 421; 24 *L. J. M. C.* 7 (1854), p. 757, prosecutor carried his watch in a waistcoat pocket, with a chain attached passing through a button-hole of the waistcoat, being there secured by a watch-key. Prisoner snatched the watch, which drew after it the chain, till the key caught in a button, and the watch and chain remained suspended. It was held, following *Lapier*, that there was a sufficient severance (viz. in the instant between the key leaving the button-hole and its catching on the button) for a conviction for stealing from the person. Jervis C.J. thought that the minority in *Thompson* were right, and Alderson B. said, "a hair's breadth" removal from the person was enough. Cf. *Walls*, p. 757.

The taking must be in presence of the owner.] There is a "taking in law" as well as "in fact"—"strictly a taking from the person, but it sufficeth if it be in his presence . . . in case it be done with a putting in fear, as where a carrier drives his pack-horses, and the thief takes his horse or cuts his pack and takes away the goods; so if a thief comes into the presence of A. and with violence, and putting A. in fear, drives away his horse, cattle, or sheep." 1 *Hale P. C.* 532, 533. So if one flying from the thief lets fall his hat, and the thief takes it, "for all is the effect of the same fear." *Ib.* But it must appear in such cases, that the goods were taken in the presence of the prosecutor. Thus "where thieves struck money out of the owner's hand, and by menaces drove him off so that he could not take it up, and then they took it themselves"; these facts being found in a special verdict, the court, after

much argument, said that they could not intend that the thieves took up the money "in the sight or presence of the owner" (though they thought the evidence would have warranted such a finding), and that, as "the first striking the money out of his hand was without putting him in fear" (as was found), there was no robbery. *Francis*, 2 *Str.* 1015; *Comyns*, 478; 2 *East P. C.* 708, 784 (1735), p. 71. And the same was resolved in *Grey* (1735), *East*, *ib.* "Where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the daytime, but did not rob the goods till night, some have holden it to be a robbery from the first force; but others consider that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves." 2 *East P. C.* 707; 2 *Russ. Cri.* 86.

But it is otherwise where the goods are in the custody of a third person. Two prisoners were indicted for robbery of a bundle. Prosecutor gave a bundle to his brother, who was with him, to carry it for him. While on the road, prisoners assaulted prosecutor; upon which, his brother laid down the bundle, and ran to his assistance. One prisoner then took up the bundle and made off with it. Vaughan B. was of opinion that the indictment was not maintainable, as the bundle was in the possession of another person at the time of the assault committed. If prisoners intended to take the bundle, why did they assault prosecutor, and not the person who had it? Prisoners were convicted of simple larceny. *Fallows, &c.*, 5 *C. & P.* 508 (1832).

Against the will of the owner.] Several persons conspired to obtain for themselves the statutory reward for apprehending robbers on the highway. The robbery was to be effected upon Salmon, one of the confederates, by Blee, another of the confederates, and two strangers procured by Blee. It was expressly found, that Salmon consented to part with his goods under pretence of a robbery, and that for that purpose he went to Deptford, where the "robbery" took place. The judges were of opinion that this did not amount to robbery in any of the prisoners, because Salmon's property was not taken from him against his will. *M'Daniel, &c., Fost. C. C.* 121; 19 *St. Tr.* 746; (1755), p. 153; but they were convicted of the *conspiracy*; 19 *St. Tr.* 808 (1756), p. 352. But this is very different from the robbery on Norden (or Norton), p. 762, where a man deliberately set a trap to catch a highwayman, by getting in his way, giving up his money, and then capturing him. *Foster*, *ib.* 129. *St. Tr. ib.* 807 (1754).

Violence.] It must be proved that the goods were taken either by violence *or* that the person was put in fear (p. 758); but either of these facts will be sufficient, and may alone be laid in the indictment. 2 *East P. C.* 708; 2 *Russ. Cri.* 87. Where violence is used it is not necessary to prove actual fear. "I am very clear that the circumstance of actual fear at the time of the robbery needeth not to be strictly proved. Suppose the true man is knocked down, without any previous warning to awaken his fears, and lieth totally insensible, while the thief rifleth his pockets, is not this a robbery?" *Foster C. C.* 128. ". . . And if fear be a necessary ingredient, the law *in odium spoliatoris* will presume fear, where there appeareth to be so just a ground for it." *Ib.*; 2 *East P. C.* 711.

As to the degree of violence necessary, see pp. 754, 758, and *Lapier*, p. 529. A boy was carrying a bundle along the street, when the prisoner ran past him, and snatched it suddenly away, but being pursued, let it fall. The court said "the evidence in this case does not amount to a robbery"; for though he snatched the bundle, "it was not with that degree of force and terror that is necessary to constitute this offence." *Macauley*, 1 *Leach* 287 (1783); *Baker*, *ib.* 290 (1783); *Robins* (1787); *Davies*, below; *Horner* (1790)—all *ib.*, and all cases where there was no struggle and no touching of the person.

In *Walls and Hughes*, 2 *C. & K.* 214 (1845), where prisoners having asked prosecutor to tell them the time, and prosecutor took out his watch, holding it loosely in both hands, one prisoner caught hold of the ribbon and key, and snatched the watch away without touching his hand, Patteson J. held that this was not a robbery, but "stealing from the person" (which, though on the same footing as one kind of robbery (under s. 6 of 7–8 G. 4, 29, repealed) was not punished so severely as that under s. 3 of W. 4 and 1 V. 87 (repealed), under which *Walls* was tried, and which is almost identical with s. 43, p. 753; *Simpson*, p. 755, was probably under 7–8 G. 4, 29).

But the least personal injury makes robbery; as where, in snatching a diamond pin, well fastened in a lady's hair, part of the hair was torn away. *Moore*, 1 *Leach* 335 (1784); cf. *Lapier*, p. 529. A case is mentioned by Holroyd J. in which a person ran up against another, for the purpose of diverting his attention while he picked his pocket; and the judges held, that the force was sufficient to make it a robbery, it having been used with that intent. *Anon.*, 1 *Lewin C. C.* 300 (1825). Prisoner and others "hung around the prosecutor's person," and rifled him of his watch and money. It did not appear that any actual force or menace was used, but they surrounded him so as to render any attempt at resistance hazardous, if not in vain. Bayley J. said, "in order to constitute robbery, there must be either force or menaces. If several persons so surround another as to take away the power of resistance, this is robbery." *Hughes and Wellings*, *ib.* 301 (1825).

Any struggle renders the taking robbery. Thus where a gentleman perceived that the prisoner had laid hold of his sword, and he himself laid hold of it at the same time and struggled for it, this was adjudged robbery. *Davies*, 2 *East P. C.* 709; 1 *Lea.* 290 (1713).

Prisoner coming up to prosecutor in the street, laid "violent hold" of the seals and chains of his watch, and succeeded in pulling it out of his fob. The watch was fastened with a steel chain, which went round his neck, and which prevented the prisoner from immediately taking the watch; but, by pulling, and two or three jerks, he broke the chain, and made off with the watch. The judges were unanimous that the conviction for robbery was right, for prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and *actual force* was used for that purpose. *Mason*, *Russ. & Ry.* 419 (1820).

The force used must be used *with the intent* to accomplish the robbery, and not by accident. Where, therefore, a wound had been accidentally inflicted on the hand of prosecutrix by the thief who was using a knife to detach his booty, it was held by Alderson B. that an indictment for robbery could not be sustained, but only for simple larceny. *Edwards*, 1 *Cox C. C.* 32 (1843).

More than one robbery—Indictment.] An indictment for robbery which charges the prisoner with having assaulted G. P. and H. P., and stolen 2*s.* from one and 1*s.* from the other, is correct, when the robbery of both, who were walking together, was all one fact; and counsel for the prosecution was not put to elect, as the felonies are not distinct, as they would have been had there been an interval between them. *Giddins and two others*, *Carr. & M.* 634 (1842). Cf. p. 173.

Violence under pretence of legal or rightful proceedings.] "Merriman, carrying his cheeses along the highway in a cart, was stopped by one Hall, who insisted on seizing them for want of a permit (which was found by the jury to be a mere pretence for the purpose of defrauding Merriman, no permit being necessary); and on some altercation, they agreed to go before a magistrate to determine the matter. In the meantime other persons

riotously assembled on account of the dearness of provisions, and in confederacy with Hall for the purpose, carried away the goods in Merriman's absence. It was objected to be no robbery, there being no force used, but only larceny; but Hewitt J. overruled the objection, and left it to the jury, who found it robbery, and found a verdict for the plaintiff . . . and, upon motion for a new trial," the K. B. held the verdict right. *Merriman* v. *Hundred of Chippenham*, 2 *East P. C.* 709 (1767), who explains that the ground was that Hall's original taking was a robbery.

A police-officer and "runner" having the lawful custody of a woman, treated her unnecessarily ill, so that she offered him money to procure his good offices; this at first he did not take, but ultimately took it from her by force, by stopping her mouth and by putting his hand into her pocket. The jury found that his intent was felonious, to get her money, and that he had handcuffed her and forced her into a coach to prevent her resisting, and the judges held this was robbery, for he "had made use of violence, though under the sanction and pretence of law." *Gascoigne*, 1 *Leach*, 280; 2 *East P. C.* 709 (1783). See *Knewland*, p. 760, and cf. below.

Putting in fear.] This (the alternative to actual violence) means a fear of injury either to person, property, or reputation, p. 760.

Neither actual menaces nor actual threats of violence need be proved. The law, said Willes J., will not "suffer its object to be evaded by an ambiguity" of expression; for if a man *animo furandi*, say, "Give me your money—Lend me your money—Make me a present of your money," or words of the like import, they are equivalent to the most positive order or demand; and if anything be obtained in consequence, it will form the first ingredient in the crime of robbery." *Donnally*, 1 *Leach* 193, at 196; *East, ib.*, 713, 783 (1779); see p. 761. During the Gordon riots, a boy with a cockade in his hat knocked violently at prosecutor's door, and, on his opening it, said, "God bless your honour, remember the poor mob." The prosecutor told him to go along; upon which he said he would go and fetch his captain. He went, and soon after the mob came, to the number of 100, armed with sticks, and headed by prisoner on horseback, his horse led by the boy. The bystanders said, "You must give them money." The boy said, "Now I have brought my captain;" and some of the mob said, "God bless this gentleman, he is always generous." Prosecutor asked prisoner "how much?" and he answered, "half-a-crown;" on which the prosecutor, who had before intended to give only a shilling, gave the prisoner half-a-crown, and the mob, giving three cheers, went to the next house: held to be robbery. *Taplin*, 2 *East P.C.* 712 (1780).

So there may be a putting in fear "under colour," *e.g.* of a purchase; cf. above. Thus, if a person, by force or threats, compel another to give him goods, and "by way of colour" oblige him to take, or if he offer, less than the value, this is robbery. As where prisoner took wheat worth 8s., and forced the owner to take 13½*d.* for it, threatening to kill her if she refused, it was clearly held by all the judges to be a robbery. *Simons, East, ib.* 712 (1773), p. 760. Again, where prisoner and a great mob came to prosecutor, who had some corn, and one of them said if he would not sell, they were going to take it away; and prisoner said they would give him 30s. a load, and if he would not accept that they would take the corn away; upon which prosecutor sold it for 30s., though it was worth 38s.; this was held to be robbery. *Spencer, ib.* (1783), p. 760.

In such cases, the amount paid may show that the taking was not felonious; though there may be force or putting in fear, it is only a trespass. "A traveller met a fisherman with fish, who refused to sell him any; and he, by force and putting in fear, took away some of his fish, and threw him

money much above the value of it; and judgment was respited, because of the doubt whether the intent were felonious." *The Fisherman's Case*, *East*, *ib.* 661–2 (1586); 1 *Hawk. P. C.*, Bk. 1, ch. 34, s. 14. "Such, however, seem properly to be questions for the jury" to say whether, from such a circumstance the "intention was not fraudulent, and so not felonious," though, in law, the mere fact that the value is offered, does not prevent the taking being felonious, though it is "pregnant evidence" to the contrary. *East.*

So it is a question for the jury—as in the case of riots, p. 751—whether the circumstances were such as reasonably to create fear; and it can seldom happen that such a presumption may not properly be made. "It is not even," says Willes J., after citing *Foster* 128 (p. 756), "necessary that there should be *actual danger*, for a robbery may be committed without using an offensive weapon, as by using a tinderbox or candlestick instead of a pistol. A reasonable fear of *danger* caused by the exercise of a *constructive violence* is sufficient; and where such a terror is impressed upon the mind, as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be said to part with it *against his will*. Nor need the degree of constructive violence be such as in its effects necessarily imports a probable injury; for when a villain comes and demands money, no one knows how far he will go." *Donnally*, pp. 758, 761, from which the rule deduced by *East*, *ib.* 713, 727, who declines "to draw the exact line," is: "On the one hand, the fear is not confined to an apprehension of bodily injury, and on the other hand it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence or assault upon the person."

In *Jackson*, 1 *East P. C.*, *Add.* xxiv., 2 *Lea.* 619, *n.* (1802), p. 762, one expression seems to imply that the fear must be such as will operate *in constantem virum*, but it certainly cannot be required, in order to constitute a robbery, in every case, that the terror impressed should be that of which a man of constancy and courage would be sensible. See *Walton*, *L. & C.* 288 (1863); and *Tomlinson*, 1895, 1 *Q. B.*; 64 *L. J. M. C.* 97; 18 *Cox C. C.* 75; *C. C. R.*, p. 790.

Fear of injury to the person.] The judgments in *Donnally*, above, go to show that danger to the person may be apprehended from every assault with intent to rob, and a jury would be justified in presuming that the person assaulted was under the influence of such fear. And the same would be the case, if the fear was on account of a child with the person robbed, *per* Hotham B. in *Donnally*, above. So in *Reane*, 2 *Lea.* 616; 2 *East P. C.* 735 (1794), p. 762, Eyre C.J. observed, that "he saw no sensible distinction between a personal violence to the party himself, and the case put, of a man holding another's child over a river, and threatening to throw it in unless he gave him money." Cf. *Astley*, below.

Fear of injury to property.] During tinners' riots in Cornwall, prisoners, with a mob of about seventy, came to prosecutor's house, and said they would have from him the same as they had had from his neighbours, viz. a guinea, "else they would tear down his mow of corn and level his house." He gave them 5*s.*, but prisoner "swore he would have 5*s.* more," which, being terrified, he gave him. They then opened a cask of cider by force and drank part of it, ate some bread and cheese, and prisoner carried away a piece of meat. He was indicted and convicted of robbing prosecutor of 10*s.* in his house by assault, and putting him in fear. There was also another count

for putting him in fear, and taking from him, in his dwelling-house, a quantity of cider, &c., and it was held robbery in the dwelling-house. *Simons*, 2 *East P. C.* 731 (1773), p. 758. During the Birmingham riots, when many buildings had been destroyed, prisoners threatened circumstantially to burn prosecutor's house, unless he gave them money, &c., which he did. The jury found (as he had sworn) that prosecutor did not deliver his money from any [immediate] apprehension of danger to his life or person, but from an apprehension, that if he refused, his house would at *some future time* be pulled down (as others had been); cf. *Reane*, above. But he had expressed great apprehension about his wife, who was in the house, and as East asks, "If the threat of burning down a man's dwelling-house by a mob do not in itself convey a threat of personal danger to the occupiers?" A majority of the judges held this to be robbery. *Astley*, *ib.* 729; *Brown*, *ib.* 731 (1780); *Spencer*, p. 758.

A servant maid was inveigled by one prisoner, "a tout," into a mock-auction, the door was shut, and she was "hustled" and not allowed to leave till she had bid; after repeated refusals she bid "sixpence more," and a lot was knocked down to her by the other prisoner at fourteen shillings and sixpence. She had not that sum, and was forcibly prevented from leaving, and some attempt was made to seize her bundle (as a pledge). Ultimately a mock-constable was produced, who threatened there and then to take her to Bow Street and thence to Newgate (as one prisoner ordered), unless he got a shilling for his trouble, which she gave him. He thereupon pretended that the auctioneer released her, and he and she went away. She herself said that the only fear she was under was that of being arrested, &c. The jury found prisoners guilty of "combination" to obtain her money, that the shilling was given for fear of arrest, &c., and that "she did not know at the time the extent of the violence that might be committed upon her." Upon a case reserved, the judges were of opinion that the circumstances did not amount to robbery (but to conspiracy, for which prisoners were afterwards indicted). Ashurst J. said that the species of threat here "in the opinion of the judges, is not sufficient to raise such a degree of terror in the mind as to constitute the crime of robbery, for it was only a threat to put her into the hands of the law, and an innocent person need not in such circumstances be apprehensive of any danger. She might have known, that having done no wrong, the law, if she had been carried to prison, would have taken her under its protection, and set her free. The terror arising from such a source cannot, therefore, be considered of a degree sufficient to induce a person to part with his money. It is the case of a simple duress." As to the other prisoner, the "tout," "the force which he used . . . was merely that of pushing her into the sale-room, and detaining her until she gave the shilling; but as *terror* is, no less than *force*, a component part of the complex idea annexed to the term robbery, the crime cannot be complete without it." *Knewland and Wood*, 2 *Leach* 721; 2 *East P. C.* 732 (1796). Cf. p. 542.

The reasoning (though not the result) in this case has been criticised (1*st ed.* of this work), and it has been contrasted with *Gascoigne*, p. 758, where, however, some greater degree of personal violence was used, and the money was taken from the prosecutrix's pocket by the prisoner himself; but it is clearly immaterial whether the offender takes the money with his own hand, or whether it is delivered to him, in consequence of his menaces.

Fear of injury to character—charge of unnatural crime.] See p. 790. In *Knewland*, above, Ashurst J. distinctly says that threats to accuse of sodomitical practices form an exception to the terrors of injury to character (which do not constitute robbery) by reason of the peculiar abominableness of that crime. There Heath J. said *Donnally* and *Hickman*, below

"only go thus far—that to obtain money from a person by accusing him of that which, if proved, would carry with it an *infamous punishment*, is sufficient to support an indictment for robbery; but it has never been decided that a mere charge (?) of imprisonment and extortion of money . . . is sufficient." 2 *Leach* 729.

In one instance of this exception, prisoner undoubtedly intended to convey the idea of such a charge, and on one occasion held prosecutor by force in the street, and on several others blackmailed him at his house; and prosecutor swore that at the time he parted with the money, he understood the threatened charge to be an imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance, and that the violence with which prisoner had detained him in the street had put him in fear for the safety of his person. Upon a case reserved the judges were of opinion, that "to constitute robbery there was no occasion to use weapons or real violence; but that taking money from a man in such a situation as rendered him not a free man; as if a person so robbed were in fear of a conspiracy against his life or character, was such a putting in fear as would make the taking of his money under that terror a robbery," and that a conviction for highway robbery was correct. *Jones*, 1 *Leach* 139; 2 *East P. C.* 714 (1776).

Subsequent cases have made it clear that it is no less robbery where *no personal violence whatever* has been used.

The facts in *Donnally*, pp. 758, 759, 760, were those common in blackmailing charges of this crime: prisoner threatened "to take" prosecutor "before a magistrate," unless he gave him money. Prosecutor swore that he was exceedingly alarmed upon two occasions, and under that alarm gave the money; that he was not aware what were the consequences of such a charge; but apprehended that it might cost him his life, and so the jury found. The twelve judges gave their opinions *seriatim* (2 *East P. C.* 716). They unanimously resolved that prisoner was rightly convicted of robbery (he was not, however, executed). "This," said Willes J. "is a threat of *personal violence*; for the prosecutor had everything to fear in being dragged through the streets as a culprit charged with an unnatural crime. The threat must necessarily and unavoidably create intimidation. It is equivalent to actual violence, for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money."

Here, no doubt, there was apprehension of loss of life as well as of character, but in *Hickman*, 1 *Lea.* 278; 2 *East P. C.* 728 (1783), prosecutor's own account was that he only feared the stain on his character. Nevertheless, all the judges held it robbery. Their resolution was delivered by Ashurst J. who said that the case did not "*materially* differ from that of *Donnally*, for that the true definition of robbery is the stealing or taking from the person, or in the presence of another, property of any amount, with such a degree of *force* or *terror* as to induce the party *unwillingly* to part with his property; and whether the *terror* arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally, if not more, terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges are unanimously of opinion that upon the principles of law, and the authority of former decisions, a *threat* to accuse a man of having committed the greatest of all crimes is, as in the present case, a sufficient *force* to constitute the crime of robbery by putting in fear." Cf. p. 762.

Hickman was followed (by all the judges) in *Egerton*, p. 83, where prosecutor gave a similar account of his state of mind.

In *Cannon, Russ. & Ry.* 146 (1808), prosecutor admitted that he was not in bodily fear, and he did not believe prisoners' pretensions to be police officers, but did believe, when they practically forced him into a coach, that they would take him to a watch-house. Ten judges thought this was sufficient "forcible constraint"; they were equally divided whether "mere" apprehension of danger to character was enough, and whether there must not be some force or violence.

The threat must be a threat to accuse the person robbed. Prisoner was indicted for robbing the wife of a man whom he threatened to accuse, but Littledale J. declined to extend the principle, and directed an acquittal. *Edward*, 1 *Moo. & R.* 257; 5 *C. & P.* 518 (1833).

Prisoner went twice to the house where prosecutor lived in service, and called him a most opprobrious name. Prosecutor took him each time before a magistrate, who discharged him. On being discharged, prisoner followed prosecutor and repeated the expressions, till at last prosecutor, tired of his importunities, and "being frightened for his reputation, and in fear of losing his situation," gave him money. Prisoner was convicted; but on some doubts of the judges he received a pardon. *Elmstead*, 2 *Russ. Cri.* 106 (1802). This case is insufficiently reported; L. Ellenborough's view that the principal inducement to part with the money was the fear of a loss of his place, is surely not incompatible with a fear that that loss would follow on the loss of character.

At any rate, it was always held that it must appear that the property was delivered, while the person was under the influence of the fear arising from the threats or the violence. Where prosecutor, in order to entrap blackmailers, pretended to parley and negotiate with them, and though he had been alarmed at first, when he actually gave the money, he was under no apprehension at all, the judges were of opinion that it was no robbery, there being no violence nor fear at the time when prosecutor parted with his money. Eyre C.J. observed "The principle of robbery was violence; where the money was delivered through fear, that was constructive violence. That the principle he had acted upon in such cases was to leave the question to the jury whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. [Cf. p. 761.] Therefore, when the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoner, he negatived the robbery. That this was different from Norden's case [p. 756], where there was actual violence; for here there was neither actual nor constructive violence"—on which ground the judges held the conviction wrong. *Reane*, p. 759. The same point was ruled in *Fuller, Russ. & Ry.* 408 (1820), where prosecutor, who had already been blackmailed, made an appointment to meet prisoner, and in the meantime procured a constable to attend, who as soon as the prisoner received the money, apprehended him. Prosecutor stated that he parted with the *last* sum of money in order that he might prosecute prisoner.

Duration of the fear caused.] Where the immediate danger is over, it has been doubted when prosecutor has had time between threat and yielding to seek assistance from the law or friends, whether, if he complies, there has been *robbery*. *Jackson, &c.*, p. 759, was such a case, where prosecutor went and fetched a friend who was present at the payment of money, and advised him not to pay. The judges, by a majority, held that it was not robbery, though the money was taken in the presence of the prosecutor, and the fear of losing his character was upon him at the time. "Most of the majority thought that, in order to constitute robbery, the money must be parted with from an *immediate* apprehension of present danger *upon the charge being*

made, and not, as in this case, after the parties had *separated*, and the prosecutor had time to deliberate upon it, and apply for assistance, and had applied to a friend, by whom he was advised not to pay it; and who was actually present at the very time when it was paid; all which carried the appearance more of a composition of a prosecution than it did of a robbery, and seemed more like a calculation whether it were better to lose his money or risk his character. One of the judges, who agreed that it was not robbery, went upon the ground that there was not a *continuing* fear, such as could operate *in constantem virum*, from the time when the money was demanded till it was paid. . . . The minority, who held the case to be robbery, thought the question concluded by the finding of the jury that the prosecutor had parted with his money through fear continuing at the time, which fell in with the definition of robbery long ago adopted and acted upon, and they said that it would be difficult to draw any other line. That this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for assistance, for the money was given to prevent the public disclosure of the charge." The reference to an ancient definition is, perhaps, repeated 2 *East P. C.* 714, where thieves make a man swear "by menace of death" to bring them money: "the true reason" that this is robbery "is given by L. Hale and others; *because the fear of that menace still continued upon him at the time he delivered the money.*"]

Relation between common law and statute.] The question is now settled by 24–5 V. 96, 46 and 47, p. 786.

Semble that now, where money is obtained by any of the threats specified in those sections, the indictment must be on the statute. See *Henry, &c.*, 2 *Moo. C. C.* 118 (1840), below, where such threats, having been made a distinct felony, under a repealed statute, a prisoner who was convicted of having aided another prisoner convicted of robbery with violence, but who, the jury found, though privy to the design to extort by accusation, was not privy to the violence, was held to have been wrongly convicted, as he should have been indicted under that statute. But where the money is obtained by threats to accuse other than those specified in an Act, the indictment may be for robbery, if the party was put in fear and parted with his property in consequence. *Norton*, 8 *C. & P.* 671 (1838). See 2 *Russ. Cri.* 112, *n.* It has been decided, that assaulting and threatening to charge with an infamous crime (where the terms did not come within certain repealed sections), with intent thereby to extort money, was an assault with intent to rob, because prisoners intended to get the money by the violence of the assault, as well as by the charge, "which would be a common law robbery." *Stringer*, 2 *Moo. C. C.* 261; 1 *C. & K.* 188 (1842), where the judges doubted whether *Henry*, above, was rightly decided.

It is no defence to a charge of robbery by such threatening, that prosecutor has in fact been guilty of such a crime; but if the money was given voluntarily, without any previous threat, the indictment could not be supported: acquittal. *Gardner*, 1 *C. & P.* 479 (1824). See p. 791.

The putting in fear must precede the taking.] The property must be taken while the influence of fear exists; for if the property be taken first, and the menaces or threats inducing the fear be used afterwards, it is not robbery. Prosecutor seeing his purse in prisoner's hand demanded it, when prisoner answered, "Villain, if thou speakest of this purse, I will pluck thy house over thine ears," &c., and then went away; and "because he took it not with such violence as put prosecutor in fear, it was ruled to be but stealth, and not robbery, for the words of menace were used after the taking of the purse." *Harman*, 2 *Roll. Rep.* 154; 1 *Hale P. C.* 534; 1 *Leach* 198, *n.* (1620).

SACRILEGE.

"Sacrilege is the 'felonious taking of any goods out of a parish church, or other church or chapel' (s. 10, 1 E. 6, c. 12 [repealed]: *2 Hale P. C.* 365); and such goods are not confined to things used for Divine Service." *Stroud, Judic. Dict.*

Breaking and entering place of worship and committing a felony.] By 24–5 V. 96, 50: "Whosoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit any felony therein, or being in any church, chapel, meeting-house, or other place of divine worship shall commit any felony therein and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . ." (see p. 198). Cf. p. 209.

Breaking and entering a place of worship with intent to commit felony.] See 24–5 V. 96, 57, p. 370.

Riotously demolishing or injuring place of worship.] See 24–5 V. 97, 11, 12, p. 746.

"*Church, chapel . . . or other place of divine worship.*"] It must be proved that the building was a church, chapel, &c. Where the goods had been stolen from a box in the church tower, which had a separate roof, but no outer door, the only way of going to it being through the body of the church, from which the tower was not separated by a door or partition of any kind; Parke J. was of opinion, that this tower was to be taken as a part of the church. *Wheeler*, 3 *C. & P.* 585 (1829).

The vestry of a parish church was broken open and robbed. It was formed out of what before had been the church porch; but had a door opening into the churchyard, which could only be unlocked, if at all, from the inside. It was held by Coleridge J. that this vestry was part of the fabric of the church. *Evans, Carr. & M.* 298 (1842).

Both these cases were under a repealed statute which only spoke of *church* or *chapel*; but it seems clear that the proof as to any "other place of divine worship" must be of the same sort.

Property how laid.] In *Wortley*, p. 562, prisoner was indicted for breaking into a church and stealing a box and money. The box was a very ancient box, firmly fixed by two screws at the back to the outside of a pew in the centre aisle of the church, and by a third screw at the bottom, to a supporter beneath, and over the box was an ancient board, with the inscription painted thereon, "Remember the poor." In the count, which was sustained, the property was laid in the vicar *by name* and "others" (the churchwardens). The court "thought that the box might be presumed, in the absence of any contrary evidence, to have been placed in the church

pursuant to the canon (84), *Burn's Eccl. Law*, 369, tit. *Church;* and that the money therein placed was constructively in the possession of the vicar and churchwardens, who jointly are not a corporation, and that they were properly described as individuals in the indictment."

Frequently the property is laid in the parishioners; sometimes in the rector alone, and sometimes in the churchwardens alone. See 1 *Hale P. C.* 512; 2 *ib.* 181; 2 *East P. C.* 651. In a private chapel the property ought perhaps to be laid in the private owner.

SEA AND RIVER BANKS, PONDS, MILL-DAMS, &c.,

OFFENCES RELATING TO

Damaging sea, river, and canal banks or works in ports, harbours, &c.] By 24–5 V. 97, 30 (as printed in the *2nd ed.* of *The Statutes Revised*): "Whosoever shall unlawfully and maliciously break down or cut down or otherwise damage or destroy any sea bank or sea wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool, or marsh, whereby any land or building shall be, or shall be in danger of being, overflowed or damaged, or shall unlawfully and maliciously throw, break, or cut down, level, undermine, or otherwise destroy any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping."

By s. 31 (*2nd ed. Statutes Revised*): "Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping."

Injuries to fish-ponds, mill-dams, &c.] By s. 32: "Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby, to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, or shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam or floodgate of any millpond, reservoir, or pool, shall be guilty of a misdemeanor" —punishment as in preceding s.

By the Salmon Fishery Act, 1873, 36–7 V. 71, 13, the provisions of this s. (32), "so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words

"or in any salmon river" were inserted in the said section in lieu of the words "private rights of fishery" after the words "noxious material in any such pond or water." Cf. p. 430. The meaning of this s. is clear though, if its terms be followed literally, s. 32 does not read grammatically: (there is also a misquotation of "private *rights*" for "*right*"). A conviction under s. 13 was confirmed by the C. C. R. on the ground that "the obvious intention" of a statute must prevail, despite grammatical difficulties. *Vasey*, 21 *Cox C. C.* 49 (1905).

SEAMEN, OFFENCES AGAINST.

See generally, pp. 769–71.

Forcing seamen on shore.] By s. 43 of 6 E. 7, 48, Merchant Shipping Act 1906 (repealing, by sched. 2, 57–8 V. 60, 187): "A person belonging to a British ship shall not wrongfully force a seaman on shore and leave him behind, or otherwise cause a seaman to be wrongfully left behind in any place either on shore or at sea in or out of his Majesty's dominions, and if he does so he shall in respect of each offence, be guilty of a misdemeanor."

The same sched. repeals 57–8 V. 60, 188, and other ss., Part. IV. (ss. 28–49) of the later Act (1906), replacing them and creating several similar misdemeanors.

As to offences against seamen under the Conspiracy and Protection of Property Act, see p. 363.

As to violence by smugglers, see p. 775.

Punishment.] Cf. p. 770. By 57–8 V. 60, 680, every offence declared by the Act to be a misdemeanor shall be punishable by fine or imprisonment, not exceeding two years, with or without hard labour, but may be prosecuted summarily. But notwithstanding this s., s. 17 (1) of the Summary Jurisdiction Act, 1879, pp. 69, 161, applies, and where the conditions of that s. are fulfilled defendant has the right to claim to be tried by a jury. *Goldberg*, 20 *Cox C. C.* 699 (1904), *K. B. D.*

Venue.] By s. 684, every offence is deemed to have been committed either where it actually was committed, or in any place where the offender may be. Cf. p. 769.

This s. is applied by 4 E. 7, 24, 1 (5), the Wireless Telegraphy Act, 1904; and by 5 E. 7, 13, 7 (2), the Aliens Act, 1905.

SHIPS AND VESSELS—OFFENCES IN RESPECT OF.

Stealing from ships, docks, wharves, &c.] By 24–5 V. 96, 63: "Whosoever shall steal any goods or merchandise in any vessel, barge, or boat, of any description whatsoever in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such haven, port, river, canal, creek or basin, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . ." (see p. 198).

Stealing from ship in distress or wrecked.] By s. 64: "Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . and the offender may be indicted and tried in the county or place in which the offence shall have been committed or in any county or place next adjoining" (see p. 198).

For other offences, see—

24–5 V. 97, 42, set out p. 240.
„ „ 43, „ „ 240.
„ „ 44, „ „ 241.
„ „ 45, „ „ 394.
„ 100, 13, „ „ 651.
„ „ 30, „ „ 394.

Damaging ships otherwise than by fire.] By 24–5 V. 97, 46: "Whosoever shall unlawfully and maliciously damage, otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or render the same useless, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . [see p. 198], and if a male under the age of sixteen years, with or without whipping."

Exhibiting false signals, &c.] By s. 47: "Whosoever shall unlawfully mask, alter or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . [see p. 198], and if a male under the age of sixteen years, with or without whipping."

Removing or concealing buoys and other sea-marks.] By s. 48 : "Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy rope, perch, or mark used or intended for the guidance of seamen, or for the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . [see p. 198], and if a male under the age of sixteen years, with or without whipping."

Destroying wrecks or any articles belonging thereto.] By s. 49 : "Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen . . . years" (see p. 198).

N.B.—These ss. are reprinted from *The Statutes Revised, 2nd ed.*

Misconduct endangering life or ship.] By 57–8 V. 60, 220 : "If a master, seaman, or apprentice belonging to a British ship, by wilful breach of duty, or by neglect of duty, or by reason of drunkenness (*a*), does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of a person belonging to or on board the ship; or (*b*) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from immediate danger to life or limb, he shall in respect of each offence be guilty of a misdemeanor."

By s. 607, the same provision is made with respect to pilots, "when in charge of a ship."

Punishment.] By that s., qualified pilots are *also* subject to suspension or dismissal—as well as to the general punishment under s. 680, p. 768.

Sending to sea an unseaworthy ship.] By 57–8 V. 60, 457, every person who sends a British ship to sea in such unseaworthy state that the life of any person would be likely to be endangered, is guilty of a misdemeanor, unless he prove that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable; and for the purpose of giving such proof, such person may give evidence in the same manner as any other witness. Every master of a British ship who knowingly takes such a ship to sea is similarly guilty of a misdemeanor. No prosecution (except in Scotland) under this section shall be instituted except by or with the consent of the Board of Trade or of the governor of the British possession in which the prosecution takes place. No misdemeanor under this section shall be punishable upon summary conviction.

Neglecting to render assistance in collision.] By 57–8 V. 60, 422, the neglect of the master of a vessel to render assistance in the case of collision, or to give to the other vessel the name, port of registry, &c., of his own vessel, is a misdemeanor. If he is a certificated officer, his certificate may be cancelled or suspended.

Other offences under the Merchant Shipping Act.] By s. 16, the master or owner of a ship using or attempting to use for her navigation a certificate of registry not legally granted shall be guilty of a misdemeanor. By s. 70, carrying papers and documents with intent to conceal the British or assume a foreign character of the ship is made a misdemeanor. By s. 147, a superintendent or officer granting or issuing a seaman's money order with a fraudulent intent shall be guilty of felony, and liable to penal servitude for a term not exceeding five years and not less than three. Cf. p. 709. Wilfully destroying, or altering, or making false entries in an official log-book is a misdemeanor by s. 241 (3).

By s. 398, the receiving any payment, &c., from the person to whom an apprentice or sea-fishing boy is bound, or from the apprentice or boy in consideration of his being so bound, and the making of such payment is made a misdemeanor. By s. 535, any person taking wreck found in British waters into a foreign port and selling it there is guilty of felony, and liable to five years' penal servitude, with a minimum of three. As to forgery of documents under the Act, see p. 457.

Venue.] See s. 64, p. 769, and s. 684, p. 768.

Other offences relating to vessels.] As to destroying, &c., cordage, &c., and other offences on the Thames, see 2–3 V. 47, 27, 28; destroying ships in the port of London, 39 G. 3, lxix. s. 104, p. 241; destroying ships of war, 12 G. 3, 24, p. 240; getting possession of documents, sketches, plans, &c., for the purpose of wrongfully obtaining information, 52–3 V. 52, 1, p. 673.

SHOOTING.

Shooting or attempting to shoot with intent to murder.] See 24–5 V. 100, 14, p. 651.

Shooting or attempting to shoot with intent to do grievous bodily harm.] See 24–5 V. 100, 18, pp. 249, 494.

Loaded arms.] See 24–5 V. 100, 19, p. 249.

It makes no difference what the gun is loaded with, if it is capable of effecting, and probably would effect, the intent with which prisoner is charged. This ruling was approved by all the judges: the indictment was for an intent to kill, and the jury found that the pistol was loaded (not only with powder and paper, but) with some destructive material. *Kitchen, Russ. & Ry.* 95 (1805).

Where prisoner, by snapping a percussion-cap, discharged a gun-barrel detached from the stock and lock, Patteson J. and other judges held this to be shooting with "loaded arms," within 9 G. 4, 31 (repealed). *Coates*, 6 *C. & P.* 394 (1834).

Sending a tin box, filled with gunpowder and peas, so contrived that the person who opened it should thereby set fire to the powder and kill himself, was held by the judges not to be an attempt to discharge loaded arms within that statute. *Mountford*, 1 *Moo. C. C.* 441 (1835).

The shooting.] Where prisoner fired into a room in which he supposed a certain person to be, but in point of fact he was not, and could not possibly be reached by the shot, Gurney B. held that the indictment under that statute could not be supported. *Lovell*, 2 *Moo. & R.* 39 (1837). An indictment for maliciously shooting at A. B. is supported if he be struck by the shot, though the gun be aimed at a different person. *Jarvis*, pp. 110, 156. See p. 495.

As to an attempt, see *Duckworth*, pp. 221, 258, 652, and *Linneker*, p. 652. Whether it would be an indictable offence for a man to attempt to discharge a firearm which could not be discharged seems doubtful (see p. 258), but where prisoner pointed at prosecutor a revolver which was loaded only in some of its chambers and pulled the trigger, but the hammer fell upon an empty chamber, Charles J. held that this was an attempt to discharge a loaded firearm. *Jackson*, p. 258.

SHOPS—OFFENCES IN.

See, generally, 24–5 V. 96, 56, p. 370. See also pp. 239, 297.

What buildings are "shops."] It was held by Alderson B. that a work-shop, such as a carpenter's or blacksmith's shop, was not a "shop" (within a repealed Act), "it must be a shop for the sale of articles." *Sanders*, 9 *Carr. & P.* 79 (1839). But it was held by L. Denman C.J. in *Carter*, 1 *C. & K.* 173 (1843), also under that Act, that a person who breaks into an ordinary blacksmith's shop containing a forge, and used as a workshop only, not being inhabited nor attached to any dwelling-house, and who steals goods therein, could be convicted of breaking into a shop, &c.; he declined to be bound by *Sanders*. A building forming part of chemical works, was commonly called "The Machine House," a weighing-machine being there, where all the goods sent out were weighed, and entered in a book kept there. The work-sheets were also kept in this place; the wages of the men were paid there; the books, &c., at other times were kept in what is called "the office," where the general books and accounts were kept. It was held that this building was a "counting-house" within that Act. *Potter*, 2 *Den. C. C. R.* 235; 23 *L. J. M. C.* 170 (1857). A cellar used merely for the deposit of goods intended for removal and sale is a "warehouse" within that Act. *Hill*, 2 *Moo. & R.* 458 (1843).

SLAVE-DEALING.

See p. 701 and p. 67.

SMUGGLING

AND OTHER OFFENCES CONNECTED WITH THE CUSTOMS.

The Customs Consolidation Act, 1876, 39–40 V. 36, is the principal statute with regard to prosecutions by the customs.

Assembling to assist in smuggling.] By s. 189 of 39–40 V. 36: "Every person who shall by any means procure or hire, or shall depute or authorise any other person to procure or hire any person or persons to assemble for the purpose of being concerned in the landing, or unshipping, or carrying, conveying, or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured, shall be imprisoned for any term not exceeding twelve months; and if any person engaged in the commission of any of *the above offences* be armed with firearms or other offensive weapons, or whether so armed or not be disguised in any way, or being so armed or disguised shall be found with any goods liable to forfeiture under the Customs Acts within five miles of the sea coast or of any tidal river, *shall be imprisoned* with or without hard labour, for any term not exceeding three years."

There is no nominative case to "*shall be imprisoned*" (second time), as is pointed out in a note to *Stephen's Digest of Crim. Law*, art. 81, p. 58, *5th ed.*, where there is a severe criticism of the drafting of this s. "The above offences" clearly are those of "landing, &c. . . . concealing," three lines above.

By 42–3 V. 21, 10: "All persons to the number of three or more who shall assemble for the purpose of unshipping, landing, running, carrying, concealing, or having so assembled shall unship, land, run, carry, convey, or conceal any spirits, tobacco, or any prohibited, restricted, or uncustomed goods, shall each forfeit a penalty not exceeding 500*l.*, nor less than 100*l.*"

The assembling together.] It must be proved that prisoners, to the number of three or more, were assembled together *deliberately*, for the purpose of aiding and assisting in the commission of the illegal act. Where a number of drunken men came from an ale-house, and hastily set themselves to carry away some Geneva which had been duly seized in a vault by the excise as uncustomed, and the officers were beaten, it was considered very doubtful, whether the case came within 19 G. 2, 34 (repealed), the words of which "manifestly allude to the circumstance of great multitudes of people coming down upon the beach of the sea for the purpose of escorting uncustomed goods," and prisoners, one of whom was the holder of the house where the gin was seized, were acquitted. *Hutchinson and others*, 1 *Leach* 339 (1784).

Reasonable proof must be given from which the jury may infer that the goods were uncustomed. See *Shelley*, *ib.* (1784).

"*Offensive weapons.*"] "Although it was difficult to say what should or

should not be called an offensive weapon, it would be going a great deal too far to say that nothing but guns, pistols, daggers, and instruments of war should be so considered; but . . . bludgeons, properly so called, and clubs, and anything that is not in common use for any other purpose but a weapon, are clearly offensive weapons within the meaning of the legislature." *Cosan, Leach, ib.* (1785), following *Ince*, below. Large sticks about three feet long, with large knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were held not to be offensive weapons; the preamble of the statute showing that they must be what the law calls *dangerous*. *Ince, ib.* (1785). But on an indictment with intent to rob, a common walking-stick has been held to be an offensive weapon. *Johnson*, and cf. *Fry*, p. 486. See also *Sharwin*, 1 *East P. C.* 421 (1785). A common whip was held not to be an offensive weapon. *Fletcher*, 1 *Leach* 23 (1742). And, *bats*, which are poles used by smugglers to carry tubs, were held not to be offensive weapons. *Noakes*, p. 111. If in a sudden affray a man snatch up a hatchet "accidentally," this does not come within that statute. *Rose*, 1 *Leach* 342, *n.* (1784). See pp. 485–6.

Making signals to smugglers.] By s. 190 of 39–40 V. 36: "No person shall after sunset and before sunrise between the 21st day of September and the 1st day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time of the year, make, aid, or assist in making any signal in or on board, or from any ship or boat, or on, or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person so on board of any such ship or boat be or not within distance to notice any such signal; and if any person, contrary to the Customs Acts [explained s. 284; see *Chronological Table and Index of Statutes*, vol. ii.], shall make, or cause to be made, or aid or assist in making any such signal, he shall be guilty of a misdemeanor, and may be stopped, arrested, detained, and conveyed before any justice, who, if he see cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of law; and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast; and the offender, being duly convicted, shall, by order of the court before whom he shall be convicted, either forfeit the penalty of one hundred pounds, or, at the discretion of such court, be committed to a gaol or house of correction, there to be kept to hard labour for any term not exceeding one year." By s. 191: "If any person be charged with having made or caused to be made, or for aiding or assisting in making any such signal as aforesaid, the burden of proof that such signal, so charged as having been made with intent and for the purpose of giving such notice as aforesaid, was not made with such intent and for such purpose, shall be upon the defendant against whom such charge is made." By s. 192, any person may prevent such signals being made, and may enter lands for that purpose.

Shooting at a vessel belonging to the navy, &c.] By s. 193: "If any person shall maliciously shoot at any vessel or boat belonging to her Majesty's navy, or in the service of the revenue, or shall maliciously shoot at, maim, or wound any officer of the army, navy, marines, or coastguard, being duly employed in the prevention of smuggling and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, upon conviction, be adjudged guilty of felony, and shall be

liable, at the discretion of the court, to penal servitude for any term not less than five years, or to be imprisoned for any term not exceeding five years." See s. 261, below.

It was held, when a custom-house vessel chased a smuggler, and fired into her without hoisting such a pendant and ensign as statute required, the returning of the fire by the smuggler was not malicious within the (repealed) Act. *Reynolds, Russ. & Ry.* 465 (1821). Cf. p. 638.

Assaults upon revenue officers.] Assaults upon revenue officers in the execution of their duty are included in the general provisions of 24–5 V. 100, 38, p. 250; and see 44–5 V. 12, 12.

Compensations and rewards.] See as to officers and others employed in preventing smuggling, 39–40 V. 36, 210–216.

Indictments.] By 39–40 V. 36, 255: "All indictments or suits for any offences or the recovery of any penalties or forfeiture under the Customs Acts [see p. 775], shall, except in the cases where summary jurisdiction is given to justices, be preferred or commenced in the name of her Majesty's Attorney-General for England . . . or of some officer of customs or inland revenue." By s. 256, the Attorney-General may enter a *nolle prosequi*.

Limitation of time of prosecution.] By s. 257: "All suits, indictments, or informations brought, or exhibited for any offence against the Customs Acts [see p. 775], in any court or before any justice, shall be brought or exhibited within three years next after the date of the offence committed."

Venue.] By s. 258: "Any indictment, prosecution, or information which may be instituted or brought under the direction of the commissioners of customs for offences against the Customs Acts [see p. 775], shall and may be inquired of, examined, tried, and determined in any county of England, when the offence is committed in England," and so of Scotland and Ireland, "in such manner and form as if the offence had been committed in the said county, where the said indictment or information shall be tried."

Averments primâ facie sufficient.] Cf. p. 73. By s. 260: "The averment that the commissioners of customs or inland revenue have directed or elected that any information or proceedings under the Customs Acts [see p. 775], shall be instituted, or that any ship or boat is foreign, or belonging wholly or in part to her Majesty's subjects, or that any person detained or found on board any ship or boat liable to seizure, is or is not a subject of her Majesty . . . or that any person is an officer of customs or excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such port in any information or proceeding shall be deemed to be sufficient, unless the defendant in any such case shall prove to the contrary."

Proof of office, orders, &c.] See pp. 6, 17, 144. By s. 261: "If upon any trial a question shall arise whether any person is an officer of the army, navy, marines, or coastguard, duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, his own evidence thereof, or other evidence of his having acted as such, shall be deemed sufficient, without production of his commission or deputation." By s. 262: "the order, or any letter or instructions referring thereto, which shall have been officially received

by any officer of customs or excise for his government and under which he shall have acted as such officer, shall be admitted and taken as sufficient evidence and proof of such order."

Obstructing officers of inland revenue.] By 53–4 V. 21, 11: "If any person by himself, or by any person in his employ, obstructs, molests, or hinders" any such officer or person in the execution of his duty, he shall incur a fine of 100*l.* Ss. 21, 22, prescribe how this fine may be recovered in the High Court.

SODOMY.

By 24–5, V. 100, 61: "Whosoever shall be convicted of the abominable crime of buggery committed either with mankind or with any animal shall be liable, at the discretion of the court, to be kept in penal servitude for life . . ." (see p. 198). Cf. p. 251, as to the attempt. See p. 786.

If the offence be committed on a boy under fourteen years of age, it is felony in the agent only. 1 *Hale P. C.* 670; 3 *Inst.* 59. In *Allen*, 1 *Den. C. C.* 364 (1848), prisoner induced a boy of twelve years of age to commit this crime upon him, and the court were unanimously of opinion that the conviction was right. See p. 804.

In one case a majority of the judges were of opinion that the commission of the crime with a woman was indictable. *Wiseman, Fortescue*, 91 (1718); in *Jellyman*, p. 111, Patteson J. held that a married woman who consents to her husband committing the crime with her, is an accomplice in the felony, and as such that her evidence requires confirmation, though consent or non-consent is not material to the offence.

The act with a fowl constitutes the offence: *Brown*, pp. 203, 258; but the act in a child's mouth does not. *Jacobs, Russ. & Ry.* 331 (1817).

The offence would be complete on proof of penetration only: see 24–5 V. 100, 63, pp. 722, 729.

Outrages on decency.] By 48–9 V. 69, 11: "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour." Cf. p. 660. Where prisoner procured the commission of such an act with himself, it was held that the offence was complete. *Jones and another*, 1896, 1 *Q. B.* 4; 65 *L. J. M. C.* 28; 18 *Cox C. C.* 207; *C. C. R.*

The wife or husband of a person charged under this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged. 61–2 V. 36, 4, and Sched., p. 830.

SPRING-GUNS, SETTING.

By 24–5 V. 100, 31: "Whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude . . . [see p. 198]; and whosoever shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid: provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: provided also, that nothing in this section shall be deemed to make it unlawful to set or place, or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or placed, or caused, or continued to be set or placed, in a dwelling-house, for the protection thereof." Cf. p. 494.

STAMPS—OFFENCES RELATING TO.

By 54–5 V. 38 (Stamp Duties Management Act), 13: "Every person who does or causes or procures to be done, or knowingly aids, abets, or assists in doing any of the acts following, that is to say:

(1) Forges a die or stamp;

(2) Prints or makes an impression upon any material with a forged die;

(3) Fraudulently prints or makes an impression upon any material from a genuine die;

(4) Fraudulently cuts, tears, or in any way removes from any material any stamp with intent that any use should be made of such stamp or of any part thereof;

(5) Fraudulently mutilates any stamp with intent that any use should be made of any part of such stamp;

(6) Fraudulently fixes or places upon any material or upon any stamp any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any way removed from any other material, or out of or from any other stamp;

(7) Fraudulently erases, or otherwise either really or apparently removes from any stamped material, any name, sum, date, or other matter or thing whatsoever thereon written with the intent that any use should be made of the stamp upon such material;

(8) Knowingly sells or exposes for sale, or utters or uses any forged stamp or any stamp which has been fraudulently printed or impressed from a genuine die;

(9) Knowingly and without lawful excuse (the proof whereof shall lie on the person accused) has in his possession any forged die or stamp or any stamp which has been fraudulently printed or impressed from a genuine die or any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise either really or apparently removed,

shall be guilty of felony, and shall on conviction be liable to be kept in penal servitude for any term not exceeding fourteen years . . . " (see p. 198).

By s. 14: "Every person who without lawful authority or excuse (the proof whereof shall lie on the person accused) (*a*) makes, or causes or procures to be made, or aids or assists in making, or knowingly has in his custody or possession, any paper, in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or used by or under the direction of the commissioners for receiving the impression of any die, or any part of such words, letters, marks, lines, threads, or other devices, and intended to imitate or pass for the same; or (*b*) causes or assists in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same to appear in the substance of any paper whatever,

shall be guilty of felony, and shall on conviction be liable to be kept in penal servitude for any term not exceeding seven years . . . " (see p. 198).

By s. 15: "Every person who, without lawful authority or excuse (the proof whereof shall lie on the person accused) purchases or receives, or knowingly has in his custody or possession (*a*) any paper manufactured and provided by or under the direction of the commissioners, for the purpose of being used for receiving the impression of any die before such paper shall have been duly stamped and issued for public use; or (*b*) any plate, die, dandy-roller, mould, or other implement peculiarly used in the manufacture of any such paper,

shall be guilty of a misdemeanor, and shall on conviction be liable to be imprisoned with or without hard labour for any term not exceeding two years."

By s. 18 (1): "If any forged stamps are found in the possession of any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, that person shall be deemed and taken, unless the contrary is satisfactorily proved, to have had the same in his possession knowing them to be forged, and with intent to sell, use, or utter them, and shall be liable to the punishment imposed by law upon a person selling, using, uttering, or having in possession forged stamps, knowing the same to be forged."

By s. 27, the expression "commissioners" means commissioners of inland revenue; the expression "material" includes every sort of material upon which words or figures can be expressed; the expression "die" includes any plate, type, tool, or implement whatever used under the direction of the commissioners for expressing or denoting any duty or rate of duty, or the fact that any duty or rate of duty or penalty has been paid, or that an instrument is duly stamped, or is not chargeable with any duty, or for denoting any fee, and also any part of any such plate, type, tool, or implement; the expressions "forge" and "forged" include counterfeit and counterfeited; the expression "stamp" means as well a stamp impressed by means of a die as an adhesive stamp for denoting any duty or fee; cf. p. 456.

Upon an indictment (under a repealed s.) for vending counterfeit stamps, it appeared that the stamps in all respects resembled a genuine stamp, excepting only the centre part, for which, in the forged stamp, the words "Jones, Bristol," were substituted. The fabrication was likely to deceive the eye of a common observer. The judges held that the prisoner was rightly convicted of forgery. *Collicott*, p. 473.

As to what amounts to "lawful excuse," see *Dickens* v. *Gill*, (1896) 2 *Q. B.* 311; 65 *L. J. M. C.* 187, where it was held that the possession by a newspaper proprietor of a die for illustrating in black and white a supplement to his paper, which circulated among stamp collectors, was, however innocent the use he intended to make of it, a possession without lawful excuse.

TELEGRAPHS—INJURIES TO.

By 24–5 V. 97, 37: "Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds, as to the justice shall seem meet."

By s. 38, attempts to commit any of the offences mentioned in the above section are to be dealt with summarily.

48–9 V. 49, 3, deals with submarine cables, and makes it a misdemeanor wilfully or by culpable negligence to injure a cable.

TELEGRAPH MESSAGES (TELEGRAMS)—OFFENCES RELATING TO.

See generally *Post Office Offences*, 706.

By 31–2 V. 110, 20: "Any person having official duties connected with the Post Office, or acting on behalf of the Postmaster-General, who shall, contrary to his duty, disclose, or in any way make known or intercept the contents or any part of the contents of any telegraph messages, or any message intrusted to the Postmaster-General for the purpose of transmission, shall in England and Ireland, be guilty of a misdemeanor . . . and shall, upon conviction, be subject to imprisonment for a term not exceeding twelve calendar months; and the Postmaster-General shall make regulations to carry out the intentions of this section, and to prevent the improper use, by any person in his employment or acting on his behalf, of any knowledge he may acquire of the contents of any telegraphic message."

By s. 21: "In every case where an offence shall be committed in respect of a telegraphic message sent by or intrusted to the Postmaster-General, it shall be lawful and sufficient, in the indictment . . . to be preferred against the offender, to lay the property of such telegraphic message in her Majesty's Postmaster-General, without specifying any further or other name, addition, or description whatsoever, and it shall not be necessary in the indictment . . . to allege or to prove upon the trial or otherwise that the telegraphic message was of any value; and in any indictment . . . to be preferred against any person employed under the Post Office for any offence committed under this Act, it shall be lawful and sufficient to state and allege that such offender was employed under the Post Office at the time of the committing of such offence, without stating further the nature or particulars of his employment."

By 32–3 V. 73 (the Telegraph Act, 1869), s. 23: "Every written or printed message or communication delivered at a Post Office for the purpose of being transmitted by a postal telegraph, and every transcript thereof made by any person acting in pursuance of the orders of the Postmaster-General, shall be a post-letter within the meaning of an Act passed in the first year of the reign of her present Majesty, chapter thirty-six [p. 709]; provided always that nothing in this Act contained shall have the effect of relieving any officer of the Post Office from any liability which would but for the passing of this Act have attached to a telegraph company, or to any other company or person, to produce in any court of law, when duly required so to do, any such written or printed message or communication."

By s. 24: "The Telegraph Act, 1868 [31–2 V. 110], and this Act shall be 'Post Office Acts,' [see Index] and the provisions contained therein respectively shall be 'Post Office Laws' within the meaning of" 1 V. 36. See p. 709.

Proof of origin of telegraph message.] In order to give in evidence the contents of a telegram sent by prisoner, it is necessary that the original message handed to the Post Office should be produced, and some evidence given that the message is in the handwriting of the prisoner or sent by his authority, and the copy received by a witness cannot be given in evidence until it is proved that the original cannot be produced. *Regan*, p. 4.

Proof of delivery.] In order to prove a telegram sent to a prisoner and not produced after notice to produce has been given, it is usual to prove the handing in of the form at one office and its receipt at the other, and that the telegram was taken to prisoner's place of abode and left there. That is sufficient—on proof of the serving of the notice to produce—to allow the original form to be put in evidence.

Forgery and improper disclosure of telegrams.] By 47–8 V. 76, 11: "Every person who forges or wilfully and without due authority alters a telegram, or utters a telegram knowing the same to be forged, or wilfully and without due authority altered, or who transmits by telegraph as a telegram, or utters as a telegram any message or communication which he knows to be not a telegram, shall, whether he had or had not an intent to defraud, be guilty of a misdemeanor, and shall be liable on summary conviction to a fine not exceeding ten pounds, and, on conviction, on indictment, to imprisonment, with or without hard labour, for a period not exceeding twelve months. If any person, being in the employment of a telegraph company as defined by this section, improperly divulges to any person the purport of any telegram, such person shall be guilty of a misdemeanor, and be liable, on summary conviction, to a fine not exceeding twenty pounds, and, on conviction, on indictment, to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine not exceeding 200*l.*

For the purposes of this section the expression 'telegram' means a written or printed message, or communication, sent to or delivered at a post office, or the office of a telegraph company for transmission by telegraph, or delivered by the post office or a telegraph company as a message or communication transmitted by telegraph.

The expression 'telegraph company' means any company, corporation, or persons carrying on the business of sending telegrams for the public under whatever authority, or in whatever manner such company, corporation, or persons may act or be constituted.

The expression 'telegraph' has the same meaning as in 'the Telegraph Act, 1869' [s. 3], and the Acts amending the same."

It has been held that where a man sent a telegram announcing that he was dead and signed it with his surname an offence against this s. had been committed, as it necessarily purported to come from some one different from the sender (*i.e.* himself). *Ex parte Wickham*, 10 *Times L. R.* 266 (1894), *Q. B. D.*

A forged telegram is a forged instrument within the meaning of 24–5 V. 98, 38, p. 452, see *Riley*, pp. 169, 471. Cf. *Warner*, 147 *C. C. C. Sess. Papers*, 385 (1907), where prisoner was convicted of obtaining money on a (betting) telegram, knowing it to be forged: either he or an accomplice had tampered with it after delivery.

TENANTS AND LODGERS—OFFENCES BY.

Injuries committed by tenants or lodgers.] By 24–5 V. 97, 13: "Whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor."

Larceny by tenant or lodger.] By 24-5 V. 96, 74: "Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping; and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned, it shall be lawful to prefer an indictment in the common form as for larceny; and in every case of stealing any fixture in this section mentioned to prefer an indictment in the same form as if the offender were not a tenant or lodger; and in either case to lay the property in the owner or person letting to hire."

THREATS.

Sending letters threatening to murder.] By 24–5 V. 100, 16: "Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping."

Sending letters demanding property with menaces.] By 24–5 V. 96, 44: "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court to be kept in penal servitude for life . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping."

Demanding property with menaces, &c., with intent to steal.] By s. 45: "Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for the term of three years" (see p. 198).

Sending letters threatening to accuse of crime with intent to extort.] By s. 46: "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing, or threatening to accuse, any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act."

Accusing or threatening to accuse with intent to extort.] By s. 47: "Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any

of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping."

Inducing a person by threats, &c., to execute deed, &c.] By s. 48: "Whosoever with intent to defraud or injure any other person, shall by any unlawful violence to, or restraint of, or threat of violence to or restraint of the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime, as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name or the name of any other person or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as a valuable security, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . ." (see p. 198). Cf. *Edwards*, p. 754.

Immaterial from whom menaces proceed.] By s. 49: "It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person."

Sending letters threatening to burn or injure property.] By 24–5 V. 97, 50: "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce, in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years . . . or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping."

Threatening to publish a libel with intent to extort.] By 6–7 V. 96, 3: "If any person shall publish, or threaten to publish, any libel upon any other person, or shall, directly or indirectly, threaten to print or publish, or shall, directly or indirectly, propose to abstain from printing or publishing, or shall, directly or indirectly, offer to prevent the printing or publishing, of any matter or thing touching any other person, with intent to extort any money, or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: provided always, that nothing herein contained shall in any manner alter or affect any law now in force, in respect of the sending or delivery of threatening letters or writings."

Procuring the defilement of women by threats.] See 48–9 V. 69, 3, p. 722.

Threat of legal proceedings by brothel-keeper.] See p. 725.

The sending or delivering of the letter or writing.] The sending or delivering

of the letter need not be immediately by the prisoner to the prosecutor; if it be proved to be sent or delivered by his means and directions it is sufficient. Upon an indictment (under a repealed statute) for sending a threatening letter to Kirby, it appeared that the threats were, in fact, directed against two persons named Rodwell and Brook. Kirby received the letter by the post, but did not pass it on, though he communicated its contents to them. The judges held that as Kirby was not threatened, the judgment must be arrested, but they laid it down that if Kirby had delivered the letter to Rodwell or Brook, and a jury should think that prisoner intended he should so deliver it, this would be a sending by prisoner to Rodwell or Brook, *Paddle*, *Russ. & Ry.* 484 (1822). Where prisoner dropped the letter upon the steps of prosecutor's house, and ran away, Abbott C.J. left it to the jury to say, whether they thought the prisoner carried the letter and dropped it, meaning that it should be conveyed to the prosecutor, and that he should be made acquainted with its contents, directing them to find him guilty if they were of opinion in the affirmative. *Wagstaff*, *Russ. & Ry.* 398 (1819). So in a case for sending a letter demanding money, Yates J. observed that "it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance by which it might finally come to his hands." The fact was, that prisoner dropped the letter into a vestry-room, which prosecutor frequented every Sunday morning before the service began, where the sexton picked it up and delivered it to him. *Lloyd*, 2 *East P. C.* 1122 (1767), where the note is "*Quære*, whether, if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person who, it is expected, will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending *to such party?* The same evidence was given in *Jepson and Springett's case* [*ib.* 1115 in 1798, p. 790], in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground." So where the evidence was that the letter was in the handwriting of the prisoner, who had sent it to the post-office, whence it was delivered in the usual manner, no objection was made. *Heming*, 2 *East P. C.* 1116 (1799).

An indictment charged sending a threatening letter to R., and threatening to burn houses, the property of B., who was R.'s tenant on lease; prisoner dropped the letter in a public road near R.'s house, A. found it, and gave it to H., who opened it, read it, and gave it to E., who showed it both to B. and R. The court held that this was a sending within the (repealed) statute, and that the conviction was good. *Grimwade*, 1 *Den. C. C.* 30 (1844).

Affixing a threatening letter on a gate in a public highway, near which the prosecutor would be likely to pass from his house, is some evidence to go to the jury of the sending of a letter to him. *Per* Cresswell J., *Williams*, 1 *Cox C. C.* 16 (1843).

Under the repealed statutes anonymity was of the essence of the offence: under the present ones that is not essential, and an *indirect* sending is expressly provided for.

Where there is no person in existence of the precise name which the letter bears as its address, it is a question for the jury whether the person into whose hands it falls was really the one for whom it was intended. It is also for the jury, and not for the judge, to determine whether the letter is a threatening one, and the judge will not withdraw it from them unless by no possible construction can it be so considered (cf. pp. 789, 791). *Per* Maule J., *Carruthers*, 1 *Cox C. C.* 138 (1844).

The demand.] On an indictment for demanding money with menaces,

there must be evidence that the prisoner demanded something; but the demand need not be made in words, it may be made by conduct. Where prisoners seized prosecutor, and one of them said, "Not a word, or I will blow your brains out," and the other repeated the words, and appeared to be searching for some offensive weapon in his pocket, but on some resistance both ran away without anything more being said; the court said that *an actual demand* was not necessary, and that this was a fact for the jury, under all the circumstances of the case. *Jackson*, 1 *Leach* 267; 1 *East P. C.* 419 (1783). Cf. *Remnant*, 5 *T. R.* 169 (1793).

A highwayman was indicted for an assault, with an intent to rob; he made no demand of any sort; but held a pistol in his hand towards prosecutor, who was a coachman on his box; Willes C.J. said, "A man who is dumb may make a demand of money, as if he stop a person on the highway with a pistol, and put his hand or hat into the carriage or the like; but in this case, as the prisoner only held a pistol at the coachman, but said to him nothing but 'Stop,' that was no demand of his money as the Act requires." *Parfait*, 1 *Lea.* 19; 1 *East P. C.* 416 (1740). The latter justly remarks, that the fact of stopping another on the highway, by presenting a pistol at his breast, is, if unexplained by other circumstances, sufficient evidence of a demand to go to a jury. "The unfortunate sufferer understands the language but too well; and why must courts of justice be supposed ignorant of that which common experience makes notorious to all men?"

"A mere request, such as asking charity, without imposing any conditions," does not come within the meaning of the word "demand." *Robinson*, 2 *Leach* 749; 2 *East P. C.* 1111 (1796).

Prisoner wrote an anonymous letter to prosecutor, offering to reveal a conspiracy against the latter's person and property, and to bring the offenders to justice on his being paid a certain sum. He was indicted for sending a letter to prosecutor, demanding money, with menaces. Bolland B. doubted whether the letter contained either a *demand* or a *menace*, and reserved the point for the judges, who held that the conviction was wrong. *Pickford*, 4 *C. & P.* 227 (1830).

Where prisoner threatened to accuse prosecutor's son of a crime unless prosecutor or the boy's master would buy a mare of him, and did, in fact, bring the charge, which was dismissed, it was held to be a threat with intent to extort within s. 47, p. 786. *Redman*, 35 *L. J. M. C.* 89; *L. R.* 1 *C. C. R.* 12; 10 *Cox C. C.* 159 (1865). Cf. *Lovell*, p. 542.

The threat.] Whether or not the letter amounts to a threat to kill or murder, &c., is a question for the jury, pp. 788, 791. Prisoner was indicted for sending the following letter to prosecutor, threatening to kill or murder him.

"Feb. 9, 1776.—Sir—I am sorry to find a gentleman like you would be guilty of taking M'Allester's life away for the sake of two or three guineas, but it will not be forgot by one who is but just come home to revenge his cause. This you may depend upon; whenever I meet you I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from M'Allester, before he died, for to seek revenge, I am come to town.—I remain a true friend to M'Allester, J. W."

(The circumstances are not explained.) Hotham B. left it to the jury to consider whether this letter contained in its terms an actual threatening to kill or murder, directing them to acquit prisoner if they thought the words might import anything less than to kill or murder. The jury having found the prisoner guilty, the judges were of opinion that the conviction was right, and he was executed. *Girdwood*, 1 *Leach* 142; 2 *East P. C.* 1121 (1776).

Prisoners were indicted for sending to prosecutor the following passage, *inter alia*, in a letter:—

"I am very sorry to acquaint you, that we are determined to set your mill on fire, and likewise to do all the public injury we are able to do you, in all your farms . . ."

It was proved that this was in the handwriting of one of the prisoners, and that it was thrown by the other into prosecutor's yard, when it was taken by a servant and delivered to him. The prosecutor swore that he had had a share in a mill three years before this letter was written, but had no mill at that time; but he did have a farm with several buildings upon it. It was agreed by the judges, that as prosecutor at the time had no such property as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest, L. Kenyon C.J. and Buller J. were of opinion that the letter must be understood as also importing a threat to burn prosecutor's farmhouse and buildings, but the other judges not thinking that a necessary construction, the conviction was held wrong, and a pardon recommended. *Jepson and Springett*, 2 *East P. C.* 1115; 2 *Lea.* 756, *n.* (1798), p. 788.

Prisoners were charged in one count with sending a letter to prosecutor, threatening to kill and murder him, and in a second with threatening to burn and destroy his house, stacks, &c. The writing was as follows:— "Starve Gut Butcher, if you don't go on better great will be the consequence; what do you think you must alter (or) must be set on fire," &c., &c., some of the remainder being equally unintelligible. The jury negatived the threat to put to death, but found that the letter threatened to fire his houses, &c. L. Denman C.J. had some doubt whether the question ought to have been left to the jury, and whether the letter could be, in point of law, a threatening letter to the effect found, but the judges held the conviction good after verdict. *Tyler*, 1 *Moo. C. C.* 428 (1835).

For an offence under s. 44, p. 786, it is not essential that the menace should be a threat of injury to person or property, or to accuse of a crime. A threat to accuse of misconduct, immoral, though not criminal, is enough, *e.g.* a threat to tell prosecutor's wife and friends of his "doings" with another woman. *Tomlinson*, p. 759. Cf. *Robertson* and *Robinson*, below.

The rule that a threat is not of a criminal character, unless it be such as may "overcome the ordinary free will of a firm man, and induce him, from fear, to part with his money," has reference "rather to the nature of the threat," and "the general nature of the evil threatened," than to "its probable consequences in any particular case," and "the nerves of the individual threatened." *Smith*, 1 *Den. C. C.* 510; 19 *L. J. M. C.* 80 (1849). In *Tomlinson*, above, Wills J. said, "The doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind . . . ought . . . to receive a liberal construction in practice . . . for persons who are thus practised upon are not as a rule of average firmness, but . . . the threat must not be one that ought to influence nobody." Cf. p. 759.

Demanding with menaces under s. 45.] In this s., p. 786, the gist is the intent to steal; accordingly, the threat must be of a nature "to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action, which alone constitutes consent. . . . The menace may be made with such gesture and demeanor, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect, and this should be decided by the jury." (Cf. pp. 788, 789.) *Walton*, p. 759, where prisoner had obtained money by threatening to execute a distress warrant—"not

necessarily of a character to excite either fear or alarm" (*per* the Court)—which he had no authority to do, and the chairman had directed that this was *in law* a menace: conviction quashed.

It is no objection that the money was actually obtained or that it was obtained by a threat to accuse of a fictitious charge. *Robertson, L. & C.* 483; 34 *L. J. M. C.* 35 (1864), where a policeman got money by threatening to arrest prosecutor for speaking to a woman in the street. Cf. pp. 759–60, and *Tomlinson*, above.

Threat to accuse of infamous crimes.] See p. 760. The terror of this particular accusation has always been an exception to the rule that fear for one's *character* alone is not enough to support indictments in certain cases. *Per* the judges in *Knewland*, 2 *Lea.* at 730, p. 760.

If prosecutor has been already accused, threatening to procure witnesses to *support* that accusation is not within the (repealed) statute. "It is one thing to accuse, but another to procure witnesses in support of a charge already made." This was at most a threat to support it by evidence. *Per* Bayley J., *Gill*, 1 *Lewin C. C.* 305 (1827).

It was held, that the threatening to accuse need not have been a threat to accuse before a judicial tribunal; "to accuse" means to charge before any third person. *Robinson*, 2 *Moo. & R.* 14 (1837); cf. *Tomlinson*, above.

It must be shown that the accusation, made or threatened, was of the nature of those specified in the statute. Cf. p. 763. Where the meaning is ambiguous, it is for the jury to say whether it amounts to the accusation or threat imputed.

Declarations subsequently made by the prisoner are also admissible to explain the meaning of a threatening letter. Prisoner was indicted for sending a letter threatening to accuse prosecutor of an infamous crime. Prosecutor, meeting prisoner, asked him what he meant by sending that letter, and by the material words therein, "*transactions five nights following.*" Prisoner said that prosecutor knew what he meant. This prosecutor denied, and prisoner afterwards said, "I mean, by taking indecent liberties with my person." This evidence having been received, and the point having been reserved for the judges, who were informed that without this (parol) evidence prisoner could not have been convicted, they unanimously resolved that the evidence had been rightly received. *Tucker*, 1 *Moo. C. C.* 134 (1826). And see, as to the necessity of particularising in the indictment the specific charge to which the accusation or threat refers, and as to the evidence necessary to support such indictment, *Middleditch*, 1 *Den. C. C.* 92 (1845).

Defence.] It is immaterial whether the accusation is true or not, and evidence of its truth will not be admitted, though the prosecutor may be asked in cross-examination questions suggesting his guilt. *Cracknell* (Willes J.), 10 *Cox C. C.* 408 (1866); *Menage*, 3 *F. & F.* 310 (1862); cf. p. 763. See also *Richards*, 11 *Cox C. C.* 43 (1868); where the facts were that prisoner went to prosecutor, whom he accused of having given a disease to his son, his son in fact having such a disease, and having informed prisoner of it; he at that time only demanded payment of the doctor's bill, amounting to 25*s.*; but some time afterwards he went again to prosecutor and threatened to give him into custody unless he would compromise it by payment of 100*l.* Blackburn J. said the truth of the accusation was not material for the jury, if, by that accusation prisoner intended to extort money, but that it *was* material in considering with what intent prisoner made the accusation. If, believing it, he made the accusation at first without any intent to extort money he would not be guilty; but if afterwards he

endeavoured to compromise the matter by taking money, that would not render him guilty of obtaining money by threats, though he might be guilty of compounding a felony. The report of this case is very short, and prisoner was acquitted, so that it is possible that the learned judge thought that the demand for the 100*l.* might be wholly unconnected with the accusation which had preceded it.

TRANSPORTATION, RETURNING FROM.

(ESCAPE FROM PENAL SERVITUDE.)

TRANSPORTATION was partially abolished in 1853, and wholly in 1857, by 16–17 V. 99, and 20–1 V. 3, respectively. Penal servitude was substituted for it; and, speaking generally, *mutatis mutandis*, was to take its place everywhere in the statute-book; indeed, "places beyond the seas" which served for the former may still serve for the latter (by s. 3 of the latter Act). Deportation, however, has been recently revived, p. 199.

Legislation as to penal servitude may conveniently be found in the *Chronological Table, &c., of the Statutes*, vol. ii., under *Punishment*, of which head 4 is *Penal Servitude and Punishment*. See also *Stephen Dig. Cr. L., 5th ed.*, arts. 170–1, and 173.

Perhaps the only surviving transportation-enactment now of any practical importance is 5 G. 4, 84, 22, which, as amended by 4–5 W. 4, 67, makes a convict illegally "at large" (*i.e.* escaped), within the dominions of the crown, liable to penal servitude for life; see p. 198. Prison-breach is dealt with p. 714, but in view of the modern system of convict settlements, whereby the prisoners spend much time not within walls, so that, in case of escape, technically a "breach" may be impossible, this s. may contain the only penalty for that offence. As to Parkhurst and Pentonville prisons specially, see 1–2 V. 82, 12, and 5–6 V. 29, 24, respectively. A convict at large within the dominions of the crown outside the United Kingdom may be dealt with under the Fugitive Offenders Act, 1881, 44–5 V. 69, p. 218.

By ss. 23, 24, of 5 G. 4, 84 respectively, the form of the indictment against offenders at large and the rescuers of such offenders is simplified, and the certificate of the clerk of the court, &c., is made evidence of the conviction and sentence. Cf. p. 137.

The "signature and official character of the person signing" the certificate must be proved, s. 23. If the certificate is made by the clerk or officer of a court out of Great Britain, it is admissible when verified by the seal of the court or the signature of the judge. The "effect and substance" (s. 24) of the former conviction must be stated in the indictment and the certificate; merely stating that the prisoner was convicted "of felony" is not sufficient. *Sutcliffe, Russ. & Ry.* 469, *n.* (1788); *Watson, ib.* 468 (1821).

When a certificate of prisoner's former conviction and sentence was put in and purported to be that of J. G., "deputy clerk of the peace" for the county of L., "and clerk of the courts of general quarter sessions of the peace," &c., "and having the custody of the records of the courts of general quarter sessions," &c., and it was proved that Mr. H. was clerk of the peace for L., and that he had three deputies, partners, of whom J. G., who had signed the certificate, was one, and that each of them acted as clerk of the peace; and that for forty years they had kept the sessions' records at their office, Coltman J. held that the conviction and sentence was sufficiently proved. *Jones*, 2 *C. & K.* 524 (1847); see also *Parsons, L. R.* 1 *C. C. R.* 24 (1866), both under 8–9 V. 113, 1, p. 135. In *Finney*, 2 *C. & K.* 774 (1849), Alderson B. held, that the fact of the sentence being in force at the time the prisoner was found at large, was sufficiently proved by the

certificate of his conviction and sentence, *the judgment not having been reversed*, although on the face of such certificate it did not appear that the sentence (viz. fourteen years) was one which could have been inflicted on him, for his offence, viz. mere larceny. This presumes *omnia rite esse acta*, p. 17.

Aiding and abetting.] The punishment is the same as that of the principal.

Reward to discoverer of convict at large.] The judge at the trial has power to order the county treasurer to pay the reward (20*l.*) under s. 22 above. *Emmons*, 2 *Moo. & R.* 279 (1840).

TREES, &c.—OFFENCES RELATING TO.

Stealing or destroying with intent to steal trees, shrubs, &c.] By 24–5 V. 96, 32: "Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny." See p. 796. As to the meaning of the words "adjoining" or "belonging to," see *Hodges*, p. 430.

Stealing or destroying with intent to steal trees to the value of 1s.] By s. 33: "Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, shall . . . forfeit and pay," &c., &c.; ". . . and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act), shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny."

Stealing, &c., any fruit, &c.] By s. 36: "Whosoever shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse, or conservatory," shall be punished summarily; "and whosoever having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.'

As to *Arson*, see p. 240.

Injuring hopbinds.] By 24–5 V. 97, 19: "Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony, and being convicted thereof

shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding . . . fourteen years, or to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping."

Injuring trees, &c., in a pleasure ground to the value of more than 1l.] By s. 20: "Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound), shall be guilty of felony . . . "—conclusion the same as in s. 19, above, but maximum term of penal servitude is three years.

S. 21 deals in identical terms with the same things "growing *elsewhere*." "In case the amount of injury done shall exceed the sum of five pounds," the penalty is exactly the same as in s. 20, above.

Injuring trees, &c., wheresoever growing, to the amount of 1s.] By s. 22: "Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of one shilling at the least," is for the first and second offences made liable to conviction before a justice; "and whosoever having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act) shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned . . . [see p. 198], and, if a male under the age of sixteen years, with or without whipping."

Injuring fruit, &c., in gardens.] By s. 23: "Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, shall" be dealt with summarily; "and whosoever, having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony . . . "—conclusion as in s. 20, above.

The actual injury to the trees *themselves*—without consequential damage—must be to the value mentioned in the s. Where, therefore, prisoners were indicted for having done damage to trees in a hedge amounting to more than 5*l.*, and it appeared that the injury to the trees themselves amounted to 1*l.* only, but that it would be necessary to stub up the old hedge and replace it, the expense of which would be 4*l.* 14*s.* more, the conviction was held to be wrong. *Whiteman, Dears. & P. C. C.* 353; 23 *L. J. M. C.* 120 (1854).

It is sufficient to prove that the aggregate value of trees damaged at one time, *i.e.* in one continuous transaction, amounts to the statutory value. *Shepherd, L. R.* 1 *C. C. R.* 118; 37 *L. J. M. C.* 45; under s. 32, p. 795.

Value.] Cf. pp. 371, 558.

TRUSTEES—FRAUDS BY.

Definition of term.] By 24–5 V. 96, 1: "The term 'trustee' shall mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall include the heir, or personal representative of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or any other like officer acting under any present or future Act relating to joint stock companies, bankruptcy, or insolvency."

Trustees fraudulently disposing of property.] By s. 80: "Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to" be punished, as in s. 1 (1 E. 7, 10), p. 235. A proviso follows, that no prosecution shall be commenced without the sanction of some judge or the Attorney-General.

As to the meaning of the word "property," see p. 522.

As to what persons are within the s., see *Fletcher*, 31 *L. J. M. C.* 206; 9 *Cox C. C.* 189 (1862); *C. C. R.*

TURNPIKE GATES—INJURIES TO.

Destroying turnpike gates, toll houses, &c.] By 24–5 V. 97, 34: "Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate or toll bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate or toll bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act of parliament relating thereto, or any house, building or weighing engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor."

UNLAWFUL ASSEMBLY.

See p. 751, and cf. p. 594.

UTTERING.

See FORGERY, p. 440, and COINING OFFENCES, p. 335.

WORKS OF ART—INJURIES TO.

Injuring works of art.] By 24–5 V. 97, 39: "Whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust, or vase, or any other article or thing kept for the purposes of art, science, or literature, or as an object of curiosity in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library, or other repository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art, in any church, chapel, meeting-house, or other place of divine worship, or in any building belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish or place, or to any university, or college, or hall of any university, or to any inn of court, or in any street, square, churchyard, burial-ground, public garden, or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping. . . ."

WOUNDING.

Wounding with intent to murder.] See 24–5 V. 100, 11, p. 651.

Wounding with intent to do grievous bodily harm.] See 24–5 V. 100, 18, p. 249.

Unlawfully wounding.] See 24–5 V. 100, 20, p. 249.

Indictment and verdict.] By 14–15 V. 19, 5: "If upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding." Cf. pp. 70, 255, 496.

Wounding cattle.] See 24–5 V. 97, 40, p. 318.

The wounding.] Where prisoner is indicted for *wounding*, it must appear that the skin was broken; a mere contusion is not sufficient. Where prisoner had struck the prosecutor with a *bludgeon*, and the skin was broken, and blood flowed, Patteson J. said that it was not material what the instrument used was, and held the case to be within a (repealed) statute. *Payne*, 4 *C. & P.* 558 (1838). Littledale J. directed a prisoner to be acquitted, it not appearing that the skin was broken or incised; *Anon.*, about 1829, in *Wood*, 1 *Moo. C. C.* 280; 4 *C. & P.* 381 (1830). Where there was (a savage assault but) no proof of an incised wound, the judge told the jury that he was clearly of opinion that it need not be an incised wound, but prisoner being found guilty, on the strength of that case, this was reserved for the judges, who, from the continuity of the skin not being broken, resolved, by a large majority, that there was no wound, and that the conviction was wrong. See also *Moriarty* v. *Brooks*, 6 *C. & P.* 684 (1834). So "a scratch is not a wound within the [repealed] statute; there must at least be a division of the external surface of the body." *Per* Parke B., *Beckett*, 1 *Moo. & R.* 526 (1836). So it was held by Coleridge, Bosanquet, and Coltman JJ., that "to constitute a wound it is necessary that there should be a separation of the whole skin, and a separation of the cuticle or upper skin only is not sufficient." *M'Loughlin*, 8 *C. & P.* 635 (1838). But where a blow given with a hammer broke the lower jaw in two places, and the skin was broken internally, but not externally, and there was not much blood, L. Denman C.J. and Parke J. held this a wounding within another (repealed) Act. *Smith*, 8 *C. & P.* 173 (1837). Where prisoner threw a heavy hammer at prosecutor, which struck him on the face, and broke the skin for an inch and a half, and was

convicted, the judges "being asked whether the injury was "a stab" or "a cut" or a "wound" within the (repealed) statute held that the conviction for *wounding* was right. *Withers*, 1 *Moo. C. C.* 294; 4 *C. & P.* 446 (1831). Where prisoner struck prosecutor on the outside of his hat with an air-gun, and so drove the hard rim of the hat into prosecutor's head, but the gun did not come directly in contact therewith, the judges held this to be a wounding within that statute. *Sheard*, 7 *C. & P.* 846; 2 *Moo. C. C.* 13 (1837).

Throwing vitriol in the face of prosecutor with intent, &c., was held not to be a wounding within that statute, though the jury found expressly that a wound was the result of the act, on the ground that no instrument was used nor an immediate wound produced. *Murrow*, 1 *Moo. C. C.* 456 (1835). See also *Gray*, p. 494.

Where the intent is not proved, the defendant may be found guilty of unlawfully wounding under s. 5, p. 799, and where the indictment is for unlawfully wounding, of a common assault, p. 255. Where, however, the indictment merely charged a "felonious shooting with intent to do grievous bodily harm," and "grievous bodily harm," with the same intent, it was held by Bowen J. that it was not competent to the jury to convict of unlawfully wounding, it not being alleged that prisoners did "cut, stab, or wound." *Miller*, &c., p. 496. This point, not having been reserved, does not seem to have been noticed in *Waudby*, 1895, 2 *Q. B.* 482; 64 *L. J. M. C.* 251; 18 *Cox C. C.* 194; *C. C. R.*, p. 158; where on the trial of an indictment against two prisoners, charging one with feloniously shooting *and* feloniously wounding with intent to do grievous bodily harm, and the other with aiding and abetting therein, the jury found the former guilty of the misdemeanor only, and the latter of aiding and abetting him. It was claimed that on that indictment such a verdict against the latter could not be found, but the court held that if the principal be convicted of the misdemeanor under s. 5 of unlawfully wounding, the accessory may be convicted also.

Malice.] See *Latimer*, p. 21, &c., and see the cases cited, pp. 20, 617. Although s. 5, p. 799, states in effect that if the jury think that the prisoner had no felonious intent, they may find him guilty of "unlawful wounding" merely, yet such unlawful wounding must still be malicious within s. 20, p. 249. *Ward*, p. 21.

WRITTEN INSTRUMENTS, LARCENY, &c., OF.

Larceny or destruction of valuable securities and documents of title.] By 24–5 V. 96, 27: "Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security."

By s. 28: "Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, obliterate, or conceal the whole or any part of any document of title to lands shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude . . ." (see p. 198). Cf. p. 347.

Indictment.] The s. continues: "And in any indictment for any such offence relating to any document of title to lands, it shall be sufficient to allege such documents to be or to contain evidence of the title or of part of the title of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof."

Stealing, injuring, or concealing wills.] By s. 29: "Whosoever shall, either during the life of the testator or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for life . . . [see p. 198]; and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument, is the property of any person."

Effect of disclosure.] The s. concludes: "No person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination, or deposition before any court upon the hearing of any matter in bankruptcy or insolvency."

Stealing records or other legal documents.] By s. 30: "Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole or any part of any record, writ, return, panel, process, interrogatory, deposition,

affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order, or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under her Majesty, and being or remaining in any office appertaining to any court of justice, or in any of her Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . [see p. 198]; and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person."

What instruments are within the statute.] At common law, larceny could not be committed of "chattels real," and therefore not "of a box or chest of charters that concern land." 1 *Hale P. C.* 510. See below and cf. p. 433. Thus it was held that stealing a commission, directed to commissioners to ascertain boundaries, was not a felony, the commission concerning the realty. *Westbeer*, 1 *Leach* 12; 2 *East P. C.* 596; 2 *Str.* 1134, pp. 59, 433. But the parchment upon which the records of a court of justice are inscribed, if it do not relate to the realty, may be the subject of larceny. *Walker*, p. 433, distinguished from *Westbeer*. "Bonds, bills, and notes, which concern mere choses in action, were also at common law held not to be such goods whereof larceny might be committed; being of no intrinsic value, and not importing any property *in possession* of the person from whom they are taken." 4 *Bl. Com.* 234; 2 *East P. C.* 597. It was even held that larceny could not be committed of the box with charters concerning the land, "and the box or chest, though it be of great value, yet shall it be of the same nature the charters be of: *et omne majus dignum trahit ad se minus.*" 3 *Inst.* 109; so *Hale*, above. Mortgage deeds, being subsisting securities for the payment of money, are "choses in action," and not "goods and chattels." Where, therefore, the prisoner was indicted for a burglary, in breaking into a house at night, with intent to steal the "goods and chattels" therein, and the jury found that he broke into the house with intent to steal mortgage deeds only, the conviction was quashed. *Powell*, pp. 199, 314, 370. Whether a policy of insurance is a chattel, see *Tatlock*, p. 236.

It was held that a pawnbroker's duplicate ticket was a "warrant for the delivery of goods" which a prisoner may be convicted of stealing. *Morrison*, 1 *Bell C. C.* 158 (1859). It may be so described or as "a pawnbroker's ticket" or as "a piece of paper."

Prisoner was indicted in several counts for stealing a number of promissory notes, and in others for stealing so many pieces of paper, stamped with a stamp, &c. The notes consisted of country bank notes, which, after being paid in London, were sent down to the country to be re-issued, *with the same stamps*, and were stolen on the road. It was objected that these were no longer promissory notes, the sums of money mentioned in them having been paid, and that depriving the bankers of the privilege of re-issuing them which they possessed, could not be considered as larceny. The judges, however, held that the conviction on the counts for stealing the paper and stamps was good, the paper and stamps, "particularly the latter," being valuable to the owners. *Clark, Russ. & Ry.* 181; 2 *Leach* 1036 (1810). In a similar case, prisoner having been convicted upon an indictment charging him in different counts with stealing valuable securities called promissory notes, and also with

stealing so many pieces of paper stamped with a stamp, &c., the judges held the conviction right. Some of them doubted whether the notes could properly be called "valuable securities": but if not, they all thought they were goods and chattels. *Vyse*, 1 *Moo. C. C.* 218 (1829). "In *Vyse*," said Jervis C.J. in *Powell* (p. 199), at 410, "the notes had been paid, and though re-issuable, were not at the time of the larceny securities for the payment of money. The paper and stamp on which they were written were, therefore, properly described as goods and chattels."

If the halves of promissory notes are stolen, they could be described as goods and chattels. *Mead*, 4 *C. & P.* 535 (1831).

An incomplete bill of exchange or promissory note is not as such a valuable security so as to be the subject of larceny. A. applied to prisoner to raise money for him. The latter promised to procure 5000*l.*, and producing ten blank 10*s.* stamps, procured A. to write an acceptance across them, and, afterwards to sign them. Prisoner then took them, without saying anything, and afterwards filled them up as bills of exchange for 500*l.* each, and put them into circulation. It was held by three judges that these stamped papers were neither "bills of exchange," nor "orders for the payment of money," nor "securities for money"; and that a charge of larceny for stealing the paper and stamps could not be sustained, the stamps and paper not being the property of A., or ever (probably) in his possession. *Minter Hart*, 6 *C. & P.* 106 (1833); see also *Phipoe*, p. 754. Where prisoners were indicted (under s. 48, pp. 754, 787) for having by blackmailing threats induced prosecutor to sign the following document, "I hereby agree to pay you 100*l.* to prevent any action against me," it was held that, although not negotiable, yet that it was a valuable security, because, if the transaction had been genuine, it would have been a valid agreement upon which prosecutor might have been sued. *John and wife*, 13 *Cox C. C.* 100 (1875).

A cheque upon a banker, not stamped, has been held not to be a *bill* or *draft*, within the repealed statute, being of no value, nor in any way available. *Pooley*, p. 712; *Yates*, p. 418. But where prisoner was indicted in one count for stealing a cheque, and in another count for stealing a piece of paper, he having converted to his own use a cheque belonging to his employers, which was possibly void as a cheque under the then law, it was held that even if the cheque was void, he was properly convicted for stealing a piece of paper. *Perry*, 1 *Den. C. C.* 69; 1 *C. & K.* 725; 1 *Cox C. C.* 222 (1845). See *Walsh* and *Metcalfe*, p. 558; also *Heath*, p. 544; cf. the cases, p. 440.

An indictment under s. 27, p. 801, must particularise the kind of valuable security stolen, and any material variance between such description and the evidence, if not amended, will be fatal. *Lowrie*, *L. R.* 1 *C. C. R.* 61; 36 *L. J. M. C.* 24 (1867).

See as to the present meaning of "*valuable security*," p. 522.

Notice to produce.] See pp. 10–1.

Taking for a fraudulent purpose.] Two actions had been brought against prisoner and warrants of execution had issued, and a levy had been made by the high bailiff, who then handed the warrants to his deputy, who remained in possession. Prisoner forcibly took the warrants out of the latter's hands and kept them. He then forcibly turned the bailiff out, believing that his authority was gone. It was held he was not guilty of larceny, but of taking with a fraudulent purpose under s. 30, p. 801; for he had acted as he did in order to take possession of the goods and turn the bailiff out, and that was in fraud of the execution creditor and in fraud of the law, and constituted a fraudulent purpose within the meaning of the statute. *Per* Cockburn C.J. *Bailey*, *L. R.* 1 *C. C. R.* 347; 41 *L. J. M. C.* 61; 12 *Cox C. C.* 129 (1872).

PART III.

GENERAL MATTERS OF DEFENCE.

There are certain general matters of defence, the evidence with regard to which it will be convenient to comprise under the three following heads:—Infancy, Insanity, and Coercion by Husband (to which is appended Crimes by Husband or Wife against each other). To these defences that of *Necessity* is sometimes added.

INFANCY.

An infant is, in certain cases, and under a certain age, privileged from punishment, by reason of a presumed want of criminal design.

Misdemeanors.] In certain misdemeanors an infant is privileged under the age of twenty-one, as in cases of "mere *nonfeasance* (unless it be of such a thing as he is bound to by reason of tenure and the like as to repair a bridge, &c.) . . . because *laches* in such a case shall not be imputed to him." 1 *Hale P. C.* 20; though even if indicted for non-repair, it was admitted, in argument, that he would not be liable to imprisonment, and it would be difficult to fine him. *Manners Sutton*, 3 *A. & E.* 597 (1835). [The difficulty, apparently, was in procedure, 604, 607]. But he is liable to fine and imprisonment for misdemeanors accompanied with force or violence as a riot or battery. *Hale, ib.* So for perjury. 1 *Sid.* 258 (1666). So he may be convicted of a forcible entry, and fined, if not imprisoned, 3 *Bac. Ab., Forcible Entry* (*D.*), see p. 438; or of cheating with false dice, &c., *ib. Infancy* (*H.*). See 4 *Bl. Com.* 22–4.

Felony.] An infant under the age of seven years "cannot be guilty of felony, whatever circumstances proving discretion may appear." 1 *Hale P. C.* 27; for, as the civilians say, he is not *doli capax; ib.* 18, 19. But on attaining the age of fourteen he is *doli capax*, and so subject to capital (and, of course, to any minor) punishment, *ib.* 25.

With regard to infants, between the ages of seven and fourteen, it is now quite clear, that where the circumstances of the case show that the offender was capable of distinguishing between right and wrong, and that he acted with malice and an evil intention, he may be convicted even of a capital offence; and accordingly there are many cases, in which infants, under the age of fourteen, have been convicted and executed. Thus in 1629, an infant between eight and nine years of age was convicted of burning two barns, and it appearing that "he had malice, revenge, craft, and cunning," he was executed. *Dean, Hale, ib.* 25 *n.*, 26, who mentions other instances, one of a girl of thirteen, executed for killing her mistress, another of a boy

of ten for the murder of his companion, and another of a boy of sixteen for an atrocious arson and murder, citing *Fitzherbert's Abridgement, Corone et plees del Corone* (1514), fol. 213, par. 118 (the second). In 1748 a boy of ten years of age was convicted of murder, and the judges, on a reference to them, were unanimously of opinion that the conviction was right, and, after several reprieves, he was left for execution, but respited by the Secretary of State, and in 1757 he was pardoned "upon condition of his entering immediately into the sea service." *York, Foster C. C.* 70, p. 52. For a conviction of a boy for manslaughter, see *Longstaffe*, p. 628, and for larceny as a bailee, *Macdonald*, p. 544.

As to rape, see p. 726, though in other felonies, *malitia supplet ætatem*, "yet it seems, as to this fact, the law presumes him impotent, as well as wanting discretion." 1 *Hale P. C.* 630. See also *Waite*, and *Williams*, p. 727, and cf. 258. As to infamous crime, see p. 778.

"It is necessary that very strong and pregnant evidence ought to be [*sic*] to convict one of that age, and to make it appear he understood what he did." *Hale, ib.* 27; cf. *Bl. Com.*, above.

See, generally, *Kenny, Outlines Crim. L.*, ch. 4.

INSANITY.

The inability of insane persons to plead has been dealt with, pp. 167, 190, 195. By 46–7 V. 38, 2, the jury may return a special verdict that "the accused was guilty of the act or omission charged against him, but was insane at the time when he did the act or made the omission."

"The defence of insanity is one involving great difficulties of various kinds, and the rules which have occasionally been laid down by the judges with regard to the nature and degree of aberration of mind which will excuse a person from punishment, are by no means consistent with each other, or, as it should seem, with correct principle." This passage appeared in the first edition of this work in 1835, and so before *M'Naughten's case*, which has certainly led to greater, if not total, uniformity in the views of the judges. Some advance has undoubtedly been made owing to the progress of science, and such diversity of judicial opinion as still remains, it may be gathered from the latest writer on the subject, Prof. Kenny (in *Outlines of Crim. Law*, ch. 4, 1907), is due to the uncertainty of science on some points. After a recapitulation of the older cases, some of which are historic, the conclusions of this learned writer will be stated (p. 814) as representative of the prevailing view.

As to the opinion of a medical expert, see *Wright*, p. 122. It is "a mistake to suppose that in order to satisfy a jury of insanity, scientific evidence must be adduced." The insanity may also be inferred from the behaviour of prisoner and other facts in evidence, *per* Brett L.J. *Dart*, 14 *Cox C. C.* 143 (1878).

On an indictment for treason, which stated as an overt act, that prisoner discharged a loaded pistol at her late Majesty, the defence being insanity, L. Denman C.J. (with Patteson J. and Alderson B.) said, "Persons *primâ facie* must be taken to be of sound mind till the contrary is shewn. But a person may commit a criminal act and yet not be responsible. If some controlling disease was, in truth, the acting power within him, which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule. . . . On the part of the defence it is contended that the prisoner was *non compos mentis*, that is (as it has been said), unable to distinguish right from wrong, or in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong." After remarking "there may be cases in which medical testimony may be essential, but I cannot agree with the notion that moral insanity [see p. 808] can be better judged of by medical men than by others," L. Denman continued, "Something has been said about the power to contract and to make a will. But I think that those things do not supply any test. The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind and was really unconscious at the time he was committing the act, that it was a crime." *Oxford*, 9 *C. & P.* 525 (1840).

Prisoner was indicted for shooting at his wife with intent to murder her, &c., and was defended by counsel, who set up for him the defence of insanity. He, however, objected to such a defence, asserting that he was not insane; and he was allowed to suggest questions to be put by the judge both to the

witnesses for the prosecution and for the defence,—and, in fact, put them himself. *Pearce*, 9 *C. & P.* 667 (1840), where the judge said: "This case cannot be conducted in two ways—first, by the prisoner's counsel and then by the prisoner himself." Verdict; "Not guilty on the ground of insanity."

Prisoner held not to be insane.] Prisoner was indicted for shooting at L. Onslow; he was undoubtedly to a certain extent deranged, and had greatly misconceived the conduct of L. Onslow, but he had formed a regular design to shoot him, and prepared the means of effecting it. Tracy J. observed that the defence of insanity must be clearly made out; that "it is not every frantic and idle humour of a man," or "something unaccountable" in his actions, that will "exempt him from justice and the punishment of the law; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing no more than an infant, than a brute, or a wild beast." *Arnold* (1724), 1 *Collinson* on *Lunatics* (1812), 475; 16 *St. Tr.* 695 (at 764).

L. Ferrers was tried before the House of Lords for the murder of his steward. It was proved that he was occasionally insane, and fancied his steward to be in the interest of certained supposed enemies. The steward being in the parlour with him, he ordered him to go down on his knees, and shot him with a pistol, and then directed his servants to put him to bed. He afterwards sent for a surgeon, but declared he was not sorry; and that it was a premeditated act; and he would have dragged the steward out of the bed, had he not confessed himself a villain. Many witnesses stated that they considered him insane, and it appeared that several of his relations had been confined as lunatics. It was contended for the prosecution, "upon the authorities of Coke and Hale, that complete possession of reason was unnecessary" in order to render a man answerable for his acts; it was sufficient if he could "discriminate between moral good and evil. As it appeared when he committed the offence he had capacity sufficient to form a design and know its consequences, he was found guilty." *Collinson, ib.* 477, on *E. Ferrers*, 19 *How. St. Tr.* 885 (1760).

Prisoner was indicted, on July 2, 1812, for shooting at and wounding W. B.; the defence was insanity arising from epilepsy. He had been attacked with a fit on the 9th July, 1811, and was brought home apparently lifeless. A great alteration had been produced in his conduct, which became eccentric, and it was necessary to watch him, lest he should destroy himself. The keeper of a lunatic asylum deposed that in insanity caused by epilepsy, the patient often imbibed violent antipathies against even his dearest friends, for causes wholly imaginary, which no persuasion could remove, though he was rational on other topics. He had no doubt of the insanity of prisoner. A commission of lunacy was produced, dated 17th June, 1812, with a finding that prisoner had been insane from the 30th of March. Le Blanc J. concluded his summing up by observing that it was for the jury to determine whether the prisoner, when he committed the offence, "was or was not incapable of distinguishing right from wrong, or under the influence of any illusion in respect of the prosecutor, which rendered his mind at the moment insensible of the nature of the act he was about to commit, since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty." *Bowler*, *Collinson*, *ib.* 673, *n.*; his execution was said by Alderson B. in *Oxford*, above, to be "very barbarous."

The prisoner was indicted for high treason. His defence, made by Mr. Brougham, was insanity. He had been accounted (a witness deposed) from a child a person of very weak intellect, so that it surprised many in his neighbourhood that he had been accepted as a soldier. He had been captured by the French, and had enlisted in the French Army, displaying considerable deliberation and reason in doing so; thus, he stated to a comrade that it was much more agreeable to be at liberty, and have plenty of money, than to remain confined in a dungeon. The attorney-general in reply, said, that before the defence "could have any weight in rebutting a charge so clearly made out, the jury must be perfectly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong." He was convicted. *Parker, Collinson, ib.* 477 (1812).

The direction of Mansfield C.J. to the jury in *Bellingham* (1812), seems not altogether in accordance with the correct rules on the subject of a prisoner's insanity—as Campbell A.G. seems to imply in *Oxford*, above (at 533). The direction was that, "in order to support this defence, it ought to be proved by the most distinct and unquestionable evidence, that the criminal was incapable of judging between right and wrong. It must, in fact, be proved beyond all doubt, that, at the time he committed the atrocious act, *he did not consider that murder was a crime against the laws of God and nature.* There was no other proof of insanity which would excuse murder or any other crime. Some human creatures were void of all power of reasoning from their birth; such could not be guilty of any crime. There was another species of madness in which persons were subject to temporary paroxysms, in which they were guilty of acts of extravagance; this was called lunacy. If these persons were to commit a crime when they were not affected with the malady, they would be, to all intents and purposes, amenable to justice. So long as they could distinguish good from evil, so long would they be answerable for their conduct. There was a third species of insanity in which the patient fancied the existence of injury, and sought an opportunity of gratifying revenge by some hostile act. If such person were capable, *in other respects*, of distinguishing right from wrong, there was no excuse for any act of atrocity which he might commit under this description of derangement." Prisoner was found guilty. *Collinson, ib.* 636; *Shelford* on *Lunatics*, 2*nd ed.* (1847), 592; in *Offord*, 5 *C. & P.* 168 (1831), where prisoner was acquitted, L. Lyndhurst C.B. expressed his complete accordance with that direction, which, however, does not appear to make a sufficient allowance for the incapacity of judging between right and wrong *upon the very matter in question*, as in all cases of *monomania.*

See as to the meaning of "delusions," *Burton*, 3 *F. & F.* 772 (1863); *Townley*, 3 *F. & F.* 839 (1863). The headnote of the former is: "The delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility are delusions of the senses, or such as relate to facts or objects—not mere wrong notions, or impressions of a moral nature; and the aberration must be mental, not moral, to affect the *intellect* of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong being still, although it may be perverted, yet not destroyed. And the theory of a moral insanity, or insanity of the moral feelings, while the sense of right and wrong remains, is not to be reconciled with the legal doctrine on the subject." This is a fair summary of Wightman J.'s remarks and summing up which, with the learned reporter's comments, should be read as representing the state of thought on the subject at the time. Prisoner, who was eighteen, murdered a child without any apparent motive except (it was said) a desire to be hanged. He was executed, having previously acknowledged his responsibility.

Prisoner held to be insane.] James Hadfield was tried before a special commission in 1800, on an indictment for high treason, in shooting at the king in Drury Lane Theatre, and the defence made for the prisoner was insanity. It was proved that he had been a private soldier in a dragoon regiment, and in the year 1793 received many severe wounds in battle near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country, he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder he imagined himself to hold intercourse with God: sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 11th May preceding his commission of the act in question his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning he suddenly jumped out of bed, and, alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bedpost, and that God had ordered him to do so; and, upon his wife screaming and his friends coming in, he ran into a cupboard, and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day, he used many incoherent and blasphemous expressions. On the morning of the 15th May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the Society of Odd Fellows; and after repeating his irreligious expressions, left the house and went to the theatre. On the part of the crown it was proved that he had sat in his place in the theatre nearly three-quarters of an hour before the king entered: that at the moment when the audience rose on his Majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; and when he fired, his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra in the pit; and he took a deliberate aim, by looking down the barrel as a man usually does when taking aim. On his apprehension, amongst other expressions, he said 'he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer he supposed.' These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that his plan was to get rid of it by other means; he did not intend anything against the life of the king; he knew the attempt only would answer his purpose. The counsel for the prisoner [Erskine] . . . put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for the jury "to be satisfied that the act in question was the immediate unqualified offspring of the disease. And L. Kenyon held, that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed, yet, there being no reason for believing him to have been at that period a rational and

accountable being, he ought to be acquitted," and he was acquitted accordingly, on the ground of insanity. *Hadfield*, *Shelford* (as above), 593; 27 *St. Tr.* 1281; *Collinson* (as above), 480.

Prisoner was indicted for setting fire to York Cathedral. The defence was that he was insane: he was, perhaps, what is now called a religious monomaniac, and there were physical reasons why he was not "right in his head." The jury acquitted the prisoner on the ground of insanity, though the gaol surgeon thought he had capacity to distinguish between right and wrong. *Martin*, *Annual Register*, vol. 71, at 23, 301 (1829).

Opinions of the judges.] In consequence of the acquittal in 1843, at the Central Criminal Court, of Daniel M'Naughten, on the ground of insanity, for shooting Mr. Drummond, the following questions of law were propounded by the House of Lords to the judges. There was no case pending before the House, but no doubt was expressed in debate that the House has the right to call on the judges to give their opinions on abstract questions of law. 8 *Scott's N. R.* 595; 1 *C. & K.* 130; 10 *Cl. & F.* 200; 4 *St. Tr. N. S.* 847; *Kenny Crim. Cas.* 43; the trial is only reported in 4 *St. Tr.* and 1 *Townsend Mod. St. Tr.* 314. Cf. p. 122.

"1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

4. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?

5. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?"

The following answers were given:—

Maule J.—"I feel great difficulty in answering the questions put by your lordships on this occasion:—First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; and this difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases; secondly, because I have heard no argument at your lordships' bar or elsewhere on the subject of these questions, the want of which I feel the more, the greater is the number and extent of questions which might be raised in argument: and, thirdly, from a fear, of which I cannot divest myself, that, as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may

embarrass the administration of justice when they are cited in criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your lordships to excuse us from answering these questions: but, as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned, fearing that my answers may be as little satisfactory to others as they are to myself.

First question.—The first question, as I understand it, is, in effect, What is the law respecting alleged crime, when, at the time of the commission of it, the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done; and therefore request to be permitted to answer the question only so far as it comprehends the question whether a person, circumstanced as stated in the question, is for that reason only to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding; and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as to render him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves or is necessarily connected with such an unsoundness, this is not a matter of law, but of physiology, and not of that obvious and familiar kind as to be inferred without proof.

Second question.—Secondly, the questions necessarily to be submitted to the jury are those questions of fact which are raised on the record. In a criminal trial the question commonly is, whether the accused be guilty or not guilty; but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the judge—a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject.

Third question.—Thirdly, there are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

Fourth question.—Fourthly, the answer which I have given to the first question is applicable to this.

Fifth question.—Fifthly, whether a question can be asked, depends, not

merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances, of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful, though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect.

Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question. In principle, it is open to this objection, that, as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in the case of *the Queen* v. *M'Naughten*, tried at the Central Criminal Court in March last, before the Lord Chief Justice, Mr. Justice Williams, and Mr. Justice Coleridge, in which counsel of the highest eminence were engaged on both sides; and I think the course and practice of receiving such evidence, confirmed by the very high authority of these judges, who not only received it, but left it, as I understand, to the jury without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of parliament."

Tindal C.J.—"My lords, her Majesty's judges, with the exception of Mr. Justice Maule, who has stated his opinion to your lordships, in answering the questions proposed to them by your lordships' house, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and, as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing arguments of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordships' questions.

They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your lordships; and as they deem it unnecessary, in this peculiar case, to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your lordships.

First question.—The first question proposed by your lordships is this" [set out, p. 810].

"In answer to which question, assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law—by which expression we understand your lordships to mean the law of the land.

Second and third questions.—Your lordships are pleased to inquire of us, secondly" [set out, p. 810]. "And, thirdly" [set out, p. 810]. "And, as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved, that at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

Fourth question.—The fourth question which your lordships have proposed to us is this" [set out, p. 810].

"To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

Fifth question.—The question lastly proposed by your lordships is" [set out, p. 810]. "In answer thereto, we state to your lordships that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those

questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

Summary of the present law.] "English law . . . divides, and would seem to be fully justified in dividing, insane persons into two classes:—

(*a*) Those lunatics over whom the threats and prohibition of the criminal law would exercise no control, and on whom, therefore, it would be gratuitous cruelty to inflict its punishments; and

(*b*) Those whose form of insanity is only such that—to use Lord Bramwell's apt test—'they would not have yielded to their insanity if a policeman had been at their elbow.'

But the very difficult practical question as to where the line of demarcation should be drawn between the two classes, is one upon which the views of English judges have undergone grave, though gradual, changes, and even now cannot be said to have developed into a complete or even a perfectly stable form."

The progress of science since 1843 has, according to this authority, taken the direction of "conferring immunity from criminal responsibility" on those forms of insanity which "affects not only men's beliefs, but also, and, indeed, more frequently, their emotions and their wills. . . . The result has been that though the doctrines laid down in the judges' answers [above] . . . remain theoretically unaltered, the practical administration of them has been such as to afford a wider immunity than their language would at first sight seem to recognise." (The remark of a superintendent of Bradmoor is cited that "had the McNaughten dictum been rigidly insisted on, it would have been the means of hanging more than half the women who are now in Bradmoor, as criminal lunatics, for the murder of their children.") "For many forms of insanity, which do not in themselves constitute those particular defects of reason which the judges recognised as conferring exemption from responsibility, are now habitually treated as being sufficient evidence to show that one or other of those exemptive defects was also actually present."

"As to the legal effect of kleptomania it is impossible to speak with certainty, as there seems to be no reported case in which any judge of assize has dealt with this subject." "The more novel subject of hypnotism has not yet become a subject of judicial consideration in this country at all." *Dr. Kenny, Outlines*, c. 4.

Insanity through intoxication.] P. 631. "The legal aspects of intemperance are very involved. Till recently it was generally held that drink was no excuse for crime. This doctrine must now, however, be modified; and it is held that total deprivation of self-control, or at all events delusions induced by excess, as in *delirium tremens*, renders an individual irresponsible for his actions." *Taylor, Medical Jurisprudence, 5th ed.* (1905), p. 909, see also p. 910. The older doctrine here mentioned was already modified in Hale's time, as the following passage (dealing with *voluntary* drunkenness) shows:—"If, by one or more such practices, an habitual or fixed phrenzy be caus'd, tho this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caus'd puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first." 1 *Hale P. C.* 32. For practically the same statement of the law in 1823, see 3 *Paris and Fonblanque Medical Jurisprudence*, pp. 139–40,

and *Dey* and other cases there cited. A disease of the mind caused by drunkenness—such as *delirium tremens*, though only temporary—relieves from criminal responsibility. Drunkenness is "one thing" (and no excuse), "and the diseases to which drunkenness leads are different things." *Per* Stephen J. *Davis*, 14 *Cox C. C.* 563 (1881), and see *Grindley*, p. 632. Day J. in *Baines* (the *Times*, January 25, 1886) is reported to have expressly dissented from the view that, to excuse, the mental affection must be permanent, and "said it was immaterial whether the mental derangement was permanent or temporary so long as it prevented prisoner from knowing the nature and moral quality of his acts" (*Wood Renton* on *Lunacy* (1896), p. 912). Dr. Kenny (below) calls this "a general application to drunkenness of the principles laid down as to insanity in the McNaughten answers" (above). And where prisoner was tried for attempting to commit suicide, she at the time being so drunk that she did not know what she did, Jervis C.J. held that negatived the *intent* to commit suicide. *Moore*, 3 *C. & K.* 319 (1852), and the cases cited, p. 632.

The law to-day, according to the latest writer (*Kenny, Outlines Crim. L.* ch. 4), is the same as laid down by Hale (whom, as well as many of the cases here mentioned and others, he cites). "Drunkenness," he says, "is ordinarily no excuse for the commission of a criminal act; even though it have produced for the time as great an aberration of mind as would, if caused by insanity, constitute a legal exemption from responsibility. For, closely akin though it is to a temporary insanity, it differs from it by having been produced voluntarily. And to produce it, is morally wrong; and was, until 1872, even a criminal offence (4 J. 1, 5, 2; repealed by the Licensing Act, 1872). It is thus a madness for which the madman is to blame. Accordingly the law will not permit him to excuse one wrongful act by another. His *mens rea* in allowing himself to become intoxicated is sufficient to supply the ordinary mental element of guilt to any criminal act which may ensue from it. . . . If, however, a man's habits of drinking have resulted in rendering him truly insane, insanity, even though caused thus, will have just the same effect in exempting him from criminal responsibility as if his madness had not been so brought on by his own voluntary misconduct."

COERCION BY HUSBAND.

In certain cases a married woman is privileged from punishment, upon the ground of the actual or presumed command and coercion of her husband compelling her to the commission of the offence. "But this I take to be only a presumption till the contrary appear, for I have always thought that if upon the evidence it can clearly appear that the wife was not *drawn* to it by her husband, but that she herself was the principal actor and inciter of it, she is guilty as well as the husband." 1 *Hale P. C.* 516. "The mere fact that the parties are married never even formed a presumption of compulsion by the husband." *Per* L. Halsbury, C. *Brown* v. *A.-G. of New Zealand*, (1898) *A. C.* 234; 18 *Cox C. C.* 658; *P. C.* "In one case it appears to have been held by all the judges, upon an indictment against a married woman for falsely swearing herself to be next of kin, and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath." *Dicks*, 1 *Russ. Cri.* 147 (1871). Upon an indictment against a man and a woman, who, the prosecution proved, had lived together and passed for man and wife for some months, for putting off forged notes, and who went together, the man disposing of them to a person in her presence, and the woman having some of them in her pocket, she was held entitled to an acquittal, on the presumption of her being his wife: for evidence of reputation and cohabitation is in such a case (in all, except bigamy) sufficient evidence of marriage. *Atkinson*, 1 *Russ. Cri.* 159 (1814): p. 272.

But where the woman is not described in the indictment as the wife of the man, the *onus* of proving that she is so rests upon her. The woman refused to plead (in burglary) as *Jones*, saying she was Mrs. Wharton. The judges sent for the jury which found the indictment,—with their consent altered her name to "*Jane Wharton, alias Jones*, spinster" (taking care not to say *wife of T. Wharton*). She could not prove the marriage, and judgment was given against her. *Jane Jones and Wharton*, *J. Kel.* 37 (1664); 1 *Russ. Cri. ib.*

But where on the trial of a man and woman for larceny it appeared that they addressed each other as husband and wife, and passed as such, and were so spoken of by the witnesses for the prosecution, Patteson J. held that it was for the jury to say whether they were satisfied that they were in fact husband and wife (even though the woman had pleaded—by mistake—to the indictment, which described her as a single woman). *Woodward*, 8 *C. & P.* 561 (1838). See also *Mary Good*, 1 *C. & K.* 185 (1845), where prisoner was indicted for harbouring a man, to all intents and purposes her husband (cf. *Hale*, cited p. 818), though possibly by an irregular marriage (as to which there was no proof), after a murder, of which he was convicted: an acquittal was directed. *Martha Torpey*, 12 *Cox C. C.* 45, 49 (1871).

The presumption of coercion on the part of the husband does not arise, unless it appear that he was present at the time of the offence committed. 1 *Hale P. C.* 45. See *Morris*, p. 479. Cf. p. 739.

So if a husband deliver a threatening letter ignorantly, merely as the agent of his wife, she alone may be punishable. *Per* two judges. *John and Mary Hammond*, 1 *Leach* 444 (1787).

Prisoner was indicted for forging and uttering Bank of England notes. A

witness stated that, in consequence of a previous conversation with her husband, he went to his shop, where, he being absent, she took him into an inner room, and, after his telling her what her husband had said, sold him the notes, for which he paid; while he was putting them into his pocket the husband put his head in and said (only), "Get on with you." On returning to the shop he saw the husband, who saw him get his change, and, as well as the wife, desired him to be careful. It was objected that the offence was committed under coercion, and, as, if both had been on trial, he must be convicted on these facts, she must, therefore, be acquitted (citing 2 *East P. C.* 559; *Hale* (46) and *Kel.*, as above), but Thompson B. thought otherwise. "The law," he said, "out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *primâ facie* and *primâ facie* only (as is strongly laid down by L. Hale) that it was done under his coercion. But it is absolutely necessary that the husband should be actually present, and taking a part in the transaction. Here it is entirely the act of the wife. It was, indeed, in consequence of a communication previously with the husband that the witness applies to the wife, but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came, and it was sufficient if, before that time, she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law, out of tenderness, refers it *primâ facie* to his coercion; but when it has been completed in his absence, no subsequent act of his (although it might possibly make him an accessary to the felony of the wife) can be referred to what was done in his absence." *Hughes*, 1 *Russ. Cri.* 153; 2 *Lewin C. C.* 229 (1813). But where on an indictment against a woman for uttering counterfeit coin (misdemeanor: see *Price*, below) it appeared that the husband accompanied her as she went from door to door, but did not go in, Bayley J. directed an acquittal. *Sarah Conolly*, 2 *Lewin C. C.* 229 (1829). Cf. pp. 341–2. See *Archer*, p. 740; cf. *Will. and Ellen Matthews*, 1 *Den. C. C.*, p. 596 (1850). And where stolen goods are found in a man's house, and his wife in his presence makes a statement exonerating him and criminating herself, it may well be that with respect to the admissibility of this statement against her on her trial, the doctrine of presumed coercion applies. *Laugher*, p. 41. And see *Brooks*, p. 740; *Wardroper*, p. 740.

Exceptions from the rule.] There are crimes from the punishment for which the wife shall not be privileged on the ground of command or coercion (such as those which are *mala in se* and prohibited by the law of nature, as *Bl.* 4 *Comm.* 29, puts it), as treason and murder, "in regard of the heinousness of those crimes." 1 *Hale P. C.* 44, 45; *Manning* (note at end), p. 650. On the words of *Bl.* Mr. Greaves remarks, "This position of Blackstone J. is obviously much too large, as it includes larceny and burglary." 1 *Russ. Cri.* 147, *note.* "Some of the books also except robbery. It may be, that in cases of felony, committed with violence, the doctrine of coercion does not apply." *Per* Patteson J. *Cruse and wife*, see *Table of Cases* and below, which was an indictment under a repealed statute for inflicting an injury dangerous to life (a capital offence); that judge seemed of opinion (but with doubt) that as the wife took an active part in the transaction, she might be found guilty of the offence with her husband. Prisoners, however, were acquitted of the felony and convicted of an assault. But see *Torpey*, p. 818. See also *Mary Buncombe*, 1 *Cox C. C.* 183 (1845), where Coleridge J. expressed his intention, if prisoner were convicted of *robbery*, of reserving this point for the judges, and only allowed the case to proceed on the authority of a passage in *Russell* on *Crimes.* [The same sentence is in the *6th ed.* vol. i. p. 146, but with a note

admitting that *robbery* is not an exception on the authority of *Torpey* and *Dykes*, below.]

The presumption "extends to most felonies, *e.g.* to burglary, larceny, forgery." *Kenny, Outlines Crim. L.*, ch. 4, who adds in a note, "In 1891 Cave J. allowed this exemption in a case of arson."

And, generally, in offences "as to the government of the house, in which the wife has a principal share," it is implied that coercion is not presumed. 1 *Hawk. P. C.* Bk. 1, ch. 1, s. 12; see p. 662; *Dixon*, p. 661.

Misdemeanors.] "In all misdemeanors," it is said, "it appears that the wife may be found guilty with the husband." *Christian's* note to 4 *Bl. Com.* 29, but the learned editor (Mr. Welsby) thinks it is still (1844) doubtful whether she is punishable for *all*. *Ingram and wife* (assault), 1 *Salk.* 384 (1712).

But where a husband and wife were jointly indicted for the misdemeanor of uttering counterfeit coin, (the wife merely being present), the Common Serjeant, after consulting two judges, held, on the authority of *Connolly*, p. 817, that she was entitled to an acquittal, and, perhaps, that there is no sound distinction, in the rule as to coercion, between felonies and misdemeanors. *Price*, 8 *C. & P.* 19 (1837), the last note to which states that *Connolly* was a misdemeanor.

However, in *Cruse*, p. 817, where the jury convicted a husband and wife of an assault, the judges affirmed the conviction, being unanimously of opinion that the point with respect to the coercion of the wife did not arise, as the ultimate result was a conviction for misdemeanor. Nevertheless, on an indictment for misdemeanor (assault), Russell Gurney, Recorder of London, after consulting Bramwell B., left the question of coercion to the jury. *Torpey*, pp. 816, 817. So did Stephen J. in *Dykes and wife*, 15 *Cox C. C.* 771 (1885), and on their finding both guilty (of highway robbery), but the woman under coercion, directed an acquittal of her.

Where the wife is to be considered as merely the servant of her husband (as in *Saunders* and in *Squire*, p. 620; in the latter, however, the judge said that if the husband had given her food for the apprentice and she had withholden it, she would have been guilty of murder), she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct.

A woman cannot be indicted as an accessory by barely receiving her husband, who has done treason or felony. 1 *Hale P. C.* 47: p. 816.

HUSBAND AND WIFE, CRIMES AGAINST EACH OTHER.

As to crimes of violence, see p. 106.

As to larceny, see p. 556. Upon ss. 12, 16, there cited, Mr. Eversley (*Domestic Relations, 3rd ed.* (1906), p. 251) says, "It does not seem necessary to confine criminal proceedings under these sections to simple larceny; but charges involving obtaining money or chattels under false pretences, or larceny by a trick, might well be preferred, for they are all offences concerning property, and seem to be within the mischief of this section."

The same reasoning, it is submitted, would apply to arson, forgery, and other offences with respect to property. In *March*, pp. 247-8, the judges thought the conviction of a wife, living apart, for arson with intent to injure her husband's property was wrong, because she was "identified" with him, but there seems no doubt that if a wife burned a husband's house with intent to defraud an insurance office, she could be convicted. So, it is submitted, if she defrauded *others* by forging his name, she could be convicted, but not—apart from statute—if she defrauded him. *March* seems to be the only case on the point.

"NECESSITY."

This defence, except in the case of self-defence (for which see Index; cf. p. 604), has been very little discussed, *i.e.*, where there has been no positive attack on the accused. See, however, Dr. Kenny, *Outlines Crim. Law*, c. iv, where *Dudley*, pp. 189, 649 (the *Mignonette* case), is commented on. The decision therein implies that English law does not accept the proposition "Self-preservation is the first law of nature" (if "first" means paramount or overriding), but adopts the principle—relied upon in the judgment—of Hale (1 *P. C.* 51) that a man "ought rather to die himself than kill an innocent," and the contrary dictum of Bacon (supposing a very similar state of facts to those here) was, necessarily, expressly overruled. The dicta of later jurists, *e.g.* Blackstone (1 *Comm.* 129), who speaks of "Life [as] a right inherent by nature in every individual" must, therefore, be qualified by some such words as "so long as some one else's life is not sacrificed." This view of the law logically makes the "stealing" of food by a starving person theft—the doctrine of Hale, again, but repudiated by Bacon, as stated in the argument in the *Mignonette* case—and would condemn the taking of a horse or boat belonging to an innocent third person by one escaping from brigands or pirates as larceny. Whether this uncompromising moral standard in cases of extreme necessity is justified is, perhaps, an ethical question: in practice it is mitigated by considerable leniency in punishment, as in the *Mignonette* case.

APPENDIX.

THE CRIMINAL PROCEDURE ACT, 1851.

14 & 15 VICT. c. 100.

AN ACT FOR FURTHER IMPROVING THE ADMINISTRATION OF CRIMINAL JUSTICE.

[7th August, 1851.]

WHEREAS offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case; and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence; and whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor, by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the mis-statement whereof the person on trial cannot have been prejudiced in his defence: Be it therefore enacted, &c., &c.:

The court may amend certain variances not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with or postpone the trial to be had before the same or another jury.

I. From and after the coming of this Act into operation, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offence, or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof, by some officer of the court or other person, both in that part

of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred: and in case such trial shall be had at Nisi Prius the order for the amendment shall be endorsed on the postea [p. 141], and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be endorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: Provided that, in all such cases where the trial shall be postponed as aforesaid, it shall be lawful for such court to respite the recognisances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognisances for that purpose, in such and the same manner as if they were originally bound by their recognisances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

Verdicts and judgments valid after amendments.

II. Every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

Amended records to be drawn up without noticing the amendments.

III. If it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

IV. Repealed by 24–5 V. 95, 1.

Forms of indictment.

V. In any indictment for . . . stealing, embezzling, destroying, or concealing, or for obtaining by false pretences any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof. [Words repealed, by 24–5 V. 95, 1.]

VI. Repealed by 24–5 V. 95, 1.

In other cases.

VII. In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the

purport thereof, without setting out any copy or fac-simile of the whole or any part thereof.

VIII. Repealed by 24–5 V. 95, 1.

IX. [*Recital*]: s. set out p. 69.

X. Repealed by 38–9 V. 66 (S. L. R.). See p. 171.

XI. Repealed by 24–5 V. 95, 1.

XII. Set out p. 70.

XIII, XIV, XV, XVI, XVII, repealed by 24–5 V. 95, 1.

Party indicted for felony or misdemeanor may be found guilty of an attempt and punished accordingly.

Person tried for misdemeanor not to be acquitted if the offence turn out to be felony.

Coin and bank-notes may be described simply as money.

XVIII. In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved, and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

Certain provisions of 23 Geo. 2, c. 11, and 31 Geo. 3, (I.) extended.

Any court, judge, justice, &c. may direct a person guilty of perjury in any evidence, &c. to be prosecuted,

and commit the party, unless he enter into recognisance to appear and take his trial, and bind persons to give evidence;

and give certificate of prosecution being directed, which shall be sufficient

XIX. [*Recital of* 23 G. 2, 11, & 31 G. 3, 18, "made in Ireland."] It shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of her Majesty's justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder or deputy-recorder, chairman, or other judge holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy-judge of any county court or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognisance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognisance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall, and are hereby

evidence of the same.

required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and when allowed by any such court in Ireland such sum as shall be so allowed, shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised and levied in Ireland: Provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

Extending 23 Geo. 2, c. 11, s. 1, and simplifying indictments for perjury, &c.

XX. Partly set out p. 694.

XXI. In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly, to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

Extending 23 Geo. 2, c. 11, s. 2, as to form of indictments for subornation of perjury and other like offences.

XXII. Set out p. 694.

XXIII. Set out p. 210.

On such indictments certificate of trial where perjury committed sufficient.

Venue in the margin sufficient except where local description is necessary.

What defects shall not vitiate an indictment.

XXIV. No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ*, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.

[p. 73.] Formal objections before jury

XXV. Set out p. 176.

XXVI. Repealed by 38–9 V. 66 (S. L. R.).

XXVII. Set out p. 167.

sworn.

XXVIII. In any plea of autrefois convict or autrefois acquit, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment.

Court may amend defects.

Provision as to traversing indictments.

XXIX. Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person . . . any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment. [Words repealed, by 24-5 V. 95, 1.]

Plea of autrefois convict or acquit.

Punishment for certain indictable misdemeanors.

XXX. In the construction of this Act the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any Nisi Prius record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information," and "the making a presentment"; and wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing; and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.

Interpretation of terms.

XXXI. Repealed by 38-9 V. 66 (S. L. R.).

Commencement of Act.

XXXII. Nothing in this Act shall extend to Scotland.

Not to extend to Scotland.

THE VEXATIOUS INDICTMENTS ACT, 1859

22 & 23 VICT. c. 17.

AN ACT TO PREVENT VEXATIOUS INDICTMENTS FOR CERTAIN MISDEMEANORS.

I. Substantially set out p. 160.

II. Where any charge or complaint shall be made before any one or more of her Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail

No indictment for offences herein named to be preferred

without previous authorisation.

14 & 15 Vict. c. 100.

In certain cases where prosecutor desires to prefer an indictment justice to take his recognisance to prosecute.

the person charged with such offence to be tried for the same, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice and he is hereby required to take the recognisance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognisance, information, and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.

Act not to extend to Scotland.

III. This Act shall not extend to Scotland.

THE CRIMINAL LAW AMENDMENT ACT, 1867.

30 & 31 VICT. c. 35.

AN ACT TO REMOVE SOME DEFECTS IN THE ADMINISTRATION OF THE CRIMINAL LAW.

[20th June, 1867.]

[p. 160.]

WHEREAS it is found that delay and inconvenience are frequently caused by the provisions contained in the first section of the Act, 22 & 23 Vict. c. 17, in cases not within the mischief for remedy whereof the same Act was made and passed, and it is expedient to restrict the operation thereof: Be it enacted, &c.:

Limitation of 22 & 23 Vict. c. 17.

I. The said provisions of the said first section of the said Act shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said Act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred.

On acquittal, &c., of person indicted, who has not been committed or held to bail, court may order prosecutor to pay costs to accused if it think the prosecution

II. Whenever any bill of indictment shall be preferred to any grand jury, under the provisions of the Act, 22 & 23 Vict. c. 17, against any person who has not been committed to or detained in custody, or bound by recognisance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person the just and reasonable costs, charges, and expenses of such accused person and his witnesses (if any) caused or occasioned by or consequent upon the preferring

of such bill of indictment, to be taxed by the proper officer of the court; and upon non-payment of such costs, charges, and expenses within one calendar month after the date of such direction and order, it shall be lawful for any of the superior courts of law at Westminster or any judge thereof, or for the justices and judges of the Central Criminal Court (if the bill of indictment has been preferred in that court), to issue against the person on whom such order is made such and the like writ or writs, process or processes, as may now be lawfully issued by any of the said superior courts for enforcing judgments thereof. unreasonable.

III. And whereas complaint is frequently made by persons charged with indictable offences, upon their trial, that they are unable by reason of poverty to call witnesses on their behalf and that injustice is thereby occasioned to them; and it is expedient to remove, as far as practicable, all just ground for such complaint: Therefore, in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed within this realm or upon the high seas, or upon land beyond the sea, and whether such person appear voluntarily upon summons, or has been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person for trial or admit him to bail, shall, immediately after obeying the directions of the 18th section of the Act 11 & 12 Vict. c. 42, demand and require of the accused person whether he desires to call any witness; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case or anything tending to prove the innocence of such accused person, and shall put the same into writing; and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same and transmitted in due course of law with the depositions, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case or tending to prove the innocence of the accused person shall be bound by recognisance to appear and give evidence at the said trial; and afterwards upon the trial of such accused person all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken. Accused person to be asked by justice if he desire to call witnesses. Their depositions to be taken and returned to court of trial if accused person call any.

IV. All the provisions of the said Act 11 & 12 Vict. c. 42, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognisance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read, and shall have operation as part of this Act. Provisions of 11 & 12 Vict. c. 42, extended to this Act.

V. The court before which any accused person shall be prosecuted or tried, or for trial before which he may be committed or bailed to appear for any felony or misdemeanor, is hereby authorised and empowered, in its discretion, at the request of any person who shall If witnesses for accused, bound by recognisance, appear

at the trial, court may allow expenses.

appear before such court on recognisance to give evidence on behalf of the person accused, to order payment unto such witness so appearing, such sum of money as to the court shall seem reasonable and sufficient to compensate such witness for the expenses, trouble and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court; and the amount of such expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of sixpence [*amended by* 32–3 V. 89, 10, 11] for each witness, make out, and deliver to the person entitled thereto an order for such expenses and compensation, together with the said fee of sixpence, upon such and the same treasurers and officers as would now by law be liable to payment of an order for the expenses of the prosecutor or witnesses against such accused person; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, then upon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough or place where the offence of such accused person may be alleged to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts: Provided always, that in no case shall any such allowance or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution; and provided always that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution.

Power to take deposition of person dangerously ill, and not likely to recover, and to make same evidence in certain events after death of such person.

VI. [*Recital of* 11–12 V. 42, 17, p. 59]. Whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition, in accordance with the provisions of the said Act, of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give

evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

Provision for the prisoner being present at taking of statement.

VII. Whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement: and such gaoler shall convey the prisoner accordingly . . . [words repealed by 56–7 V. 14, S. L. R. 1].

VIII. Repealed by 51–2 V. 46, 6.

Money found on prisoner to be given to purchaser of property not known to be stolen, on restitution of property.

IX. Where any prisoner shall be convicted, either summarily or otherwise, of larceny or other offence, which includes the stealing of any property, and it shall appear to the court by the evidence that the prisoner has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any monies have been taken from the prisoner on his apprehension, it shall be lawful for the court, on the application of such purchaser, and on the restitution of the stolen property to the prosecutor, to order that out of such monies a sum not exceeding the amount of the proceeds of the said sale be delivered to the said purchaser.

Governor of prison to bring up the body of any person indicted without writ of habeas corpus, under order of court.

X. Where recognisances shall have been entered into for the appearance of any person to take his trial for any offence at any court of criminal jurisdiction, and a bill of indictment shall be found against him, and such person shall be then in the prison belonging to the jurisdiction of such court, under warrant of commitment, or under sentence for some other offence, it shall be lawful for the court, by order in writing, to direct the governor of the said prison to bring up the body of such person in order that he may be arraigned upon such indictment without writ of habeas corpus, and the said governor shall thereupon obey such order.

Extent of Act.

XI. This Act shall not extend to Ireland.

Commencement of Act.

XII. Repealed by 56–7 V. 14 (S. L. R. 1).

THE CRIMINAL EVIDENCE ACT, 1898.

61 & 62 VICT. c. 36.

AN ACT TO AMEND THE LAW OF EVIDENCE.

[12th August, 1898.]

BE it enacted, &c.:

Competency of witnesses in criminal cases.

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether

the person so charged is charged solely or jointly with any other person. Provided as follows:—

(*a.*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

(*b.*) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(*c.*) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:

(*d.*) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(*e.*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(*f.*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

(*g.*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(*h.*) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

11 & 12 Vict. c. 42 [p. 51].

Evidence of person charged.

II. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

Right of reply.

III. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

Calling of wife or husband in certain cases.

IV.—(1.) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

(2.) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

Application of Act to Scotland.

V. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.

50 & 51 Vict. c. 35.

Provision as to previous Acts.

VI.—(1.) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877.

40 & 41 Vict. c. 14 [p. 107].

(2.) But this Act shall not apply to proceedings in courts martial unless so applied—

29 & 30 Vict. c. 109.

(*a.*) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

44 & 45 Vict. c. 58.

(*b.*) as to courts martial under the Army Act by rules made in pursuance of section seventy of that Act.

Extent, commencement, and short title.

VIII.—(1.) This Act shall not extend to Ireland.

(2.) This Act shall come into operation on the expiration of two months from the passing thereof.

(3.) This Act may be cited as the Criminal Evidence Act, 1898.

SCHEDULE.

ENACTMENTS REFERRED TO. Section 4.

Session and Chapter.	Short Title.	Enactments referred to.
5 Geo. 4, c. 83. . .	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83. .	The Poor Law (Scotland) Act, 1845.	Section eighty.
24 & 25 Vict. c. 100.	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.
45 & 46 Vict. c. 75.	The Married Women's Property Act, 1882.	Section twelve and section sixteen.
48 & 49 Vict. c. 69.	The Criminal Law Amendment Act, 1885.	The whole Act.
57 & 58 Vict. c. 41.*	The Prevention of Cruelty to Children Act, 1894.	The whole Act.

* See p. 326.

N.B.—All these enactments deal with offences against wives (including matrimonial offences) or children; some of them with analogous offences by wives against husbands or children.

THE INEBRIATES ACT, 1898.

61 & 62 VICT. c. 60.

[12th August, 1898.]

Criminal Habitual Drunkards.

Detention of habitual drunkard guilty of crime.

I.—(1.) Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence, and the offender admits that he is or is found by the jury to be a habitual drunkard, the court may, in addition to or in substitution for any other sentence, order that he be detained for a term not exceeding three years, in any state inebriate reformatory, or in any certified inebriate reformatory, the managers of which are willing to receive him.

(2.) In any indictment under this section, it shall be sufficient, after charging the offence, to state that the offender is a habitual drunkard. In the proceedings on the indictment, the offender shall, in the first instance, be arraigned on so much only of the indictment as charges the said offence, and if on arraignment he pleads guilty, or is found guilty by the jury, the jury shall, unless the offender admits that he is a habitual drunkard, be charged to inquire whether he is a habitual drunkard, and in that case it shall not be necessary to swear the jury again.

Provided that, unless evidence that the offender is a habitual drunkard has been given before he is committed for trial, not less than seven days' notice shall be given to the proper officer of the court by which the offender is to be tried, and to the offender that it is intended to charge habitual drunkenness in the indictment.

Detention of habitual drunkard four times convicted of drunkenness.

II.—(1.) Any person who commits any of the offences mentioned in the first schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory, the managers of which are willing to receive him.

42 & 43 Vict. c. 49.

(2.) The Summary Jurisdiction Act, 1879, shall apply to proceedings under this section as if the offence charged were specified in the second column of the first schedule to the said Act. [Sec 62-3 V. 35, 1.]

FIRST SCHEDULE.

Sections 2, 24.

Description of Offence.	Statute enacting Offence.
Being found drunk in a highway or other public place, whether a building or not, or on licensed premises.	Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12.
Being guilty while drunk of riotous or disorderly behaviour in a highway or other public place, whether a building or not.	
Being drunk while in charge, on any highway or other public place, of any carriage, horse, cattle, or steam-engine.	
Being drunk when in possession of any loaded firearms.	
Refusing or failing when drunk to quit licensed premises when requested.	Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 18.
Refusing or failing when drunk to quit any premises or place licensed under the Refreshment Houses Act, 1860, when requested.	Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 41.
Being found drunk in any street or public thoroughfare within the Metropolitan Police District, and being guilty while drunk of any riotous or indecent behaviour.	Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 58.
Being drunk in any street, and being guilty of riotous or indecent behaviour therein.	Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 29.
Being intoxicated while driving a hackney carriage.	Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 61.
Being drunk during employment as a driver of a hackney carriage, or as a driver or conductor of a stage carriage in the Metropolitan Police District.	London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 28.
Being drunk and persisting, after being refused admission on that account, in attempting to enter a passenger steamer.	Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 287.
Being drunk on board a passenger steamer, and refusing to leave such steamer when requested.	
Being found in a state of intoxication and incapable of taking care of himself, and not under the care or protection of some suitable person, in any street, thoroughfare, or public place.	[Public Houses Acts Amendment (Scotland) Act, 1862 (25 & 26 Vict. c. 35), s. 23: repealed.]
Being in any street drunk and incapable and not under the care and protection of some suitable person.	Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), s. 381.
Being drunk while in charge in any street or other place of any carriage, horse, cattle, or steam-engine, or when in possession of any loaded firearms.	Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), s. 380.

FIRST SCHEDULE—*continued.*

Description of Offence.	Statute enacting Offence.
Being found in any shebeen drunk.	[Public Houses Acts Amendment (Scotland) Act, 1862 (25 & 26 Vict. c. 35), s. 19 : repealed.]
Refusing or neglecting when drunk to quit any premises or place licensed under the Refreshment House (Ireland) Act, 1860, when requested.	Refreshment Houses (Ireland) Act, 1860 (23 & 24 Vict. c. 107), s. 42.
Being drunk in any street or public thoroughfare within the Dublin Police District or being guilty while drunk of any riotous or indecent behaviour.	Dublin Police Act, 1842 (5 & 6 Vict. c. 24), s. 15.
Being found drunk in any street, square, lane, roadway, or other public thoroughfare or place.	Licensing (Ireland) Act, 1836 (6 & 7 Will. IV. c. 38), s. 12.
All similar offences in local Acts.	
Being drunk while in charge of a child.	Licensing Act (1902) (2 Edw. VII. 28), ss. 2, 3.

N.B.—Some of these ss. have been amended.

THE CRIMINAL APPEAL ACT, 1907.

[28th August, 1907.]

7 ED. 7, c. 23.

COURT OF CRIMINAL APPEAL.

Constitution of Court of Criminal Appeal.

1.—(1.) There shall be a Court of Criminal Appeal, and the Lord Chief Justice of England and eight judges of the King's Bench Division of the High Court, appointed for the purpose by the Lord Chief Justice with the consent of the Lord Chancellor for such period as he thinks desirable in each case, shall be judges of that court.

(2.) For the purpose of hearing and determining appeals under this Act, and for the purpose of any other proceedings under this Act, the Court of Criminal Appeal shall be summoned in accordance with directions given by the Lord Chief Justice of England with the consent of the Lord Chancellor, and the court shall be duly constituted if it consists of not less than three judges and of an uneven number of judges.

If the Lord Chief Justice so directs, the court may sit in two or more divisions.

The court shall sit in London except in cases where the Lord

Chief Justice gives special directions that it shall sit at some other place.

(3.) The Lord Chief Justice, if present, and in his absence the senior member of the court, shall be president of the court.

(4.) The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the court hearing the case.

(5.) Unless the court direct to the contrary in cases where, in the opinion of the court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court, the judgment of the court shall be pronounced by the president of the court or such other member of the court hearing the case as the president of the court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court.

(6.) If in any case the director of public prosecutions or the prosecutor or defendant obtains the certificate of the Attorney General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that court to any other court.

(7.) The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court.

(8.) Rules of court shall provide for securing sittings of the Court of Criminal Appeal, if necessary, during vacation.

(9.) Any direction which may be given by the Lord Chief Justice under this section may, in the event of any vacancy in that office, or in the event of the incapacity of the Lord Chief Justice to act from any reason, be given by the senior Judge of the Court of Criminal Appeal.

Registrar of the Court of Criminal Appeal.

2. There shall be a Registrar of the Court of Criminal Appeal (in this Act referred to as the Registrar) who shall be appointed by the Lord Chief Justice from among the Masters of the Supreme Court acting in the King's Bench Division, and shall be entitled to such additional salary (if any), and be provided with such additional staff (if any), in respect of the office of Registrar as the Lord Chancellor, with the concurrence of the Treasury may determine.

The senior Master of the Supreme Court shall be the first Registrar.

Right of Appeal and Determination of Appeals.

Right of appeal in criminal cases.

3. A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—

(*a*.) against his conviction on any ground of appeal which involves a question of law alone; and

(*b*.) with the leave of the Court of Criminal Appeal or upon the certificate of the Judge who tried him that it is a fit case

for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and

(*c.*) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.

Determination of appeals in ordinary cases.

4.—(1.) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(2.) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3.) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

Powers of court in special cases.

5.—(1.) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.

(2.) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

(3.) Where on the conviction of the appellant the jury have found a special verdict, and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

(4.) If on any appeal it appears to the Court of Criminal Appeal

that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act. 46 & 47 Vict. c. 38.

Re-vesting and restitution of property on conviction. 56 & 57 Vict. c. 71. [p. 197.]

6.—(1.) The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation in case of any such conviction, of the provisions of subsection (1) of section twenty-four of the Sale of Goods Act, 1893, as to the re-vesting of the property in stolen goods on conviction, shall (unless the Court before whom the conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute) be suspended—

(*a.*) in any case until the expiration of ten days after the date of the conviction; and

(*b.*) in cases where notice of appeal or leave to appeal is given within ten days after the date of conviction, until the determination of the appeal;

and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal. Provision may be made by rules of court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

(2.) The Court of Criminal Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

Procedure.

Time for appealing.

7.—(1.) Where a person convicted desires to appeal under this Act to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within ten days of the date of conviction: Such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires. Any case or argument so presented shall be considered by the court.

Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal.

(2.) In the case of a conviction involving sentence of death or corporal punishment—

(*a.*) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and

(*b.*) if notice is so given, the appeal or application shall be heard and determined with as much expedition as practicable, and

the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

Judge's notes and report to be furnished on appeal.

8. The judge or chairman of any court before whom a person is convicted shall, in the case of an appeal under this Act against the conviction or against the sentence, or in the case of an application for leave to appeal under this Act, furnish to the Registrar, in accordance with rules of court, his notes of the trial; and shall also furnish to the Registrar in accordance with rules of court a report giving his opinion upon the case or upon any point arising in the case.

Supplemental powers of court.

9. For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice,—

(*a.*) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

(*b.*) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court or before any officer of the court or justice of the peace or other person appointed by the court for the purpose, and allow the admission of any depositions so taken as evidence before the court; and

(*c.*) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(*d.*) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the court conveniently be conducted before the court, order the reference of the question in manner provided by rules of court for inquiry and report to a special commissioner appointed by the court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(*e.*) appoint any person with special expert knowledge to act as assessor to the court in any case where it appears to the court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

Legal assistance to appellant.

10. The Court of Criminal Appeal may at any time assign to an appellant a solicitor and counsel or counsel only in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the court, it appears desirable in the interests of justice

that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

Right of appellant to be present.

11.—(1.) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of court provide that he shall have the right to be present, or where the court gives him leave to be present.

(2.) The power of the court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.

Duty of Director of Public Prosecutions.

12. It shall be the duty of the Director of Public Prosecutions to appear for the Crown on every appeal to the Court of Criminal Appeal under this Act, except so far as the solicitor of a Government department, or a private prosecutor in the case of a private prosecution, undertakes the defence of the appeal, and the Prosecution of Offences Act, 1879, shall apply as though the duty of the Director of Public Prosecutions under this section were a duty under section two of that Act, and provision shall be made by rules of court for the transmission to the Director of Public Prosecutions of all such documents, exhibits, and other things connected with the proceedings as he may require for the purpose of his duties under this section.

42 & 43 Vict. c. 22.

Costs of appeal.

13.—(1.) On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto under this Act no costs shall be allowed on either side.

(2.) The expenses of any solicitor or counsel assigned to an appellant under this Act, and the expenses of any witnesses attending on the order of the court or examined in any proceedings incidental to the appeal, and of the appearance of an appellant on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the court for the purpose, or any reference of a question to a special commissioner appointed by the court, or of any person appointed as assessor to the court, shall be defrayed, up to an amount allowed by the court, but subject to any regulations as to rates and scales of payment made by the Secretary of State, in the same manner as the expenses of a prosecution in cases of felony.

Admission of appellant to bail, and custody when attending court.

61 & 62 Vict. c. 41.

14.—(1.) An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by prison rules within the meaning of the Prison Act, 1898.

(2.) The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

(3.) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether

it is the sentence passed by the court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

11 & 12 Vict. c. 78.

(4.) Where a case is stated under the Crown Cases Act, 1848, this section shall apply to the person in relation to whose conviction the case is stated as it applies to an appellant.

(5.) Provision shall be made by prison rules within the meaning of the Prison Act, 1898, for the manner in which an appellant, when in custody, is to be brought to any place at which he is entitled to be present for the purposes of this Act, or to any place to which the Court of Criminal Appeal or any judge thereof may order him to be taken for the purpose of any proceedings of that court, and for the manner in which he is to be kept in custody while absent from prison for the purpose; and an appellant whilst in custody in accordance with those rules shall be deemed to be in legal custody.

Duties of registrar with respect to notices of appeal, &c.

15.—(1.) The registrar shall take all necessary steps for obtaining a hearing under this Act of any appeals or applications, notice of which is given to him under this Act, and shall obtain and lay before the court in proper form all documents, exhibits, and other things relating to the proceedings in the court before which the appellant or applicant was tried which appear necessary for the proper determination of the appeal or application.

(2.) If it appears to the registrar that any notice of an appeal against a conviction purporting to be on a ground of appeal which involves a question of law alone does not show any substantial ground of appeal, the registrar may refer the appeal to the court for summary determination, and, where the case is so referred, the court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any persons to attend the hearing or to appear for the Crown thereon.

(3.) Any documents, exhibits, or other things connected with the proceedings on the trial of any person on indictment, who, if convicted, is entitled or may be authorised to appeal under this Act, shall be kept in the custody of the court of trial in accordance with rules of court made for the purpose, for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits, or things from that custody.

(4.) The registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this Act to any person who demands the same, and to officers of courts, governors of prisons, and such other officers or persons as he thinks fit, and the governor of a prison shall cause those forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the registrar.

(5.) The registrar shall report to the court or some judge thereof any case in which it appears to him that, although no application has been made for the purpose, a solicitor and counsel or counsel

only ought to be assigned to an appellant under the powers given to the Court by this Act.

Shorthand notes of trial.

16.—(1.) Shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the registrar so directs, and furnished to the registrar for the use of the Court of Criminal Appeal or any judge thereof: Provided that a transcript shall be furnished to any party interested upon the payment of such charges as the Treasury may fix.

(2.) The Secretary of State may also, if he thinks fit in any case, direct a transcript of the shorthand notes to be made and furnished to him for his use.

(3.) The cost of taking any such shorthand notes, and of any transcript where a transcript is directed to be made by the registrar or by the Secretary of State, shall be defrayed, in accordance with scales of payment fixed for the time being by the Treasury, out of moneys provided by Parliament, and rules of court may make such provision as is necessary for securing the accuracy of the notes to be taken and for the verification of the transcript.

Powers which may be exercised by a judge of the court.

17. The powers of the Court of Criminal Appeal under this Act to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court of Criminal Appeal in the same manner as they may be exercised by the Court, and subject to the same provisions; but, if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act.

Rules of court.

18.—(1.) Rules of court for the purposes of this Act shall be made, subject to the approval of the Lord Chancellor, and so far as the rules affect the governor or any other officer of a prison, or any officer having the custody of an appellant, subject to the approval also of the Secretary of State, by the Lord Chief Justice and the judges of the Court of Criminal Appeal, or any three of such judges, with the advice and assistance of the Committee herein-after mentioned. Rules so made may make provision with respect to any matter for which provision is to be made under this Act by rules of court, and may regulate generally the practice and procedure under this Act, and the officers of any court before whom an appellant has been convicted, and the governor or other officers of any prison or other officer having the custody of an appellant and any other officers or persons, shall comply with any requirements of those rules so far as they affect those officers or persons, and compliance with those rules may be enforced by order of the Court of Criminal Appeal.

(2.) The Committee herein-before referred to shall consist of a chairman of quarter sessions appointed by a Secretary of State, the Permanent Under Secretary of State for the time being for the Home Department, the Director of Public Prosecutions for the time being, the Registrar of the Court of Criminal Appeal, and a clerk of

assize, and a clerk of the peace appointed by the Lord Chief Justice, and a solicitor appointed by the President of the Law Society for the time being, and a barrister appointed by the General Council of the Bar. The term of office of any person who is a member of the Committee by virtue of appointment shall be such as may be specified in the appointment.

(3.) Every rule under this Act shall be laid before each House of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament within the next subsequent thirty days on which the House has sat next after any such rule is laid before it, praying that the rule may be annulled, His Majesty in Council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

SUPPLEMENTAL.

Prerogative of mercy.

19. Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—

(*a.*) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or

(*b.*) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.

Criminal informations, procedure in the High Court, &c.

20.—(1.) Writs of error, and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished.

(2.) This Act shall apply in the case of convictions on criminal informations and coroners' inquisitions and in cases where a person is dealt with by a court of quarter sessions as an incorrigible rogue under the Vagrancy Act, 1824, as it applies in the case of convictions on indictments, but shall not apply in the case of convictions on indictments or inquisitions charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by a court of assize.

5 Geo. 4, c. 83.

(3.) Notwithstanding anything in any other Act, an appeal shall lie from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river in whatever court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes, and shall not lie under this Act.

(4.) All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by section forty-seven of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his

[p. 201]

36 & 37 Vict. c. 66.

conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be stated accordingly under that Act in the same manner as if a question of law had been reserved.

Definitions.

21. In this Act, unless the context otherwise requires,—

The expression "appellant" includes a person who has been convicted and desires to appeal under this Act; and

The expression "sentence" includes any order of the court made on conviction with reference to the person convicted or his wife or children, and any recommendation of the court as to the making of an expulsion order in the case of a person convicted, and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the Court or recommendation, and a recommendation so made by the Court of Criminal Appeal shall have the same effect for the purposes of section three of the Aliens Act, 1905, as the certificate and recommendation of the convicting Court.

[p. 199.]

5 Ed. 7, c. 13.

Repeal.

22. The Acts specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Short title, extent, and application.

23.—(1.) This Act may be cited as the Criminal Appeal Act, 1907.

(2.) This Act shall not extend to Scotland or Ireland.

(3.) This Act shall apply to all persons convicted after the eighteenth day of April nineteen hundred and eight, but shall not affect the rights, as respects appeal, of any persons convicted on or before that date.

SCHEDULE.

Enactments Repealed.

Session and Chapter.	Short Title.	Extent of Repeal.
7 & 8 Will. 3, c. 3.	The Treason Act, 1695.	In section nine, from "but nevertheless" to the end of the section.
11 & 12 Vict. c. 78.	The Crown Cases Act, 1848.	Sections three and five.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	In section nineteen, the words "including the practice and procedure with respect to Crown cases reserved."
44 & 45 Vict. c. 68.	The Supreme Court of Judicature Act, 1881.	Section fifteen.

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